



Response to the Scottish Government
on its survey Strengthening Scottish charity law

10 February 2021

Strengthening Scottish charity law survey

Our survey is submitted by the ICAS Charities Panel on behalf of ICAS. The ICAS staff contact is Christine Scott, Head of Charities and Pensions.

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

All charities registered in Scotland are under a legal duty to prepare annual reports and accounts, and submit them to OSCR. There is currently no legal requirement for reports and accounts to be published on the Scottish Charity Register.

Currently OSCR publishes the accounts of charities with an income over £25,000 and all Scottish Charitable Incorporated Organisations (SCIOs). OSCR redacts all personal information before publishing to comply with data protection legislation (i.e. charity trustee names and signatures, photographs, and the signatures and personal details of independent examiners and auditors). The proposal is for OSCR to publish all annual reports and accounts in full on the Register.

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

ICAS response. We believe that OSCR should publish the trustees' annual report and accounts in full for all charities on the Scottish Charity Register.

We understand that challenges exist to make this possible and it is desirable that OSCR's process for publishing reports and accounts is as straightforward as it can be. We believe this means ensuring that the original signed documents, the documents filed with OSCR and the published documents are as similar as feasible. In our response to this question, we highlight several areas where guidance from OSCR would be preferable to a legislative route.

With the exception of the need for 'original' signatures being required on the original trustees' annual report and accounts documents approved by the trustee board, it should be possible to reduce or preferably eliminate the need for OSCR to redact any information. It should also be possible for 'original' signatures to include an individual's electronic signature as long as their electronic signature reflects the signatory's intent. While the use of electronic signatures is valuable in an emergency, it may be preferable for OSCR to issue guidance on their use, rather than to legislate specifically in Scottish charity law.

To reduce or eliminate the need for redactions by OSCR, we have the following observations and suggestions:

- Charities could be permitted/required to file trustees' annual reports and accounts with the printed name of the signatory instead of 'original' signatures. This matter could perhaps be addressed in OSCR guidance rather than in legislation.
- With regard to external scrutiny reports, independent examiners and senior statutory auditors of charitable companies must sign an original report to accompany the trustees' annual report and accounts in their own name: auditor's reports for non-company charities are signed in the name of the firm. When it comes to filing or publishing company accounts printed names are acceptable. We therefore recommend that as part of this aspect of law reform consideration is given to a) how to ensure that auditors' and independent examiners' signatures are not published to protect personal information and b) how OSCR would ensure that external scrutiny reports were genuine, if filed reports only included the printed names of signatories. This could also be something that is dealt with in guidance issued by OSCR rather than in legislation.
- Personal information, such as photographs, included in a trustees' annual report and accounts on a discretionary basis are presumably included with the permission of individuals, therefore, OSCR should not find itself in the position of having to redact information which a) is not required by law to be included in original documents and b) it has a statutory duty to publish (which it will have under these proposals). We understand that there is a risk that charities could, inadvertently, include such information without the necessary permission from the individuals concerned but perhaps this could be addressed through the publication of guidance by OSCR which specifically addresses this point.

- Members of the public are entitled to request and receive a copy of the trustees' annual report and accounts directly from a charity. A charity should therefore be able to supply members of the public with documents which include printed rather than 'original' signatures, i.e. should be able to supply a copy of the documents filed with OSCR.
- The right of members of the public to request a copy of the trustees' annual report and accounts, in our view, means that it is essential for any information considered sensitive not to be included in the first instance: this would mean that there would be no need for OSCR to redact such information. Therefore, we believe the optimal solution (by analogy with England and Wales) is to allow a charity to apply to OSCR for consent to omit information which would normally be required but is considered sensitive in the circumstances from its annual report and accounts.
- Sections 44(4) and (5) of the Charities and Trustee Investment (Scotland) Act 2005 already allow accounting regulations to exempt particular charities from certain requirements. Therefore, we recommend amending the Charities Accounts (Scotland) Regulations 2006 to include some provision for a charity to seek OSCR's consent to omit certain information from their accounts on similar lines to the process allowed in E&W under section 40(4) of the Charities (Accounts and Reports) Regulations 2008. In addition it would help for changes to the 2006 Regulations to specify (a) that a dispensation could be sought for any information felt to be sensitive in terms of putting someone in danger, but (b) if a dispensation is obtained from OSCR, that a description of the details omitted must be given in the trustees' annual report.

