



# Analysis of Consultation on Scottish Charity Law



**PEOPLE, COMMUNITIES AND PLACES**

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# Executive Summary

This Executive Summary presents the main messages arising from the Consultation on Scottish Charity Law.

Scotland has a resilient, diverse and innovative charity sector. There are over 24,000 charities on the Scottish Charity Register, from grassroots sport and youth clubs, to health and social care providers, to national museums and galleries. Charities touch on almost every aspect of our day-to-day lives. Charities also play a prominent role at a national level - bringing expertise, insight and challenge to national policy development and implementation.

It is now over 13 years since the introduction of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act), which established the current regulatory framework. Over this time OSCR has shown its commitment to regulating in a pragmatic and proportionate way, balancing a widely preventative approach with strict enforcement where necessary. Consequently, OSCR has built up considerable learning about the framework, and in line with its general statutory function to advise or make proposals to the Scottish Ministers on matters relating to its statutory functions, has proposed areas where the 2005 Act could be improved to better serve the public and charities, with a focus on increasing transparency, accountability and trust. OSCR's specific proposals were outlined in "A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005"<sup>1</sup>.

In light of OSCR's proposals and wider stakeholder views, the Scottish Government ran the consultation to consider and consult on possible updates to the legislation. Views were sought from members of the public, the charity sector, and anyone with an interest in charity law. The focus was to learn from the expertise and experience of others, and to hear first-hand about what really makes an impact on levels of public trust and confidence.

In total 307 responses were received to the Consultation on Scottish Charity Law, broken down by individuals and organisations in Table 1.

**Table 1: Profile of Consultation Respondents**

	Number	Percentage
Individuals	127	41%
Organisations	180	59%
<b>Total</b>	<b>307</b>	<b>100%</b>

<sup>1</sup> Proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005. [Accessed online](#)

**Table 2: Summary Analysis Table**

Questions	Assessment of Feedback	Main Comments For and/or Against
<b>Section 1 - Publishing annual reports and accounts in full for all charities on the Scottish Charity Register</b>		
Q1 - On the Scottish Charity Register, should OSCR be able to publish charity annual reports and accounts in full for all charities?	Vast majority supportive	<ul style="list-style-type: none"> <li>• In the best interests of strengthening transparency and building public confidence and trust in the sector.</li> <li>• Open, direct and easier access to information is a good thing.</li> <li>• It would lead to increased scrutiny, accountability, and openness of charities to the public and other interested parties (e.g. funders).</li> <li>• This information is already publicly available or direct requests can be made to charities.</li> </ul>
Q2 - Do you think there is any information in charity annual reports and accounts that should not be published on the Scottish Charity Register?	Majority answered “No” – but wider feedback mixed	<ul style="list-style-type: none"> <li>• Full disclosure and transparency is important. As is building and maintaining strong levels of public confidence and trust.</li> <li>• Redaction can undermine transparency.</li> <li>• Accounts would be more user-friendly if not redacted.</li> <li>• But privacy is also paramount (e.g. sensitive personal information, charities involved in sensitive areas, to prevent fraudulent use).</li> <li>• Publishing in full should be the default position – however, there would require to be some exceptions to the rule.</li> </ul>

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Q3 - Do you think charities should be allowed to apply for a dispensation from having their annual reports and accounts published in full on the Scottish Charity Register?

Majority not supportive – but wider feedback mixed

- All charities should be open to public scrutiny.
  - Dispensations could undermine public confidence and trust in the sector.
  - Dispensations to be agreed in exceptional circumstances only.
  - Concerns relating to no dispensations were largely linked to risks around publishing sensitive personal information, the risk of violence, abuse, intimidation, and unwelcome exposure, and that it might deter people from becoming a trustee.
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Questions	Assessment of Feedback	Main Comments For and Against
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**Section 2 - An internal database and external register of charity trustees**

Q4 - Should OSCR be able to collect the trustee information for use in an internal database?

Vast majority supportive

- It would increase public confidence in the governance of charities.
- It would increase transparency and openness of the sector.
- It would support effective regulation.
- It would reduce fraudulent behavior within charities or mismanagement.
- Some process-related concerns were raised (e.g. data protection, cost of maintaining the database, keeping information up-to-date, administrative burden for smaller charities and OSCR).

Q5 - Should the names of trustees be published on the external public register?

Majority supportive

- As above – it would support increased transparency, trust, etc.
- Public have a right to know who is involved in running charities.
- Some process-related concerns were raised (e.g. data protection, right to apply for a dispensation, it might put trustees at risk and/or discourage others from applying to become a trustee).
- Some calls for greater clarity on the purpose of developing the external register (and internal database), and more detail required regarding how proposals would be implemented and work in practice.
- The need for appropriate safeguards to prevent any data breaches.

<p>Q6 - Should the names of trustees who have been removed following an inquiry by OSCR, be published on the external public register?</p>	<p>Vast majority supportive</p>	<ul style="list-style-type: none"> <li>• As above – it would support increased transparency, trust, etc.</li> <li>• It would support charities in undertaking due diligence activities.</li> <li>• Wider points – separate register required, it should be time-limited (in most cases), context about the decision, care to avoid mistaken identity.</li> </ul>
<p>Q7 - Do you think trustees should be allowed to apply for a dispensation from having their name published on the external public register?</p>	<p>Majority supportive</p>	<ul style="list-style-type: none"> <li>• The publication of trustee names should be the default position, and dispensations should be by exception - case-by-case basis.</li> <li>• There might be a limited and specific set of legitimate circumstances where an exemption should be granted. For example, in instances where disclosure could put a trustee (and/or their family) at risk of unwelcome exposure from a health, safety or security perspective, for charities operating in sensitive areas, etc.</li> <li>• OSCR would need to clearly define the parameters where a dispensation might be applied for.</li> </ul>

Questions	Assessment of Feedback	Main Comments For and Against
<b>Section 3 - Criteria for automatic disqualification of charity trustees and individuals employed in senior management positions in charities</b>		
<p>Q8 - Should the criteria for disqualification and removal of charity trustees be extended to match the criteria in England and Wales?</p>	<p>Vast majority supportive</p>	<ul style="list-style-type: none"> <li>• The proposals (Q8 and Q9) appear reasonable and comprehensive, and aimed at excluding those whose behaviour was unfit for leading a charity.</li> <li>• Aiding consistency between different jurisdictions made sense – important to make sure that a disbarred trustee of one charity was not able to take up a leadership role within another charity.</li> <li>• It would afford greater transparency, professionalism, and integrity across the charity sector.</li> <li>• It would help maintain and increase public confidence and trust in the sector, and protect charities from the risk of abuse.</li> <li>• Some concerns raised about the implications that the application of rigid criteria might have on charities working in sensitive areas. For example, ex-offenders recruited by charities as trustees (or staff).</li> <li>• For some, it was felt that more detail would be required to set the parameters of the proposed alignment (Q8 and Q9).</li> </ul>
<p>Q9 - Should the criteria for disqualification and removal also be extended to those in certain senior management positions?</p>	<p>Vast majority supportive</p>	<ul style="list-style-type: none"> <li>• Some of the points raised in Q8 are also relevant to this question.</li> <li>• Senior managers (and trustees) hold positions of public trust – important that all positions of responsibility are covered in any extension of criteria.</li> <li>• Need to define what is meant by “senior management”, and for small charities with few or no staff.</li> </ul>



Questions	Assessment of Feedback	Main Comments For and Against
<b>Section 4 - A power to issue positive directions to charities</b>		
Q10 - Should OSCR be given a power to issue positive directions?	Vast majority supportive	<ul style="list-style-type: none"> <li>• It would provide OSCR with stronger powers to intervene and enforce in instances where charities were not adhering to its legal obligations.</li> <li>• It would protect the reputation of the sector and safeguard charitable assets.</li> <li>• It would safeguard and enhance public (and donor) confidence and trust.</li> <li>• It would improve the reputation and credibility of the sector.</li> <li>• Support for a cautious and sparing approach – use of such powers in exceptional circumstances was supported.</li> <li>• Charities would need to have sufficient opportunity, time and support to comply with any positive direction.</li> <li>• Some concerns raised about the additional burden for smaller charities.</li> </ul>
Q11 - Should a power to issue positive directions be wide ranging or a specific power?	Majority supportive of wide ranging power – but wider feedback mixed	<ul style="list-style-type: none"> <li>• Support for a wide ranging power – it would be difficult for OSCR to list in legislation all the circumstances in which it might be needed and/or be impossible for the legislation to correctly envisage the different situations in which it might be needed.</li> <li>• Support for a specific power – OSCR should only intervene on aspects specific to the governance of charities, rather than having power to issue positive directions relating to the day-to-day operational management of charities. The importance of protecting and maintaining a charity's independence from the public sector was emphasised.</li> </ul>

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Q12 - If a charity failed to comply with a positive direction that OSCR had issued, should this be classed as trustee misconduct?

