

Strengthening Scots Charity Law



Forth Valley Third Sector Charity Law Engagement Event Report on the Charities & Investment (Scotland) Act 2005 Proposals

Prepared by SVE, CTSI & CVS Falkirk

Introduction

Background

In early 2019 the Scottish Government launched a three-month public consultation on proposed changes to Scottish charity law. The consultation focused on ten proposals for modernising charity law, that were put forward by OSCR, based on their experience of regulating charities since legislation was first introduced in 2005. 307 consultation responses were received and the majority of those responses supported the 10 proposals. However, the responses also highlighted areas where more consideration and discussion was needed before the next steps could be decided.

The rationale for the proposals in the first place were -

- To help the public to have more confidence in charities
- To keep registration and reporting straightforward and proportionate
- To continually improve the way OSCR operates and delivers services to all its stakeholders
- To help charities to understand and comply with their legal duties.

The Charity Law Engagement Event

The purpose of this event was to provide a space for local Third Sector organisations across the Forth Valley, to collectively provide further feedback on the Scottish Government's proposals for changes to the Charities & Investment (Scotland) Act 2005. This was an opportunity to restart engagement within the charity and community sectors, as the Covid pandemic has put this work on hold, and to develop and refine six of the ten proposals consulted on in 2019.

The three Forth Valley Third Sector Interfaces (TSI), SVE, CTSI and CVS Falkirk, facilitated this engagement event online (Appendix 1) on Wednesday 13th January 2021.

Fifteen individuals from across the Forth Valley attended this event. Each individual had the opportunity to formulate a position on the way forward with charity law, by providing responses to the questions associated with the following 6 proposals.

Strand A - enhancing transparency and accountability in Scottish charities

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

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

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

B. Strand B - increased regulatory powers for OSCR.

Proposal 4 - A power to issue positive directions to charities

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

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

Responses

Responses from this event can be found in (Appendix 2). The collated responses from this and other events across the country will ensure that the changes to charity law is directly informed by the public and charity sector. There are over 25,000 charities that operate in Scotland and these changes will not only strengthen good governance but also give the regulator, OSCR, the power to give positive direction to Scottish charities.

Next Steps

All collated responses, both individual and group, from across Scotland will build on the previous consultation responses from 2019 and will assist the Scottish Government in publishing its recommendations for next steps. The findings will be put onto the timetable for Parliament to approve.

Thank you to everyone who took the time to participate in this event, your feedback is invaluable.

Appendix 1

Third Sector Representatives who participated in the engagement event.

Anne	Knox	SVE
Chris	Burns	Stirling Council
Christopher	Gray	Falkirk District Association for Mental Health
Dorrie	McLaughlin	Scottish Autism
Ewen	Cameron	Cameron Accounting Ltd
Graham	Struthers	SVE
Janine	Rennie	Wellbeing Scotland
Liz	Rowlett	SVE
Margaret	Porteous	Abbeyfield Stirling Society
Marie	Brownhill	The Gate Charity
Mark	Griffiths	Mark Griffiths Management
Michelle	Cook	Institute of Fundraising
Sheena	McDonald	Blane Valley Allotments
Sherry	Macintosh	Central Scotland Chinese Elderly Association
Tom	Brown	Quiet Waters
Anne	Knox	SVE

Strand A: enhancing transparency and accountability in Scottish charities

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

Q1: in what circumstances should there be a dispensation to full annual reports and accounts publication?

- If an organisation has not received income during the year, due to COVID for example, I don't think it would be helpful to have full sets of accounts at that time. If this is the case, a smaller set would be acceptable.
- Protected services are a key area that I would want to see some form of dispensation.
- Redaction could be a way around it in terms of the details of the trustees.
- There are some circumstances where redaction is required, especially if the organisation offers protected services.
- Example given of possible dispensation (medical research company) where directors could be identified and targeted.
- Charities should publish their accounts but this shouldn't be an onerous task.
- Information should be open and transparent but should be relevant to the size of an organisation.
- Charities are in a privileged position so there is an advantage to showing their accounts/raise awareness/recruit trustees/use your annual report to sell your organisation and often funders will look at OSCR to check accounts.
- Every charity has to produce accounts to OSCR regardless of their income, therefore; all charity accounts should be published publicly, however it would be ideal if the admin burden on smaller organisations was reduced.