The COVID-19 pandemic has created some practical challenges for charities around the signing of their trustees' annual report and accounts, especially around the physical signing of documents and this has given rise to our comments above on the development of OSCR guidance. It would be helpful if OSCR could prepare some enduring guidance for Scottish charities on signing requirements and what is acceptable for original, filed and published versions. The guidance would need to be consistent with company law/Companies House requirements for charitable companies and address the needs of cross-border charities. The guidance could also highlight more general data protection issues that charities should consider in preparing their trustees' annual report and accounts and reflect Scottish charity law as it stands (updated as necessary once the 2005 Act and related regulations have been amended).

Also, as part of these proposed reforms, we believe that there should be a public consultation on changes to the 2006 Accounting Regulations. There are flaws in these Regulations and there is also further scope for improvement in light of experience. We documented these in detail in our response to the Scottish Government's 2019 Scottish charity law consultation.

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

ICAS response. We believe that if the suggestions we set out above are implemented it should be possible for OSCR to publish trustees' annual reports and accounts for all charities on the Scottish Charity Register.

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

OSCR currently holds limited information on the 180,000+ charity trustees involved in over 25,000 charities in Scotland. The law only requires the Scottish Charity Register to set out the principal office of the charity or the name and address of one of its trustees. The option proposed is for OSCR to establish a new register of trustees to provide valuable and relevant information to better support effective regulation of charities and their trustees, through improved compliance, investigation and engagement work. The proposals include:

An internal database for OSCR's use only, i.e. name, date of birth (for identification purposes), home address, email address. This register could also include the names of any person removed as a trustee following an inquiry by OSCR under the 2005 Act or preceding legislation.

A reduced external register for public use. This could contain trustee names (including removed trustees) and a principal office or trustee contact address against each charity.

List of disqualified trustees (removed by OSCR): publish the names of any person removed as a charity trustee under the 2005 Act or preceding legislation in similar fashion to the other UK Charity Regulators.

1. What information should be included in an internal database? Please explain your view.

ICAS response. We agree that in principle OSCR should be able to develop and maintain an internal database of charity trustees along the lines of this proposal.

2. How should the internal database information be kept up to date? Please explain your view.

ICAS response. 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.

We understand that OSCR is developing its existing digital service, OSCR Online, to make it easier for charities to use. Therefore, OSCR Online would likely be the means by which charities update OSCR about any changes to information about their trustees. As charitable companies also have to update Companies House about director appointments within 14 days, it may make sense for charities to be required to do likewise.

We are aware that Companies House and the Charity Commission for England and Wales have previously discussed introducing joint filing arrangements. There may be a wider issue to consider here as some entities are required to provide the same documentation or information to different regulators in the UK, including regulators in devolved jurisdictions. Therefore, we believe there is merit in revisiting the idea of having a centralised system.

Some entities or their advisers have access to company secretarial tools to facilitate digital filings with Companies House. Having a centralised system would streamline this process for all types of entity, in particular those with dual filing or reporting requirements.

3. What information should be included in a public list of charity trustees? Please explain your view.

ICAS response. The names of trustees are required to be disclosed in the trustees' annual report so this information is already in the public domain so it would be reasonable to include this information on a public register along with details of all the charities a person acts as a trustee for.

4. In what circumstances should there be an exception to being included in a public list? Please explain your view.

ICAS response. Dispensation arrangements should be the same as for trustees' annual reports and accounts.

5. How long should a disqualified trustee remain on the list? Please explain your view.

ICAS response. A person disqualified from being a trustee should remain on the list for the length of their disqualification. However, governance arrangements would be needed, for example, to remove the names of disqualified trustees who had passed away.

6. What information should be available in the disqualified trustee list? Please explain your view.

ICAS response. Would suggest consistency with the approach taken by Companies House towards individuals disqualified from being a company director given that the trustees of charitable companies are also its directors for company law purposes.

Companies House provides a search facility for disqualified directors and the landing page for the service sets out what information is included about disqualified directors on the register:

<https://www.gov.uk/search-the-register-of-disqualified-company-directors>

Also, the CCEW use a web-based app to facilitate checks on whether someone has been disqualified as a charity trustee: <https://apps.charitycommission.gov.uk/trusteeregister/>

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

Changes to the charity legislation for England and Wales have extended automatic disqualification criteria for charity trustees and senior employees (Chief Executive and Chief Financial Officer).