Majority  
supportive – but  
wider feedback  
mixed

- Supportive overall, but the main feedback was that it should not be automatically classed as misconduct.
  - There would require to be a full inquiry or investigation – including to identify any potential mitigating factors. Each case should be considered on its own merits.
  - The importance of having a fair and effective rights to appeal process was raised.
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Questions	Assessment of Feedback	Main Comments For and Against
<b>Section 5 - Removal of charities from the Scottish Charity Register that are persistently failing to submit annual reports and accounts and may no longer exist</b>		
Q13 - Should OSCR be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts?	Vast majority supportive	<ul style="list-style-type: none"> <li>• The submission and publication of annual reports/accounts were vitally important to improving transparency and accountability of the sector. It also helps safeguard and build public/donor/stakeholder trust and confidence in charities, and in charity regulation.</li> <li>• OSCR would need to exhaust all possibilities of identifying and locating trustees to remind them of their responsibilities prior to removal. If confirmed that the charity has ceased to exist or was no longer operating, then removal from the Scottish Charity Register was considered appropriate.</li> <li>• “Persistently” would need to be further defined.</li> </ul>
Q14 - Should OSCR be given a positive power of direction to direct a charity to prepare annual reports and accounts?	Vast majority supportive	<ul style="list-style-type: none"> <li>• Action taken by OSCR to drive up levels of compliance was supported.</li> <li>• The importance of charities’ demonstrating where charitable funds came from, how charitable funds were spent, and public benefit provided were emphasised.</li> <li>• It was considered reasonable for OSCR to have a range of appropriate powers that it could use where charities were ignoring their legal duty.</li> </ul>

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Q15 - 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?

Majority  
supportive

- The general consensus was that there should be consequences for charities who persistently failed to submit annual reports and accounts, and for OSCR to have powers to implement sanctions/enforcement actions.
- But – it should not be assumed to be trustee misconduct, and attempts should be made to resolve the issue in the first instance.
- Any non-compliance would need to be investigated before being classed as misconduct, including consideration of any mitigating factors.
- The importance of a supportive and preventative regulatory approach was emphasised – some charities might need support to get back on track, etc. Action taken by OSCR should be appropriate and proportionate.

Questions	Assessment of Feedback	Main Comments For and Against
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**Section 6 - All charities in the Scottish Charity Register to have and retain a connection in Scotland**

Q17 <sup>2</sup> - Should all charities registered in Scotland be required to have and retain a connection with Scotland?	Vast majority supportive	<ul style="list-style-type: none"> <li>• A reasonable proposition that OSCR’s remit should only extent to charities whose activities were at least partly carried out in Scotland.</li> <li>• Plus the public would likely assume that a charity which appeared on the Scottish Charity Register would have a connection with Scotland – if not, this was felt to be potentially misleading.</li> <li>• It would support more effective regulatory function and oversight by OSCR.</li> <li>• It would strengthen transparency, accountability and credibility of the sector.</li> <li>• “Have and retain a connection” would need to be further defined – strong support for a sufficiently broad definition.</li> <li>• Some concerns raised around the potential that some cross-border charities would lose OSCR registration due to a lack of a physical base in Scotland.</li> </ul>
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<sup>2</sup>Note: Question 16 was an open-ended question. See Main Report for further details.

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**Section 7 - Inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities**

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Q18 - 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?

Vast majority supportive

- The granting of such a power was considered prudent, conducive to effective regulation, and it would strengthen current legislation.
  - Important for OSCR to have sufficient powers at its disposal and greater scope to investigate potential wrong-doing and misconduct, and to take appropriate enforcement action(s) where required.
  - Key to supporting the integrity of the charity sector in Scotland.
  - It would strengthen transparency and accountability, and protect charitable assets.
  - There would need to be a transparent process put in place, including clear articulation of the conditions under which this power could be used.
  - Some concerns were raised that OSCR could undertake inquiries “on a whim”. Others felt that in some cases other agencies might be better placed to undertake inquiries (e.g. Police, Home Office).
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Questions	Assessment of Feedback	Main Comments For and Against
<b>Section 8 - De-registered charities' assets and public benefit</b>		
Q19 - 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?	Majority supportive	<ul style="list-style-type: none"> <li>• Strong support for such assets to be used for public benefit and not for private gain - inherent duty or obligation to safeguard charitable assets.</li> <li>• Should continue to be used for the intended charitable purpose(s) – or as close as is possible to those for which they were given – otherwise this would be misleading to the public/donors.</li> <li>• The potential to transfer assets to another charity with similar aims and objectives was supported.</li> <li>• Some terms would need to be further defined – “assets” and “public benefit”.</li> <li>• Some concerns were raised regarding complexities and challenges for long-established charities with assets acquired prior to the 2005 Act.</li> </ul>
<b>Section 9 - The speed and efficiency of OSCR's powers to gather information when making inquiries</b>		
Q20 - 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?	Vast majority supportive	<ul style="list-style-type: none"> <li>• It was considered important that OSCR has effective powers of investigation, and could undertake inquiries in a timely fashion.</li> <li>• The granting of such a power was felt to be in the best interests of strengthening transparency and accountability of the charity sector.</li> <li>• It would also provide public reassurance and build trust and confidence.</li> <li>• It would support more effective charity regulation, and protect the sector's reputation and integrity.</li> <li>• There would need to be clear parameters set for the use of this power – and that use should be subject to a public interest test.</li> </ul>

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Q21 - Should it be clarified that the notice periods to charities that are subject to a request for information can overlap?

Vast majority supportive

- There was strong support for strengthening current legislation and/or addressing any perceived ambiguity in the way notice periods were presented – either through the issuing of guidance to provide clarity, or by amending the legislation.
  - The importance of ensuring a streamlined, effective and efficient process was emphasised – and making the process as clear as possible for all parties involved (e.g. to avoid any unnecessary delays, confusion, or misunderstanding).
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Questions	Assessment of Feedback	Main Comments For and Against
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**Section 10 - The reorganisation of charities established under royal charter, warrant or enactment**

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Q22 - 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?

Vast majority supportive

- Clarifying the legislation and removing any ambiguity would be a good thing.
- There was considered merit in simplifying, streamlining, and modernising this aspect of charity regulation.
- It was recognised that the reorganisation of such charities could be complex, costly in terms of legal fees, and time consuming. As such, there was strong support for the proposal as it would potentially save these charities time and money.
- It would provide a simpler route for organisations wishing to modernise their aims and objectives.
- However, it was considered important that such charities “retain and respect their long and privileged connections” with, for example, the Scottish Parliament or Privy Council, and that any changes might undermine existing legislative frameworks and processes.

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**Wider Issues**

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Wider issues raised through the consultation are documented in the main report.

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# Introduction

## About This Report

This report presents analysis of the Consultation on Scottish Charity Law which opened on the 7<sup>th</sup> January 2019 and closed on the 1<sup>st</sup> April 2019.

## Background

Scotland has a resilient, diverse and innovative charity sector. There are over 24,000 charities on the Scottish Charity Register, from grassroots sport and youth clubs, to health and social care providers, to national museums and galleries. Charities touch on almost every aspect of our day-to-day lives.

Charities also play a prominent role at a national level - bringing expertise, insight and challenge to national policy development and implementation. Charities are key partners in setting the agenda and delivering across the Outcomes set out in the National Performance Framework. Without charities the Scottish Government could not achieve its ambition of creating a fairer and more prosperous country.

It is only with public support that charities can continue to make this impact, and it is therefore vital to maintain and increase public trust and confidence in the sector.

From the Scottish Charity Survey 2018 undertaken by the Office of the Scottish Charity Regulator (OSCR), it is clear how much of an impact transparency and accountability have on levels of trust. For example, 88% of people reported that seeing evidence of a charity's achievements and knowing how much of their donation went to the cause would improve their trust in charities<sup>3</sup>.

It is now over 13 years since the introduction of the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act), which established the current regulatory framework. Over this time OSCR has shown its commitment to regulating in a pragmatic and proportionate way, balancing a widely preventative approach with strict enforcement where necessary.

Consequently, OSCR has built up considerable learning about the framework, and in line with its general statutory function to advise or make proposals to the Scottish Ministers on matters relating to its statutory functions, has proposed areas where the 2005 Act could be improved to better serve the public and charities, with a focus on increasing transparency, accountability and trust.

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<sup>3</sup>OSCR Scottish Charity Survey 2018. [Accessed online.](#)

OSCR's specific proposals were outlined in "A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005"<sup>4</sup>. These can be categorised across three thematic areas:

1. Promoting greater transparency and accountability. Research undertaken by OSCR identified that public trust and confidence was directly related to the availability of information on a charity's activities and operations e.g. performance, governance/management and regulatory protocols.
2. Enhancing trust through stronger enforcement powers. This is in recognition of gaps within the current legislative framework and changing legislation in other parts of the UK (e.g. charity law in England and Wales have adopted a different approach and process relating to the automatic disqualification for trustees). OSCR want to ensure that where changes have been made in the rest of the UK that this has not created loopholes that could be exploited and leave Scottish charities vulnerable.
3. Streamlining operations and introducing efficiencies. There is ambiguity and uncertainty linked to current legislation with regards to "reorganisation schemes". OSCR has advised that there requires to be greater clarity in the legislation - potentially saving charities both time and money.

In light of OSCR's proposals and wider stakeholder views, the Scottish Government ran the consultation to consider and consult on possible updates to the legislation. Views were sought from members of the public, the charity sector, and anyone with an interest in charity law. The focus was to learn from the expertise and experience of others, and to hear first-hand about what really makes an impact on levels of public trust and confidence.