Q2: if dispensations are made, should some form of annual reports and accounts always be published, for example in a redacted or abbreviated form?

- Strongly agree that redacted or abbreviated forms are acceptable and needs to be continued.
- A new simple template should be made available in such cases.
- Examples of what would be acceptable – Profit and Loss, micro accounts, basic accounting.
- Equality across the sector.
- Group in agreement that sensitive information be redacted i.e. if personal information, however charities should be open and transparent and all public information should be available.
- Current redactions should remain in place, particularly: Personal signature, photographs.

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

Q1: what information should be included in an internal database?

- All trustees are listed
- Designation if they have an office bearer role
- Any potential conflicts of interest
- Date they started and the date that they ended their trusteeship
- Individuals personal address
- Network of how many charities each trustee is involved in.
- Unique charity trustee number which follows them or consideration should be made to use NI numbers (however this would be an issue for refugees volunteering).
- Information about trustees which have been disqualified in the past. Disqualified trustee timelines would be dependent on nature of issue.
- Directors of Ltd Companies have to provide information, so this should be mirrored for charities and should be consistent.
- Basic details for trustees/directors with name/DOB/email/etc. but this should not be available to the public. Company secretary would provide this for larger organisations and this would display transparency and accountability for organisations and their actions.
- Email and contact number of each Trustee
- Charity address and contact details
- Bank details of organisation (protected under GDPR)
- Details of other charities they were/are involved with.
- Certain exceptions should be considered for certain organisations where sharing of information could compromise individuals (e.g. Woman's Aid).
- If OSCR had basic information they would be able to coordinate any issues but would need to be very mindful of how this was managed and controlled. (Especially) what information was shared, as this could lead to speculation and rumour.
- Appeals would need to be noted on the internal directory.

Q2: how should the internal database information be kept up to date?

- Get an email every year asking to update it.
- Introducing a rule to notify OSCR within 30 days of a Trustee joining or leaving the organisation.
- Charities are required to update any changes immediately as changes happen.
- Online portal for updating - part of OSCR Online.
- Designated charity trustee i.e. secretary must keep this up to date on an annual basis.
- Keeping this information up to date should be easy if using the online system.
- For consistency, a timescale set by OSCR should be adhered to - use Companies House as an example.
- OSCR requests charities to complete an annual database update at the start of the financial year either by emailing all current info or detailing info in a document that organisations can complete using a tick box to advise current information is up to date or advise changes to be made.

Q3: what information should be included in a public list of charity trustees?

There are a few comments below that contradict each other, however these are the comments from three separate break out rooms and therefore all responses have been noted.

- Persons name only (except if protected services)
- Organisation name
- All charities where individuals are trustees
- Public company/charity information should be generic with organisation address and generic email, with one key contact.
- Name and designation and address should be used - charities that are also companies agreed that being consistent with Companies House would make this task easier.
- How many charities the trustee is involved with should be published on a public list, which will help identify conflicts of interest.
- Date of Trustee joining and leaving

Q4: in what circumstances should there be an exception to being included in a public list?

- Protected Services such as Women's Aid, as this could be detrimental to individuals or could put their safety at risk.
- Could be an individual themselves rather than the charity they are a trustee of.
- Vulnerable person or under age 16 .
- An opt out option may be included to not disclose a Trustee's name to protect the safety of the individual, e.g. hate mail, threats etc.
- Only the organisation address to be publicly available, if this is someone's home address there should be a tick option for the address to be retracted from being made public.

List of disqualified trustees (removed by OSCR):

Q5: how long should a disqualified trustee remain on the list?

- Reflective of the issue – depends on why were they disqualified?
- There should be an appeals process.
- Need a clear distinction between people who have just left or retired as opposed to the people who have just been removed because they were disqualified.
- Take advice from the Charities Commission and Companies House.
- The length of time for a disqualified Trustee should align with the current bankruptcy criteria of 6 years.
- No less than 6 years' disqualification. Any minor infractions would be dealt with by the organisation itself inviting the Trustee to resign rather than involve OSCR.
- Apply to OSCR to have Trustee exceptions for people with criminal records/addictions who are now reformed and wishing to support charities that provide services for people with addictions or mental health issues as these people have life experience and resources to help people involved/requiring support from organisations.