To ensure criteria in Scotland are fit for purpose, the option proposed is to extend the criteria for automatic disqualification to ensure parity with legislation in England and Wales, with the provision that individuals could still apply to OSCR for a waiver from disqualification as the law currently allows.

1. What factors should be considered in defining a 'senior manager'? Please explain your view.

ICAS response. In order for there to be clarity about the extent of any ability to disqualify a senior manager, we believe that this should be restricted to persons in specific roles, for example, the role of Chief Executive Officer (CEO) or Chief Financial Officer (CFO). Someone 'in the role of' does not mean the job title held by the individual but rather the role that they perform, which is the approach in England and Wales.

There may be some merit in adding the role of Chief Operating Officer (COO) to the definition of a senior manager. More organisations, including charities, have a COO so this approach could provide some future proofing to Scottish charity law.

It is also important to note that giving OSCR the power to disqualify a senior manager 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.

A possible way of addressing this issue could be for OSCR to seek to influence the trustees with regard to an individual's future employment and for OSCR to have the power to bar individuals from holding office, rather than OSCR having the power of dismissal.

We are aware of charities using contractors to fulfil the CEO and CFO roles and there may be occasions where a volunteer, who is not a charity trustee, could be considered to be undertaking these roles too. Therefore, any changes to the law would need to be effective even where the individual performing these roles is not an employee of the charity.

Proposal 4 – A power to issue positive directions to charities

OSCR has legal powers to issue specific types of direction to charities and charity trustees. Most of OSCR's powers are preventative, requiring charity trustees or others not to take particular actions. OSCR cannot direct charity trustees to take a specified positive action to remedy non-compliance or protect charitable assets.

One option would be to give OSCR a power to issue positive directions. The Charity Commissions for England and Wales, and Northern Ireland, both have a wide-ranging power of positive direction. If OSCR had such a power this could enhance its inquiry and enforcement powers in terms of protecting charitable assets and supporting good governance.

A positive direction could be coupled with a corresponding obligation on OSCR to publish an associated inquiry report, which could improve public confidence that OSCR was taking positive steps to remedy misconduct and protect assets. If a charity failed to comply with a positive direction that OSCR issued, it could be classed as misconduct. This could mean that enforcement action would be taken against the charity or trustees as appropriate. This is currently the case if a charity fails to comply with a direction from OSCR.

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? Please explain your view.

ICAS 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. It is also vital, for the independence of the charity sector, that OSCR takes a pragmatic and proportionate view as to whether a charity has complied with a positive direction. This means that careful 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 an inquiry. OSCR should also have the ability to amend or repeal a positive direction where new information comes to light or circumstances change.

2. How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction? Please explain your view.

ICAS response. We do not have a view on the length of time a charity should take to comply and this is likely to vary depending on the specific circumstances of the charity receiving the direction.

We recognise the importance of providing a clear legal framework around any new powers of positive direction. However, there may be circumstances where it may take a considerable period for charities to establish the steps they need to take to implement the direction and then make those changes. Therefore, we believe it is preferable for OSCR to have discretion over how long a charity should be given to comply with a positive direction.

We believe that failure to comply with a positive direction would be trustee misconduct so ultimately a trustee could be disqualified from holding office.

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

All charities in Scotland are under a legal duty to prepare annual reports and accounts, and submit these to OSCR. Failure to do so can be regarded as misconduct. There are currently a number of charities where OSCR does not have up to date reports and accounts - some of which have never submitted accounts. It is thought that some charities no longer exist but have failed to notify OSCR to be removed from the Register.

OSCR endeavours to understand and pursue defaulting charities, but with limited return. While OSCR has a legal power to appoint someone to prepare accounts for a charity, and has the power to make inquiries into charities, it can only use these powers if it has current information on where the charity trustees or principal office is.

1. What factors need to be considered to define 'persistent' failure to submit annual reports and accounts? Please explain your view.

ICAS response. In addition to having the power to appoint someone to prepare a charity's annual report and accounts, we would also support OSCR having a positive power of direction to compel trustees to prepare a trustees' annual report and accounts.

Failure would therefore be if, having exercised one or both of these two options, no report and accounts were forthcoming. We believe that these powers should be sufficient to address the issue of late accounts.