## **Analysis Methodology**

The Scottish Government provided EKOS Ltd access to all responses via Citizen Space. Where responses were not submitted by respondents through Citizen Space, the Scottish Government uploaded responses as separate documents on Citizen Space for inclusion in the overall analysis.

Quantitative (closed questions) and qualitative (open-ended questions) responses were exported into Microsoft Excel for subsequent analysis:

- All Yes/No questions have been presented in table format.
- Qualitative responses have been analysed to identify common themes and messages.

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<sup>4</sup>Proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005. [Accessed online](#)

The following points should be noted:

1. When completing the consultation, respondents were not required to provide a response to every question. Where this occurs this is noted as “Not Answered”.
2. Some responses were not submitted by respondents through Citizen Space (26) and did not always follow the consultation structure (e.g. email or letter response to the Scottish Government). These responses have been included within the analysis of open-ended questions. In instances where the respondent did not provide a response to the Yes/No question set, these have been coded as “Not Answered”.

## Profile of Respondents

In total 307 responses were received to the Consultation on Scottish Charity Law, broken down by individuals and organisations in Table 3.

**Table 3: Profile of Consultation Respondents**

	Number	Percentage
Individuals	127	41%
Organisations	180	59%
<b>Total</b>	<b>307</b>	<b>100%</b>

In discussion with the Scottish Government, we agreed how best to code “organisations”, Table 4. In the remainder of the report we have sought to draw out any differences in responses across different sub-groups, where appropriate.

**Table 4: Further Breakdown of Consultation Respondents**

	Number	Percentage
Individuals	127	41%
Charity Sector	164	54%
Other	16	5%
<b>Total</b>	<b>307</b>	<b>100%</b>

Note 1: Charity Sector: local and national charities, membership/professional bodies, churches, third sector intermediaries.

Note 2: Other includes regulators, solicitors and consultants.

A diverse range of charity sector organisations responded to the consultation. This ranged from local to national charities, and from membership bodies to cross-border charities, to name a few. A “best fit” approach was adopted to provide a further breakdown, Table 5. Charity organisations were coded based on the

Scottish Government and consultant team’s combined knowledge of organisations and from details provided in the Respondent Information Form (RIF). Around two-thirds of charity sector organisations were national charities (including cross-border) or local charities.

**Table 5: Breakdown of Charity Sector Organisation Respondents**

	Number	Percentage
National	65	40%
Local	45	27%
Membership/Professional bodies	40	24%
Third Sector Intermediaries	14	9%
<b>Total</b>	<b>164</b>	<b>100%</b>

Note: National charities include some cross-border charities.

## Report Structure

The remainder of the report has been structured in line with the ten sections (and associated sub-set of questions) outlined in the Consultation Paper:

- Section 1: Publishing annual reports and accounts in full for all charities on the Scottish Charity Register.
- Section 2: An internal database and external register of charity trustees.
- Section 3: Criteria for automatic disqualification of charity trustees and individuals employed in senior management positions in charities.
- Section 4: A power to issue positive directions to charities.
- Section 5: Removal of charities from the Scottish Charity Register.
- Section 6: All charities in the Scottish Charity Register to have and retain a connection to Scotland.
- Section 7: Inquiries into former charity trustees.
- Section 8: De-registered charities’ assets and public benefit.
- Section 9: The speed and efficiency of OSCR’s powers to gather information when making inquiries.
- Section 10: The reorganisation of charities established under royal charter, warrant or enactment.

We have captured any wider points raised within the consultation, but which do not fit within any of the preceding Sections at Section 11. Appendix A provides details of consultation respondents who selected “publish response with name” in their RIF.

# Section 1

## Publishing annual reports and accounts in full for all charities on the Scottish Charity Register

### Context

All charities in Scotland are under a legal duty to prepare annual reports and accounts, which they then submit to OSCR. There is currently no legal requirement for reports and accounts to be published on the Scottish Charity Register. OSCR has implemented a programme of “targeted regulation” in recent years, part of which has involved publishing 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).

**Table 6: Question 1**

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

	Yes	No	Not Answered	Total
Individuals	84%	15%	1%	127
Charity Sector	80%	10%	10%	164
Other	88%	0%	13%	16
<b>Total</b>	<b>82%</b>	<b>12%</b>	<b>6%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The vast majority of respondents SUPPORTED giving OSCR an explicit power to publish annual reports and accounts in full for all charities (82%), and felt that it was a sensible proposal.

Support was highest among the other (including regulators) and individual sub-groups. Within the charity sector, strongest support for this proposal was among national charities and membership/professional bodies. While there was less support among local charities, the majority were supportive.

The general consensus among all respondent sub-groups was that giving OSCR an explicit power to publish annual reports and accounts in full for all charities was in the best interests of strengthening the transparency of, and building public confidence in, the charity sector in Scotland. The majority of feedback in support of this proposal was that it would lead to increased scrutiny, transparency, accountability and openness of charities to the public and other interested parties (e.g. funders, beneficiaries, potential donors).

The general consensus among all respondent sub-groups was that promoting greater accountability and transparency would “increase public trust and confidence” in the charity sector in Scotland. This finding supports previous OSCR Scottish Charity Surveys (2016 and 2018) which also found that the majority of respondents said that open access to accounts would improve their trust in charities.

Across all respondent sub-groups “open, direct and easier access” to more information was considered important for a whole host of reasons. These were commonly reported as to:

- Provide evidence that charities were adhering to their legal responsibilities, and to maintain consistent standards across the sector.
- Increase knowledge and understanding of who was involved in managing charities, and how well they were run.
- Demonstrate how charitable funds were allocated and spent and that charitable funds and donations were used appropriately.
- Demonstrate and showcase the activities charities have undertaken and the difference they were making.
- Help funders, potential donors/trustees assess a charity’s viability and competency from a due diligence perspective.
- Remove the issue of over-redaction which diminished the quality and usability of accounts.
- Provide a platform for any issues/concerns to be raised.

The majority of respondents reported that much of this information was currently in the public domain, and that it would be reasonable and sensible for OSCR to publish charity annual reports and accounts in full for all charities on the Scottish Charity Register.

Many respondents pointed out that annual reports and accounts were public documents which were routinely published on a charity’s website, and that anyone could make a direct request to a charity for a copy of its annual report and accounts (and that unredacted accounts would normally be provided). Others mentioned that for those charities that were also companies, full accounts were also submitted to Companies House.

Some respondents made reference to the different challenges they encountered with the current system of accessing such documents. This spanned: difficulties finding annual reports and accounts on individual charity websites; that many small charities relied more heavily on social media channels and did not necessarily have websites; the length of time taken to receive such documents following a direct request; and/or experience of requests either being questioned or not answered.

“Ready and easy access” to such information in a “central place” was considered particularly helpful to make it easier for the public (and others) to find the information that matters to them. The main feedback was that this would:

- Aid consistency and improve the quality of annual reporting across the charity sector.
- Make accounts more user-friendly if published in full without redactions. It was said that redacted reports often lead to inappropriate interpretation of charity accounts and financial information by users (e.g. taking information provided out of context). Others felt that there was a low level of public knowledge on accounting and charity law which called for more information on how to understand charity accounts to aid greater transparency and accountability.
- Enable potential donors/stakeholders to make informed decisions on which charities they supported and worked with.

Wider feedback provided by some respondents included:

- Charities benefit from “significant tax concessions”, and that publishing the annual reports and accounts of all charities in full would aid greater transparency of how charities work.
- The value of bringing Scotland in line with other charity regulators in the UK who are under a duty to have such information “open to public inspection” was further emphasised, in particular among the charity sector and other respondent sub-groups.
- That if OSCR was to publish all annual reports and accounts in full on the Scottish Charity Register, then charities would need to ensure that their accounts complied with the Charity Accounts Regulations, Statement Of Recommended Practice (SORP), and Financial Reporting Standard for Smaller Entities (FRSSE).
- There would be less administrative effort for OSCR if it did not redact information (e.g. its online filing requirements could be adjusted accordingly).
- It might result in fewer direct requests by the public and funders to charities for this information (i.e. it would lead to time savings for charities).
- It might reduce the volume of public requests to OSCR under Freedom of Information (FOI) legislation for information held on Scottish charities (i.e. it would lead to time/cost savings for OSCR).

A further comment was that charity annual reports and accounts should be accompanied by their external scrutiny report.



Twelve percent of respondents DID NOT SUPPORT giving OSCAR an explicit power to publish annual reports and accounts in full for all charities. Individuals, and within the charity sector, local charities were more likely to oppose the granting of such a power.

It is important to note that in many cases these respondents went on to provide wider narrative in support for OSCAR publishing annual reports and accounts for all charities - but just not in full.

The feedback from respondents that did not support this proposal largely focussed on two main points: 1) the need to redact sensitive personal (or commercial) information to ensure the privacy rights of individuals were respected and that GDPR and data protection legislation was not breached; and 2) concerns that a one-size-fits-all approach might not be appropriate, including that it could create an additional administrative burden for smaller charities.