Q6: what information should be available in the list?

- Check with GDPR registration
- In support of PVG checks where it is required, however there are lots of organisations where PVG's are not required.
- In light of Covid 19 and the potential for individuals taking on credit issues or debts there are major concerns about trustee recruitment in the future if information is included in the public list.
- Concerns about what information would be publicly available as this could affect individuals in terms of their future career, job opportunities, etc.
- If disqualification is added to the list, this should include the name, date and charity they were involved in at the time of the disqualification.
- The information on the disqualification should be limited to the name of the Trustee, the date of disqualification and the expiry date.
- It is not appropriate to state the reason for disqualification publicly however OSCR will be notified of the reason for their internal database. If an organisation wanted to find out further information on the reason they may be able to request a Freedom of Information (FOI) request.
- OSCR should not be able to publicise any information on a person before all evidence is gathered and a conclusion is made. An example in the past is that a person lost their career for something that was publicised about them that turned out to be untrue.

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

Q1: what factors should be considered in defining a ‘senior manager’?

- Someone who has responsibility for the finance of an organisation or the HR within an organisation.
- Overall management of the charity e.g. CEO, Senior Manager, Deputy manager, etc.
- Operational decision makers.
- Those who have been delegated authority by the trustees.
- There should be a clear distinguish between operational and governance matters.
- HR European Rights - are OSCR taking away from the trustees’ responsibility to do this?
- This seems a badly put forward question – there is a suggestion that OSCR want to extend their reach into normal matters of HR and employment law which we are concerned about and which is currently part of the duties of trustees. Are we taking away trustees responsibilities for HR rights?
- Depends on the structure size and operation of an organisation.
- Responsibility for managing staff/budgets/performance.
- Also consider how that senior manager is managed with guidance/direction/support/progress monitoring.

Q2: should automatic disqualification criteria always align with charity law in other parts of the UK?

- Different laws across the UK - how can we know when we do not know what the other laws are?
- Where it is appropriate – for example: a local organisational charity trustee who has been disqualified cannot sign up as a trustee for a national organisation.
- We need some clarity around what the difference between the laws are and this bears greater discussion.
- Yes, makes sense but some synergy between UK orgs would be required.
- OSCR should have more legal rights, perhaps they could look at evidence of what works well in England and apply these rights, rather than aligning all charity law.

Strand B: increased regulatory powers for OSCR

Proposal 4 – A power to issue positive directions to charities

Q1: 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?

- HR issues should not fall within this power - OSCR should signpost to the relevant services.
- Should be a strict line of compliance for reporting and replying to OSCR queries.
- Up to the board of trustees to provide governance within the charity - OSCR should not be involved when it is relevant to trustee duties unless they are not complying with trustee duties e.g. submitting accounts, updating annual database, responding to legitimate queries.
- OSCR should have a positive power of direction that extends to assets and being able to freeze charitable assets and bank accounts. If the organisation is in crisis, OSCR should be able to tell the organisation to appoint x amount of new Trustees with whatever skill set is required.
- Discussions were held around whistleblowing within organisations and these being submitted to OSCR resulting in a power of direction. Concerns were raised around this, as an example was given of how in the past OSCR published matters publicly before being investigated and the consequences this could have to an organisation and individuals was career ending.
- Sometimes people have a malicious intent and OSCR have to be mindful to protect the reputation of organisations and any individuals involved, following the legal requirements.
- Concerns were raised around how much of the positive power of direction information was publicised.
- Current Scottish structure allows for a lot of support from TSI's/measures in place.
- OSCR might not always understand how organisations operate and the different complexities. Some charities may be accountable to other regulatory bodies.
- Concern over the term "*positive direction*", is this the same as special measures. Need to clarify what "*positive direction*" actually means.
- Current practice generally means that approaching OSCR is a last resort.
- Each situation would depend on the nature or seriousness of the issues. Any interventions would require to be managed with an agreed timeframe.

Q2: How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction?