However, there may be extenuating circumstances which result in a continued failure such as the loss of records in a fire so some understanding of the circumstances should be considered before treating such a failure as misconduct.

Failure to prepare a trustees' annual report and accounts can be an indicator that a charity no longer exists, in which case we understand that OSCR has specific processes for removing charities from the register in these circumstances. We envisage that as part of removing a charity from the register, OSCR would seek to ensure that any remaining assets were secured and applied for the same charitable purposes.

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?

ICAS response. We believe that the power to appoint someone to prepare an annual report and accounts and the power of positive direction (used individually or consecutively) should be sufficient to address the issue of late accounts, where a charity is still in existence.

We envisage that, should OSCR have the power to positively direct a charity to submit its annual report and accounts, this power would be exercised prior to appointing someone to prepare the charity's report and accounts. Therefore, it is likely to be rare that a charity would be removed from the register without OSCR having first exercised its power to issue a positive direction. However, there may be circumstances where the power of positive direction is not exercised prior to the appointment of a third party so some flexibility may be needed here.

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

To be a registered charity in Scotland a body must have wholly charitable purposes and provide public benefit, but there is no requirement for the body to have any connection to Scotland (with the exception of SCIOs). This means that OSCR might be compelled to register a charity that meets the charity test but has no activities in Scotland and no trustee connection with Scotland.

The proposed option would be to require all charities in the Scottish Charity Register to have, and retain, a connection to Scotland. This would not preclude the registration of cross-border charities, which could continue to register with both the Charity Commission for England and Wales and OSCR. However, this option would mean that charities established under the law of a country or territory other than Scotland, which are managed or controlled wholly or mainly out with Scotland, do not occupy land or premises in Scotland and do not carry out activities in any shop or similar premises in Scotland, would no longer be able to be entered on the Register.

1. What factors need to 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 a trustee address? Please explain your view.

ICAS response. Care will need to be taken to ensure the term 'connection to Scotland' is clearly defined and that Scottish charity law operates in a consistent manner with Scottish trust law and, following the UK's exit from the European Union, any EU law, which remains effective in the UK, around the recognition of charitable status. This is not our area of expertise so we cannot comment on the actual current position.

Clarity could be provided by setting specific criteria which will enable OSCR to refuse registration or remove from registration any charity which does not have 'a connection to Scotland'.

We also recommend that before any changes are made to the 2005 Act on the registration of charities with a 'connection to Scotland', that draft provisions are considered alongside the requirements for cross-border registration. This 'stand back' approach will provide the opportunity to consider whether these two aspects of Scottish charity law work in tandem and that the difference between them is likely to be understood by the sector.

An element of future proofing should be considered within the definition for 'connection to Scotland'. A charity's presence can be 'virtual'. Through the use of digital technology a charity without a physical presence could have Scottish beneficiaries or potential Scottish beneficiaries. However, the definition should not be cast so widely that any charity with a digital presence anywhere in the world could claim to have a 'connection to Scotland'.

For example, an organisation meeting the charity test and meeting any one of the following could be deemed as having or retaining a connection to Scotland:

- At least one trustee normally resident in Scotland.
- In the case of a charity with a membership of at least five members in Scotland (or 1% of total membership if fewer).
- In the case of a charity which receives donations, it has received at least one donation from a Scottish donor or a Scottish-based company or organisation in the last year (or expects to do so in the year ahead).
- The charity has beneficiaries in Scotland or potential beneficiaries in Scotland who do receive or would be eligible to receive services or other tangible benefit from the charity's activities.
- The charity has organised at least one activity in Scotland in the last three years (or, in the case of a new charity, plans to do so within the three years after registration).
- In the case of a charity that makes grants (or plans to do so) it awarded at least one grant in Scotland in the last three years (or plans to do so in the three years ahead).

- The charity makes use of premises in Scotland at least once a year.
- The charity's staff includes at least one Scottish-based employee (someone with an "S" tax code).
- The charity holds title to a heritable property in Scotland.
- The charity satisfies OSCR that it regularly incurs significant expenditure in Scotland - this could be with Scottish-based businesses or freelancers (including Scottish branches of companies based elsewhere).
- The charity is a subsidiary or associate (as defined by the Charities SORP) of another Scottish charity.