Wider feedback from many of these respondents was that there was no need for OSCAR to publish annual reports and accounts for all charities given that a direct request could be made to a charity for these documents. For some, the proposal appeared to be a duplication of work/effort. The concerns relating to data protection was emphasised by the individuals sub-group. Data protection and the potential duplication of work was emphasised by local charities.

## **Summary**

Overall, the general consensus among most respondents to the consultation was that the potential benefits of the proposal outweighed any potential risks. Where risks were reported these can be categorised as follows:

- There were concerns about publishing sensitive personal information relating to trustees, staff, beneficiaries and donors. It was felt that this could put people at risk of violence, abuse or intimidation and/or fearful of attracting unwelcome exposure.
- The publishing of sensitive personal information might deter people with a variety of “lived experiences” from becoming a trustee.
- The public might misunderstand or misinterpret information in a charity’s accounts – with some calls for continued efforts to improve the quality of annual accounts, including the narrative “to help explain the numbers”.
- It might create an additional administrative burden for smaller charities – a one-size-fits-all approach might not be appropriate.
- That the published information might be used unscrupulously (e.g. by media outlets).
- Charities might be less willing to outline their future plans to preserve a competitive advantage and/or to avoid revealing commercially sensitive information.

**Table 7: Question 2**

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

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	39%	60%	1%	127
Charity Sector	32%	55%	12%	164
Other	44%	38%	19%	16
<b>Total</b>	<b>36%</b>	<b>56%</b>	<b>8%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Just over half of respondents felt that there was NOT any information in charity annual reports and accounts that should not be published on the Scottish Charity Register (56%).

Individuals and the charity sector were more likely to be supportive of NOT redacting any information. Within the charity sector, strongest support for publishing information in full was among national charities, followed but to a lesser extent by membership/professional bodies.

The main feedback across all respondent sub-groups that did not consider there to be any information that could not be published was that “full disclosure” and “transparency” were important, as were building and maintaining strong levels of public trust and confidence in the charity sector in Scotland.

Many of these respondents felt that the current system of redaction undermined transparency. Here, many reported that the material presented in charity annual reports and accounts should be available and in the public domain. Further, a number felt strongly that there was no good reason for “secrecy” or “censorship”, that annual reports and accounts were “public documents”, and that the public had a legitimate right to know who is involved in the management of charities and how charitable funds were spent.

Many added that this would be consistent with other charity regulators in the UK.

Wider feedback reported by some respondents related to the improved utility and quality of reports, and a reduced burden on OSCR of redacting such information.

However, many of the respondents that felt that there was NOT any information in charity annual reports and accounts that should not be published on the Scottish Charity Register caveated their position.

Many of these respondents felt that there should be some “exceptions to the rule” (covered in more detail in Section 1 - Question 3), with the main feedback related to specific concerns around data protection and GDPR, and the importance of charities being able to apply for a dispensation. The main points raised can be summarised as follows:

- The publishing of annual reports and accounts on the Scottish Charity Register should exclude signatures to prevent fraudulent use.
- The publishing of annual reports and accounts should be conditional on existing provisions for excluding sensitive personal and other data to protect the safety and security of any persons or premises (e.g. home address, personal email address or phone number of trustees/independent examiner).
- Sensitive personal information and other data linked to charities involved in sensitive areas (e.g. religious activities, domestic violence, rehabilitation of offenders) should be excluded. Many respondents made reference to trustees that were former or current service users as an illustrative example.
- That any personal details of beneficiaries should not be made public.
- OSCR should publicise the ability for charities to apply for a dispensation from having some or all trustee names published on the Scottish Charity Register. It was reported that the onus should be on the charity to apply for a dispensation from publishing trustees' names, rather than OSCR undertaking a redaction.

Over one-third of respondents felt that there WAS information in charity annual reports and accounts that should NOT be published on the Scottish Charity Register (36%).

The other sub-group, followed by individuals, were more likely to show support for NOT publishing some information. Within the charity sector, there was particularly strong support for not publishing annual reports and accounts in full among local charities.

The general consensus among respondents that felt there was information that should not be published was that “privacy was paramount”, and that the rights of volunteers and beneficiaries to remain anonymous must be respected.

As such, the feedback largely reflected the points raised above, namely:

- The importance of not publishing personal contact details to protect the safety and security of any persons or premises was emphasised.
- Signatures should not be published to prevent fraudulent activity.
- The publishing of sensitive personal information might be a disincentive to hold office.
- There should be a requirement to exclude sensitive personal information for charities involved in sensitive areas.

- Charities should be able to apply for a dispensation in circumstances where disclosure might jeopardise safety or security.

Some wider suggestions proposed, but not in many cases, were as follows:

- OSCR could follow the example of The Charity Commission for England and Wales who is empowered to ask for and receive unsigned copies (with a trustee confirming that the charity has a signed copy). This approach means that OSCR would not have to redact information from the reports and accounts it received from charities.
- OSCR could permit charities to submit “type signed” accounts, or accounts that had been approved electronically (i.e. in a similar way to Companies House) by the trustees alongside the original signed accounts to OSCR for publication.
- Guidance could be provided to auditors or independent examiners that they might sign in the name of the firm that they represent, or again, “type signed” might be acceptable for the version to be published.

**Table 8: Question 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?**

	Yes	No	Not Answered	Total
Individuals	30%	69%	2%	127
Charity Sector	45%	43%	12%	164
Other	44%	38%	19%	16
<b>Total</b>	<b>39%</b>	<b>53%</b>	<b>8%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

There was relatively mixed views provided to this proposal.

Just over half of respondents thought charities should NOT be allowed to apply for a dispensation (exemption) from having their annual reports and accounts published in full on the Scottish Charity Register.

Strongest support for NO dispensations was among the individuals sub-group. Within the charity sector, there was stronger support among local charities for no allowances to be made for dispensations. Indeed, a number of these respondents reported that they “could think of no legitimate reason for any charity being given dispensation”.

A number of common themes emerged from the feedback across all respondent groups, and in the main these reflected points raised earlier in Section 1 - Question 1:

- Transparency, openness, and accountability was considered paramount.
- That all charities should be “open to public scrutiny”.
- That dispensations might undermine public confidence and trust in the charity sector – “seen as an attempt to hide something”.
- Direct requests for this information could already be made to charities.

It was, however, commonly reported that current provisions which allowed OSCR to exclude information on the grounds of safety and security to persons and premises should continue.

Almost 40% of respondents thought charities SHOULD be allowed to apply for a dispensation from having their annual reports and accounts published in full on the Scottish Charity Register.

Strongest support for dispensations was among the charity sector and other sub-groups. Within the charity sector, national charities and membership/professional bodies felt strongest that there should be an opportunity to apply for dispensations.

That being said, many of the respondents that reported that charities should be allowed to apply for a dispensation felt that “publication in full should be the default position”, and that “dispensation should be allowed in exceptional circumstances only”.

Aligned to this point, was that “exceptional circumstances” would require to be defined and guidance/criteria produced for the sector. In the main, support for charities to put forward a case for dispensation related to points made earlier regarding instances where publishing sensitive personal information might put an individual and/or premises at risk of unwelcome exposure.

Reference to The Charity Commission for England and Wales guidance was made: “Where the disclosure of the names of any charity trustees, custodian trustees, senior staff member, or persons with power of appointment, or of the charity's principal address could lead to that person being placed in personal danger (for example in the case of a women's refuge), the charity trustees may dispense with the disclosure provided that the commission has given them authority so to do”.

## Section 2

### An internal database and external register of charity trustees

#### Context

OSCR currently holds limited information on the 180,000+ charity trustees involved in over 24,000 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.

**Table 9: Question 4**

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

	Yes	No	Not Answered	Total
Individuals	85%	13%	2%	127
Charity Sector	75%	13%	12%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>79%</b>	<b>13%</b>	<b>8%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The majority of respondents reported that OSCR SHOULD be able to collect trustee information for use in an internal database (79%). Highest levels of support were among individuals and other sub-groups (including regulators).

Only 13% of respondents reported that OSCR SHOULD NOT be able to collect trustee information for use in an internal database.

**Table 10: Question 5****Should the names of trustees be published on the external public register?**

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	75%	24%	2%	127
Charity Sector	67%	21%	12%	164
Other	75%	0%	25%	16
<b>Total</b>	<b>71%</b>	<b>21%</b>	<b>8%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Some 71% of respondents SUPPORTED the proposal for the names of trustees to be published on the external public register. Support was strongest among individuals and other (including regulators) sub-groups. Within the charity sector there were higher levels of support among national charities and membership/professional bodies.

Around one-fifth of respondents felt that the names of trustees should be EXCLUDED from the external public register (21%). Of note was the high level of support for excluding such information among local charities.

**Table 11: Question 6****Should the names of trustees who have been removed following an inquiry by OSCR, be published on the external public register?**

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	86%	12%	2%	127
Charity Sector	76%	12%	13%	164
Other	69%	0%	31%	16
<b>Total</b>	<b>79%</b>	<b>11%</b>	<b>9%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The majority of respondents reported that the names of trustees who have been removed following an inquiry by OSCR SHOULD BE PUBLISHED on the external public register (79%). Support was highest among the individuals sub-group.