- Usually want a response within 42 days depending on the request - want to keep this from a consistency point of view - would be ample opportunity to comply, this however being dependent on the nature of the issue as this length of time may not be satisfactory, e.g., to develop a governance framework and recruit new board of Trustees.
- OSCR should also have the same limitations to keep the contact line working - to keep the flow of information.
- Should be consistency across all - investigations should be the same for both parties in terms of timing - some sort of update point when relevant.
- Responsible for their duties under the Charities Act.
- Taking away their charitable status and taking action against trustees if they continue to ignore OSCR - recorded on internal database.
- Removal from the register, if they continue not complying.
- Fines could be problematic.
- OSCR should be able to enforce consequences if organisations do not comply, toughest consequence would be removing charitable status.
- OSCR should contact TSI's for support available, to assist charities to work better. E.g., help with training for Treasurers.
- 3 months, 6 months then 9 months warning before intervening.

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

Q1: what factors need to be considered to define ‘persistent’ failure to submit?

- If a request has been put out numerous time – there needs to be a cut off factor.
- Would hope to hear initial contact within 6-12 months after the compliance date which is 9 months after their end of year.
- Persistent failure has to be looked in to first - they have to be given a chance.
- Look for consistency to mirror what is in company law - timescales for provision of accounts and striking company off if they fail to comply - do not see why a charity should not comply to something similar or do the same.
- Consideration should be made for the following - Have they got enough trustees? Quorum Have they got a main contact? Have they got contact with the charity?
- A qualifier should be added to the proposal - the difference between people who are failing to acknowledge it and those trying to rectify it but obstacles they are in the way that need to be dealt with.
- The process for submitting accounts is time consuming for organisations, however, they have 9 months from the year end to submit their accounts to OSCR.
- If an organisation contact details are not up to date, OSCR may be trying to get in touch with a principal contact who is no longer assigned to the organisation. To prevent this issue, all trustee contact details should be available on OSCR’s internal database so that OSCR can contact an alternative person to try and progress the situation.
- OSCR currently have limited powers with only the Courts having the right to remove charitable status.
- OSCR should have this power (e.g. for some charities that are not operating anymore).
- OSCR currently receives TSI support for local/annual information and updates on charities.
- Submitting annual accounts should be an obligation like tax returns with timeline for compliance
- What happens to funds if a charity is wound up and this is not generally followed up (should funding be returned to funders? Etc.).
- OSCR should have powers to access bank accounts in certain serious situations.
- Have to consider social consequences of winding up a charity. E.g. Not adhering to procedures but still very active and providing a valuable community service.
- If accounts submitted on time this could be acknowledged by an authorisation code which would be beneficial for funding applications, (although this is already acknowledged on the charity’s register entry).

Q2: what steps should OSCR take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

- Action should not be taken prior to the charity being asked to do something first - the charity should be offered support from Third Sector Interfaces in the first instance if a charity isn't complying with a direction.
- If they have a timeline, support and still do not comply, then they should be removed.
- Ample time as this process will take up to 2 years.
- Updated internal database with all current Trustees in order to have alternative contacts to try and resolve issues before requesting support from TSI.

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

Q1: what factors should be considered when defining what 'have and retain a connection to Scotland' means? Does this have to require a physical presence in Scotland, such as an office address or trustee address?

- A base of operations (address) or a service delivery is needed in Scotland for them to be a charity registered in Scotland.
- Fundraising in Scotland, people from Scotland involved in the operations - just an address is not enough.
- If there isn't staff, volunteers or service delivery, then it should not be classed as a Scottish charity.
- Felt that organisations can be based out with Scotland as long as some activities were taking place in Scotland.
- Consideration should be given to charities that deliver overseas aid.
- Study/audit of current situation and if any changes brought in what impact they would have.

Q2: should the need to have and retain a connection to Scotland apply to existing charities or only new charities?

- If the charity is not operating and/or providing a service, have staff and volunteers in Scotland, they should be given the opportunity to review their governing document and purposes and work with OSCR to establish a proper connection with Scotland. If not, they should be removed. Should have that opportunity before it is taken off them.
- New charities should have to establish their connection within Scotland before they are registered.
- Yes, for both existing and new but a timescale would be required for any transition during this time.