Only 11% of respondents felt that the names of trustees who have been removed following an inquiry by OSCR SHOULD NOT BE PUBLISHED. Local charities were more likely to answer “No” to this question.

**Table 12: Question 7**

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

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	53%	43%	4%	127
Charity Sector	62%	23%	15%	164
Other	63%	19%	19%	16
<b>Total</b>	<b>58%</b>	<b>31%</b>	<b>11%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Some 58% of respondents thought trustees SHOULD be allowed to apply for a dispensation from having their name published on the external public register. There was stronger support among other and charity sector sub-groups. Within the charity sector, there was stronger support among national charities and membership/professional bodies.

The main themes that emerged from the feedback provided by these respondents can be grouped as follows:

- Trustees should be allowed to apply for a dispensation, however, the decision on whether or not this was granted should rest with OSCR.
- There should be a process put in place whereby a trustee has rights to appeal and challenge a decision not to grant a dispensation.
- It would be imperative that OSCR clearly defined the parameters where a dispensation might be applied for, that the number of dispensations was reported on, and that any dispensations were reviewed regularly.
- The publication of trustee names should be the default position, and dispensation should be by exception, and considered by OSCR on a case-by-case basis.

That being said, most of these respondents felt that there might be a limited and specific set of legitimate circumstances where an exemption should be granted:

- In instances where disclosure could put a trustee (and/or their family) at risk of unwelcome exposure from a health, safety or security perspective. Certain types of charities were mentioned, including those who dealt with sensitive areas/activities, and charities that operated in small geographic areas or out of a single location.
- In instances where disclosure could impact on an individual's privacy and contravene GDPR regulations.



- An exemption should be granted for trustees who were former or current service users and might be considered “vulnerable” in some way.

Many of these respondents stressed the importance of contact information (i.e. personal identifying information beyond trustee name) only being available on the internal database for OSCR’s use, and that appropriate safeguards must be put in place to prevent any data breaches.

Wider feedback from some respondents related to the extent to which publishing trustee names (but more so other personal identifying information) might make people less willing to become involved in charities as a trustee.

Almost one-third of respondents thought trustees SHOULD NOT be allowed to apply for a dispensation from having their name published on the external public register (31%).

Individuals were more likely to report that trustees should NOT be allowed to apply for a dispensation. Within the charity sector, there was strongest support among local charities.

The main themes that emerged from the respondent feedback was that:

- Individuals involved in the governance of charities should be “visible”, and that the public had a right to know who is involved in running charities.
- That not being able to apply for a dispensation would strengthen accountability, transparency, and build public trust in the sector. Full disclosure was considered important from a good governance perspective.
- This information was already published in charity annual report and accounts, and in most cases available to the public on a charity’s website (or via direct request).
- That not being able to apply for a dispensation might prevent fraudulent activity and be a deterrent for any wrong doing or possible criminal activity.

**The final question invited comments to any of the questions in Section 2 (i.e. Question 4 to Question 7).**

Note: The feedback was not specific to any question, and as such, the following presents our overall analysis of the comments provided.

The proposals outlined in Section 2 attracted relatively mixed feedback from respondents.

Among those respondents who took the opportunity to put forward their general support for the proposals, it was felt that an internal database and external register of charity trustees would help to “increase public confidence in the governance of charities”.

Wider benefits reported by many of these respondents included that the proposals would:

- Increase transparency and openness of the charity sector in Scotland.
- Support effective regulation of charities and their trustees.
- Reduce fraudulent behaviour within charities or mismanagement.
- Support due diligence activities e.g. when charities recruit new trustees.

Other benefits reported by some of these respondents was that the proposals would bring Scotland into line with the rest of the UK, and that some of this information was already in the public domain.

While these respondents expressed their overall support for the development of an internal database and external register of charity trustees (including in a searchable format), a number of process-related issues were raised:

- Robust systems and processes would be required to ensure that data protection requirements were adhered to, and access to information on trustees was tightly controlled. Personal data should only be held where there is a clear purpose for doing so and for a specified period of time.
- Privacy of data was emphasised (i.e. no personal details over and above trustee name for external register). Plus, a handful felt that publishing too much information might deter potential candidates from becoming trustees. However, others felt that this could be mitigated through clear messaging as to why the information was required and how it would be used.
- Linked to earlier questions, the importance of there being a right to apply for a dispensation from publishing details on the external register was raised.

Wider feedback from some respondents included:

- There were felt to be inherent challenges around keeping the information up-to-date.
- The importance of keeping the administration burden of providing/updating information and data to a minimum was emphasised, and for smaller charities in particular.
- A few identified the need for more information on why the internal database was needed, how the information would be used and managed, how long information would be retained for, and who it might be shared with.
- Cross-border charities felt that it would be more practical to limit this proposal to charities whose principal regulator is OSCR.

- Some points were raised around publishing the names of removed trustees – that this should be a separate register; that it should be time-limited (in most cases); that there would need to be background context about the decision; that care would need to be taken to avoid mistaken identity (e.g. trustees with the same name); while a few questioned how helpful this approach was for someone trying to recover from a previous misdemeanour.

Where respondents DID NOT support the proposals in Section 2 and/or expressed some concerns, three main points were raised:

1. That OSCR had not put forward a strong or robust enough justification for the proposals. For example, queries raised included: why was the internal and external register of trustees needed; how would personal information be processed, stored, protected, controlled and used; and more detail was required on the anticipated benefits of the proposals.
2. There was felt to be a lack of clarity on the added value of the proposals.
3. There was felt to be a lack of clarity around how the proposals would be implemented, and how it would work in practice.

The concerns raised by these respondents largely reflected those provided previously as part of OSCR's 2014 Targeted Regulation consultation, namely:

- Privacy of data concerns, including GDPR considerations.
- There was felt to be a lack of detail around how information would be safeguarded from data breaches, and that there would need to be additional reassurances provided around data security.
- The cost of maintaining the database, and inherent challenges around how the information could routinely be kept up-to-date.
- That providing the information could create an administrative burden for charities (and for OSCR).
- That publishing trustee names on an external register might put trustees at risk and/or discourage others from applying to become a trustee.
- That due care would need to be taken in publishing the names of trustees who had been removed following an inquiry by OSCR – to avoid mistaken identity.

While not mentioned to any great extent, it was proposed that contact be made with Digital Identity Scotland to develop a more “nuanced proposal” that would provide OSCR with the information it needed while ensuring alignment with the Scottish Government’s “emerging approach to online identity assurance”.

## Section 3

### Criteria for automatic disqualification of charity trustees and individuals employed in senior management positions in charities

#### Context

Recent changes to the charity legislation for England and Wales have extended disqualification criteria for charity trustees and senior employees, to include the following:

- Unspent convictions for perjury, perverting the course of justice, misconduct in public office, contempt of court and specified bribery, terrorism and money laundering offences.
- Individuals subject to terrorist asset freezing orders.
- Disobedience of specified Charity Commission orders.
- Individuals subject to notification requirements of Part 2 Sexual Offences Act 2003 (on the Sex Offenders register).

To ensure criteria in Scotland are fit for purpose, the option proposed is to extend the criteria for 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.

#### Table 13: Question 8

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

	Yes	No	Not Answered	Total
Individuals	86%	9%	5%	127
Charity Sector	84%	2%	15%	164
Other	75%	6%	19%	16
<b>Total</b>	<b>84%</b>	<b>5%</b>	<b>11%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The vast majority of respondents SUPPORTED plans to extend the criteria for disqualification and removal of charity trustees in Scotland to match the criteria in England and Wales (84%).

There was strongest support among individuals and charity sector respondent sub-groups. Within the charity sector, support was strongest among local and national charities and membership/professional bodies.

Only 5% of respondents DID NOT SUPPORT plans to extend the criteria for disqualification and removal of charity trustees in Scotland.

#### Table 14: Question 9

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

	Yes	No	Not Answered	Total
Individuals	87%	9%	4%	127
Charity Sector	74%	10%	16%	164
Other	63%	13%	25%	16
<b>Total</b>	<b>79%</b>	<b>9%</b>	<b>11%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

79% respondents SUPPORTED plans to extend the criteria for disqualification and removal to those in senior management positions. Support was strongest among the individuals sup-group. Within the charity sector, support was strongest among national charities, followed by local charities.

9% of respondents DID NOT SUPPORT the proposal to extend the criteria for disqualification and removal to those in senior management positions. Within the charity sector, membership/professional bodies were more likely to not support this proposal.

#### The final question in Section 3 invited comments to Question 8 and Question 9.

Note: The feedback was not specific to any question, and as such, the following presents our overall analysis of the comments provided.

Where respondents expressed support for the proposals, the feedback considered the following points:

- The proposals to extend criteria made sense, that the additional criteria was reasonable and comprehensive, and that it was aimed at excluding those whose behaviour was unfit for leading a charity. Some added that the list should be subject to future review and addition if required.
- It was generally reported that it made sense to bring Scotland in line with equivalent legislation for England and Wales. Aiding consistency between different jurisdictions and creating a “level playing field” was reported to make sense on a number of levels. Firstly, for charities that operated cross-border or were UK-wide it was reported that this would remove inconsistencies and provide better protection for charities across Great Britain (GB).

The importance of making sure that a disbarred trustee of one charity was not able to take up a leadership position within another was considered important. It was also reported that this would help avoid any doubt or confusion by the public, and increase trustee understanding of what was expected of them, their legal and regulatory responsibilities, etc.

- Trustees and senior managers were said to hold positions of public trust – roles that demanded high levels of professional behaviour, given that they have significant power and control over a charity and its finances. Feedback was that all positions of responsibility must be included in any extension to criteria for disqualification and removal. It was considered highly appropriate that trustees and senior managers should be able to demonstrate that they were fit and proper and were of good character (properly vetted). It therefore made sense that both were held to the same high standards.

Wider feedback from some respondents included:

- The extension of criteria would afford greater transparency, professionalism and integrity across the charity sector by adopting higher standards of governance.
- It would also help maintain and increase public confidence and trust in the governance, administration and behaviour of those involved in running and managing charities.
- It would protect charities from the risk of abuse.

Wider considerations reported by many respondents included a need to:

- Define what was meant by “certain senior management roles” prior to any legislation being passed, as it was considered too vague. For example, would it be restricted to the Chief Executive or Chief Financial Officer?
- Define what the term means for small charities with few/no paid staff. For example, it was reported that not all small charities had a Chief Executive, or more than one member of staff might play a role in the day-to-day running of the charity, or that not all small charities had paid staff. A suggestion proposed included consideration of the nature of the role or function rather than specific job titles. The Charity Commission for England and Wales published a diagram for charities to identify restricted positions in its guidance, and it was suggested that a similar document be produced by OSCR to assist charities in identifying applicable positions.
- Consider the implications that such rigid criteria might have, for example, on ex-offenders recruited by charities as staff or trustees. Here, some respondents felt that a balance needed to be struck between supporting those with criminal convictions to gain meaningful volunteering and employment opportunities, while simultaneously protecting the reputation of a charity. An extension of criteria could “deprive charities of valuable lived experience”.

In addition, the following points were raised by a few respondents:

- Some felt that enforceability by OSCR would be difficult when the senior management post holder was not a trustee.
- It was reported that the disqualification/removal of those in senior management positions should only follow (or accompany) the disqualification/removal of trustees – “It is trustees who carry the primary duties and responsibilities for their charity, and it is therefore trustees who must be the first to be disqualified or removed”.
- That care would need to be taken to ensure that any power to disqualify a senior manager (i.e. giving OSCR the power to dismiss them from their employment) could not be construed as OSCR acting as the trustee of a particular charity.
- There would need to be clear processes for investigation of any potential disqualification, an opportunity to appeal any such decision, and consideration of the time lapse between the original conduct and consideration of disqualification.
- There must be clear and open criteria for waivers/dispensation from disqualification (and associated guidance provided to the sector), use of any powers of removal on a case-by-case basis, and any decision to disqualify should be made proportionately, and the public reassured that OSCR had applied the correct safeguards.
- There should be a time limit for disqualification, variable depending on circumstance (similar to the approach adopted by Companies House).
- Further clarity was said to be required around the following: whether the plan proposed retrospective action; whether the rules would apply to those acting on a temporary basis; and whether trustees or senior managers would be required to repay any expenses, benefits, remuneration or the value of benefits in kind received from the charity during the time when they were acting while disqualified.
- That extension of disqualification criteria for charity trustees might deter potential candidates from applying.
- That there would require to be further consultation once proposals have been worked up in more detail.

Where respondents were not supportive of the proposals a variety of views were provided.

It should be noted that while these respondents answered “No” to the proposals, a few expressed broad support for the plans or felt that some extension of automatic disqualification might be appropriate.

The main feedback from respondents who did not support the proposals related to charities working in sensitive areas (e.g. ex-offenders). Here, it was reported that such charities might want to include ex-offenders as trustees on their board. Wider feedback was around the ability of those with a criminal record to change/be rehabilitated, and that many convictions might not make an individual unsuitable to be a trustee.

Wider feedback was that making changes simply because the criteria in Scotland did not match that in England and Wales was not an appropriate justification for change. For some, it was felt that more detail would be required to set the parameters of the proposed alignment and/or to make an informed decision.

Other points raised by a few respondents were that:

- The proposal did not define what was meant by “certain senior management roles” or consider the make-up of the charity sector in Scotland (mostly small and medium organisations, including many led by volunteers), and that any proposal to extend criteria to senior management posts should be dealt with by individual charity boards.
- A more suitable focus of OSCR would be to ensure charities and trustees had the correct policies and procedures in place and were aware of their responsibilities.



## Section 4

### A power to issue positive directions to charities

#### Context

OSCR has legal powers to issue specific types of direction to charities and charity trustees. Most of OSCR's powers are interdictory or 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.

**Table 15: Question 10**

#### Should OSCR be given a power to issue positive directions?

	Yes	No	Not Answered	Total
Individuals	87%	9%	5%	127
Charity Sector	80%	4%	15%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>83%</b>	<b>6%</b>	<b>11%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The vast majority of respondents said that OSCR SHOULD be given a power to issue positive directions (83%).

Only 6% of respondents said that a power to issue positive directions SHOULD NOT be granted to OSCR.

**Table 16: Question 11**

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

	<b>Wide Ranging</b>	<b>A Specific Power</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	66%	33%	1%	110
Charity Sector	41%	56%	3%	132
Other	85%	15%	0%	13
<b>Total</b>	<b>54%</b>	<b>44%</b>	<b>2%</b>	<b>255</b>

Note: Question 11 was targeted at those that provided a “Yes” response to Question 10. In instances where the respondent did not respond “Yes” to Question 10 but subsequently provided a response to Question 11, these have been removed from the sample to avoid skewing the results – 7 cases.

There was more mixed feedback regarding whether the power to issue positive directions should be wide ranging or a specific power.

Just over half of respondents that said that OSCR should be given power and a remit to issue positive directions and that this should be WIDE RANGING. The other (including regulators) and individuals sub-group were more likely to feedback that these powers should be wide ranging. Within the charity sector, there was strongest support among third sector intermediaries and local charities.

Some 44% said that it should be a SPECIFIC POWER. This was more commonly reported by the charity sector, and in particular membership/professional bodies and national charities.

**Table 17: Question 12**

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

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	65%	26%	9%	127
Charity Sector	51%	32%	16%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>59%</b>	<b>28%</b>	<b>13%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Almost 60% of respondents said that if a charity failed to comply with a positive direction that OSCR had issued, this SHOULD be classed as trustee misconduct. There was strongest support for this proposal among the other (including regulators) sub-group, followed by individuals.

Almost 30% said that if a charity failed to comply with a positive direction that OSCR had issued, this SHOULD NOT be classed as trustee misconduct. The charity sector (and in particular national charities) and individuals were more likely to report that it should not be classed as trustee misconduct.

### **The final question in Section 4 was open-ended and invited comments to Question 10 to Question 12.**

Note: The feedback was not specific to any question, and as such, the following presents our overall analysis of the comments provided.

The granting of power to OSCR to issue positive directions was in the main considered beneficial, with the most common feedback that this would:

- Provide OSCR with stronger powers to intervene and enforce in instances where charities were not adhering to its legal obligations – the power would thereby help remedy non-compliance and support improvements to be made.
- Promote change to protect the reputation of the sector and safeguard charitable assets.
- Safeguard and enhance public (and donor) confidence and trust in charity regulation by ensuring that charities were held to account for the way they operate. Positive directions would provide reassurance to the public/donors that OSCR had sufficient powers to address legitimate concerns about charities in Scotland.
- Make charity regulation consistent across the UK by aligning OSCR's powers with those of the Charity Commission for England and Wales and the Charity Commission for Northern Ireland.
- Improve the reputation and credibility of the sector.
- Support good charity governance and affect a positive impact on improving standards and practice across the sector.

Wider points, however, raised by many respondents who supported giving OSCR a power to issue positive directions included that:

- A cautious and sparing approach was welcomed, that reasonable and proportionate use of positive directions was considered essential, and that the introduction of such powers would need to be carefully managed – a risk-based regulatory approach (i.e. support to improve in the first instance).
- The granting of such a power was typically viewed as a tool for OSCR to use in exceptional circumstances, with some concerns raised that it could be

“easily misused” or become “the norm” or that OSCR could become a “shadow trustee by proxy”.

- There would need to be more detail provided and clear and transparent guidance for trustees which sets out the circumstances when such powers could be used; how the power would be applied; the process it would follow; how OSCR would support charities that had capacity issues; and the potential consequences of a charity failing to comply with a positive direction.
- Positive directions should be seen as a supportive measure to be used by OSCR rather than representing a threat to a charity’s organisational independence - “Telling trustees what not to do is fine but, when a charity is in difficulties, it is in most cases looking for positive guidance on what it must do”.
- Positive directions should only be used following a full inquiry or investigation – with the importance of ensuring a process of appropriate consultation and negotiation to achieve a positive outcome emphasised, and publication of an associated inquiry report.
- Processes would require to be put in place to review decisions made by OSCR, including rights to appeal and managing conflicts of interest.

Wider points raised by a few respondents included:

- The granting of such a power would potentially have resourcing implications for OSCR and charities.
- There would need to be a clear distinction between the powers held by OSCR and the powers of the Court of Session.
- It would appear disproportionate for multiple regulators to take action in relation to one issue. Cross-border charities highlighted that the existing approach whereby one lead regulator takes action should be continued.
- OSCR should be able to issue a positive direction not only to trustees but also to members. This point was raised in relation to enhancing the scrutiny of Arms’ Length External Organisations (ALEOs) and single member charities.

In the relatively few cases where positive directions were not supported (6% - see Table 15), the main feedback was that this might place additional burden on smaller charities.

A wide range of other factors were mentioned (often by individual respondents), including: the extra cost to the public sector of ensuring OSCR was sufficiently resourced to fulfil this function; that current powers were considered appropriate; that a strong enough case had not been made for the power to issue positive directions; that any such power should rest with the Court of Session; that Designated Religious Charities which in effect have their own regime should be exempt; and potential for conflicts of interest if, for example, another body was able

to give positive directions to Non Departmental Public Bodies (i.e. those established by an Act of Parliament or a Royal Charter).

Where respondents indicated the need for the power to issue positive directions to be “wide ranging” (i.e. just over half), the most common feedback was that it would be difficult for OSCR to list in legislation all the circumstances in which it might be needed and/or be impossible for the legislation to correctly envisage the different situations in which a positive direction was needed.

Other factors raised by some respondents was that a wide ranging power would prevent the need for future iterative legislation changes as new circumstances emerged which required OSCR’s intervention. In this regard it was frequently reported that having wide-ranging powers would provide OSCR with much needed flexibility to address issues as they arose, and that this would enhance and support its regulatory function.

Where respondents indicated the need for power to issue positive directions be a “specific power” (just under half), the most common feedback reported was that OSCR should only intervene on aspects specific to the governance of charities, rather than having power to issue positive directions relating to the day-to-day operational management of charities. The importance of protecting and maintaining a charity’s independence from the public sector was further emphasised, and that any legislation would require to be clear about the specific circumstances in which OSCR could use this power.

Much of the feedback from these respondents emphasised that the power to issue positive directions should not be “too broad” or be an “open-ended discretion”. A “narrower focus” was in the main preferred (e.g. directing a charity to act in such a way that compliance with law or regulation was secured, that compliance with the charity's governing document was enforced, etc.).

Other feedback reported by some respondents highlighted that a specific power would have the added benefit of:

- Ensuring the same standards were applied across the whole charity sector.
- Minimising dubiety regarding the specific circumstances when OSCR could intervene.

Other points raised by a few respondents were that a wide-ranging power might make it more difficult for charities to recruit trustees, and that there was a need for further consultation with the charity sector regarding how the specific power could be defined.

As highlighted in Table 17 above, almost 60% of respondents agreed that it should be classed as trustee misconduct if a charity failed to comply with a positive direction from OSCR. The following points were raised by many respondents:

- That individual trustees would need to be made aware of the positive direction, and have sufficient opportunity, time and support to comply.
- That any change to legislation should not place an undue burden on organisations with limited resources. For example, it was frequently reported that smaller charities might not have the capacity to implement required changes within the given timescales, while others might be experiencing difficulties or “struggling” in some way which might prevent it from complying) - “There could be a legitimate reason that the charity has been unable to follow the positive direction, such as lack of support, time and resources. We would like to see a support and challenge model of intervention rather than a punitive one. This will of course have implications for OSCR’s own resources and time”.

Many of the respondents who answered “Yes” to the question - if a charity failed to comply with a positive direction that OSCR had issued, should this be classed as trustee misconduct - reported that it should “not be automatically” classed as trustee misconduct. The main feedback across respondent sub-groups was that:

- It should only be classed as trustee misconduct following a full inquiry or investigation into non-compliance, otherwise it could be considered disproportionate. It was felt that reasons for issuing a positive direction were likely to be varied in nature and seriousness, and so each case should be considered on its own merits.
- An investigation would help assess whether there was a potential case of trustee misconduct, identification of any repeated wrong-doing, and for a judgment to be made which took into account the specific circumstances and context, including any mitigating factors (e.g. “genuinely tried their best or acted in good faith”, “every practicable step has been taken”). An example provided in a number of cases was failure to recruit additional board members due to a lack of applications rather than a lack of recruitment activity.
- There must be a fair and effective rights to appeal process.

Those respondents who reported that failure to comply with a positive direction that OSCR had issued should not be classed as trustee misconduct typically raised similar points to those outlined above. Wider points raised included that not every trustee involved in not carrying out the positive direction should be assumed to have been culpable.

More generally, wider points raised in a few cases included:

- That there should be a process whereby charities could apply to vary the order (i.e. agree a different course of action).
- That due regard must be had when giving positive direction in cases that may be “sub judice” in any way.
- That enforceability would be difficult to manage.

## Section 5

### Removal of charities from the Scottish Charity register that are persistently failing to submit annual reports and accounts and may no longer exist

#### Context

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 in the administration of a charity. There are currently a number of charities on the Scottish Charity Register for which 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.

**Table 18: 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?

	Yes	No	Not Answered	Total
Individuals	92%	3%	5%	127
Charity Sector	84%	2%	13%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>87%</b>	<b>3%</b>	<b>10%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

The vast majority of respondents reported that OSCR SHOULD be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts (87%).

Only 3% felt this SHOULD NOT be able to remove charities from the Scottish Charity Register if they have persistently failed to submit annual reports and accounts.

**Table 19: Question 14**

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

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	90%	6%	4%	127
Charity Sector	79%	7%	14%	164
Other	75%	0%	25%	16
<b>Total</b>	<b>83%</b>	<b>7%</b>	<b>10%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Similarly, the vast majority of respondents reported that OSCR SHOULD be given power to direct a charity to prepare annual reports and accounts (83%).

Only 7% felt OSCR SHOULD NOT be given power to direct a charity to prepare annual reports and accounts.

**Table 20: 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?**

	<b>Yes</b>	<b>No</b>	<b>Not Answered</b>	<b>Total</b>
Individuals	80%	13%	6%	127
Charity Sector	68%	13%	20%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>74%</b>	<b>12%</b>	<b>14%</b>	<b>307</b>

Almost three-quarters of respondents reported that if a charity failed to comply with a positive direction to prepare annual reports and accounts, that this SHOULD be classed as trustee misconduct.

Some 12% reported that it SHOULD NOT be classed as trustee misconduct.



## Question 16

### **This question captured explanations provided for responses to questions in Section 5 (i.e. Question 13 to Question 15).**

Note: The feedback was not specific to any question, and as such, the following presents our overall analysis of the comments provided.

There was strong support (74%+) for OSCR to be granted certain powers to respond in instances where charities have persistently failed to submit annual reports and accounts. Much of the commentary echoed themes identified throughout the report, including that the publication/submission of annual reports and accounts were vitally important to improve the overall transparency and accountability of the charity sector, and to safeguard and build public/donor/stakeholder trust and confidence in charities and in charity regulation.

The importance of both reassuring the public that charities who appeared on the Scottish Charity Register complied with basic legal requirements, and protecting charitable assets were also emphasised in a few cases - "Failing to submit accounts suggests either there is something to hide or bad management".

While not mentioned by many, where charities have never submitted accounts or for which no updated reports or accounts have been submitted, this was considered to affect OSCR's ability to carry out its regulatory role/function effectively (i.e. monitoring and compliance, etc.).

Some mentioned that if OSCR was granted the power to create an internal database of charity trustees and their contact details (Section 2), that this would support the organisation to fulfil its regulatory functions more effectively - "Where there is contact information OSCR should be able to engage with the charity, and where necessary to issue a positive direction to prepare annual reports and accounts, providing support and advice where necessary".

It was reported that OSCR needed to be able to exhaust all possibilities of identifying and locating trustees of such charities to remind them of their responsibilities regarding the submission of annual reports and accounts, prior to removal from the Scottish Charity Register (i.e. it should be a last resort). If it was confirmed that a charity had either ceased to exist or was no longer operating, removal from the Scottish Charity Register was considered appropriate. Some reported that consideration would need to be given to what would happen to any significant charitable assets held by charities removed from the Scottish Charity Register (e.g. money, investments, land, properties), and that provisions were in place to safeguard charitable assets.

Action taken by OSCR to drive up levels of compliance in the submission of annual reports and accounts was supported. Here, the importance of charities' demonstrating where charitable funds came from, how charitable funds were spent, activities undertaken, and public benefit provided were emphasised.

The general consensus was that there should be consequences for charities who persistently failed to submit annual reports and accounts. It was considered reasonable for OSCR to have a range of appropriate powers to carry out

investigations and to implement sanctions/enforcement actions for charities who ignored their legal duty. Some felt strongly that such charities should not be able to continue to claim the benefits associated with having charitable status.

A common view provided was that “persistent” would, however, need to be defined. Further detail was also deemed necessary as to when OSCR would take enforcement action, and the nature of enforcement action(s) OSCR could take in situations where deadlines for filing annual reports and accounts were missed.

While not reported by many, it was suggested that one instance of failure should act “as a signal to OSCR” that the charity might be in need of assistance and/or warrant attention from OSCR. A handful proposed that two or three or three or five consecutive years of failing to submit annual reports and accounts should lead to charities being removed from the Scottish Charity Register. Others queried whether intermittent or inconsistent submission of the documents would be treated as a persistent failure.

Here, it was further mentioned that OSCR would require to “prove such failure to comply if challenged, and if the charity’s defence can show otherwise OSCR must reinstate that charity and pay the legal costs incurred by the charity’s defence”.

Wider points raised included:

- The importance of OSCR having up-to-date trustee contact details was considered vital otherwise issuing a positive direction to prepare accounts would be of limited effectiveness.
- That the power to remove charities might encourage defaulters to submit their annual reports and accounts to OSCR.
- Consideration would need to be given to how the power would apply to SCIOs because removal from the Scottish Charity Register equals dissolution.
- Any power to remove a charity from the Scottish Charity Register would need to be accompanied by powers to restore them to the Register should that subsequently be appropriate (i.e. similar to the power to restore companies that have been struck off from Companies House).
- OSCR should publish a list of charities that have been removed from the Scottish Charity Register (along with the reason).
- The ability to remove charities who might no longer exist from the Scottish Charity Register would provide a more accurate picture of the charity sector landscape. Streamlining the Scottish Charity Register in such a way would also improve public confidence in the sector if no defunct organisations, or organisations that failed to comply with accounting and reporting regulations, were still registered as charities.
- That the positive power to direct the preparation of accounts might come prior to removal from the Register for persistent non-submission.

- On a practical level it was felt that such changes would likely require an increase in resource required by OSCR.
- The proposed changes highlight the importance of continued information sharing, including between OSCR and the Charity Commission for England and Wales to minimise the risk of confusion for cross-border charities and trustees (e.g. removal of a charity from the Scottish Charity Register does not automatically mean it would be removed from the Charity Commission for England and Wales register).

Much of the feedback regarding whether failure to comply with a positive direction to prepare annual reports and accounts should be classed as trustee misconduct echoed responses to Question 12 (Section 4) - “It is imperative that OSCR can flex its enforcement powers when needed. There would be no point in OSCR issuing a positive direction without the Regulator being prepared to take further enforcement action in the event that it is not followed by a charity or trustees”.

Even though the majority of respondents agreed that if a charity failed to comply with a positive direction to prepare annual reports and accounts, that this should be classed as trustee misconduct - most of the wider feedback was that non-compliance should not be ASSUMED to be trustee misconduct. It was reported that trustees should not be immediately penalised, and that attempts should be made to resolve the issue in the first instance.

The following points were often raised to explain this position further:

- The importance of a supportive and preventive regularity approach was emphasised. Charities should be given sufficient support to get back on track and time to comply with a positive direction where difficulties had been reported (e.g. charities who were “struggling rather than deliberately flouting the rules”). Here, the importance of avoiding creating an undue burden for small charities with limited resources was also emphasised - “The light hand that OSCR was founded with should not become a heavy hand killing off good work. That is a danger too”.
- It was felt that trustees would need to be informed and given “due warning” of any such positive direction, a timetable for providing the requested documents, and be made aware of the consequences for not doing so. The ability to issue a positive power of direction to direct a charity to prepare annual reports and accounts would enable OSCR to step in and advise a charity before a problem escalated and became a misconduct issue (i.e. providing support and/or signposting to other agencies to provide support).
- Any non-compliance would need to be investigated before being classed as trustee misconduct. There might be reasonable explanations, extenuating circumstances and/or mitigating factors (e.g. lack of ability/capacity, financial constraints for small charities, change of auditor, change of administrative staff or illness, etc.). The main feedback was that each case should be assessed on its own merits and any action taken by OSCR should be appropriate and proportionate.

- A positive direction should be accompanied by the publication of a full inquiry report, and a timetabled process that gave trustees the ability to discuss the direction with OSCR.
- There must be a fair and effective rights to appeal process.

A few respondents raised some concerns/risks regarding the proposals outlined in Section 5, namely:

- The potential impact that severe sanctions would have on small charities, and on their ability to ensure continuity of service delivery to vulnerable clients.
- The ability of OSCR to enforce a positive direction might be difficult. In particular this was mentioned for charities who faced financial difficulties in the preparation of annual reports and accounts. Reference was also made to the fact that most charities in Scotland were small (with a turnover of less than £25,000), and that the administrative burden of compliance with such proposals was disproportionate to the size of the charity.
- Some raised a concern that all trustees of a charity were seen as acting improperly when this might not be the case.

## Section 6

### All charities in the Scottish Charity Register to have and retain a connection in Scotland

#### Context

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.

**Table 21: Question 17**

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

	Yes	No	Not Answered	Total
Individuals	86%	10%	4%	127
Charity Sector	80%	10%	10%	164
Other	69%	13%	19%	16
<b>Total</b>	<b>82%</b>	<b>10%</b>	<b>8%</b>	<b>307</b>

The vast majority of respondents SUPPORTED the proposal that all charities registered in Scotland should be required to have and retain a connection with Scotland (82%).

The main feedback from respondents was that this was a reasonable proposition, and that it was appropriate that OSCR's remit should only extend to charities with a "genuine interest in Scotland", and whose activities were carried out at least partly in Scotland. It was viewed essential that all charities on the Scottish Charity Register should have and retain a connection to Scotland, and that it would be broadly consistent with the approach in England and Wales.

In this regard, many respondents questioned why a charity with no connection with Scotland would wish to register with OSCR. Some concerns raised included that there was a “danger of unscrupulous people registering with OSCR because of perceived gaps in the regulatory framework by comparison with other jurisdictions”, and that it could lead to corruption or fraudulent activity.

Further, some respondents suggested that the public would likely assume that a charity which appeared on the Scottish Charity Register would have a connection with Scotland (e.g. it was physically based in Scotland or it at least provided some public benefit in Scotland). As such, the potential for charities with NO connection with Scotland to be registered with OSCR was considered potentially misleading. Others felt that this risked damaging public trust and confidence in the charity sector in Scotland if it was known that OSCR found it more difficult to effectively regulate such charities.

Where support in principle for this proposition was reported, respondents typically emphasised the associated benefits that this change would bring. The most commonly reported were identified as follows:

- Improved and more effective regulatory function and oversight by OSCR.
- Strengthened scrutiny, transparency, accountability and credibility of the charity sector in Scotland.
- That it would help build and maintain public trust and confidence in charities, and in charity regulation.
- It would lead to a closer relationship between the charity sector in Scotland and OSCR.
- It would close a loophole in the legislation that had the potential to be exploited – it would help “mitigate against the risk of charities jurisdiction shopping”.

Wider benefits reported by some respondents was that requiring charities registered in Scotland to have and retain a connection with Scotland would ensure better use of OSCR’s time and resources given the inherent difficulties in regulating or taking enforcement action against charities with no connection. It would also reduce the administrative burden placed on OSCR.

While supportive of the proposal, respondents identified wider points that would need to be considered before any changes were made to the legislation. A strong message was that OSCR would require to clearly and sufficiently define what is meant by “to have, and retain, a connection with Scotland”.

While some respondents went on to suggest that the connection needed to be “strong” or “substantial”, others called for more detail on what would be regarded as “enough connection”.

There was strong support for a “sufficiently broad” rather than narrow definition of connection to be used.

Some concerns were raised by cross-border charities or organisations who support these charities (and others) around the potential risk that some cross-border charities would lose OSCR registration due to a lack of a physical presence in Scotland - “new criteria should be inclusive of UK-wide charities and are not so narrowly drawn as to exclude those without premises in Scotland”.

Some mentioned that for larger cross-border charities such a test would be easy to meet, but that it could have “significant implications” for other types of cross-border and other charities (e.g. federated charities that operated on a UK or GB basis, charitable trusts which awarded grants throughout the UK, charities with a non-UK focus to their work but which carried out fundraising activity targeted at Scotland, etc.).

Here, concerns were raised about the emphasis placed on charities requiring a physical base in Scotland, with some respondents highlighting a “connection” need not be where the charitable activities take place (e.g. international charities), but that it would be important that part of their governance and operations should be connected to activities in Scotland e.g. trustee meetings, Scotland-specific fundraising (needs to be clear where charitable funds is to be spent).

Ongoing discussions between the Scottish Government, OSCR and The Charity Commission for England and Wales were welcomed to ensure that any risks to charities established in England and Wales and operating in Scotland were identified and managed appropriately.

A range of related points were also raised in a few cases:

- That there should be a definitive set of criteria set out, with examples of what would trigger the need for a charity to register with OSCR.
- There would need to be greater clarity around what evidence would be required to be provided to OSCR by charities that wished to register with them.
- That detailed guidance would need to be developed and communicated widely to the charity sector.

Some 10% of respondents DID NOT SUPPORT the proposal that all charities registered in Scotland should be required to have and retain a connection with Scotland.

These respondents’ emphasised concerns related to the potential implications of the proposal for cross-border charities. This included a point raised above, namely the emphasis placed on charities requiring a physical base in Scotland. It was reported that cross-border charities should be recognised as a charity in Scotland without having to establish a physical base in Scotland.

Essentially, the view provided was that public benefit tests could be satisfied without occupying land or property.

Wider points raised, but not by many respondents, included:

- There was considered to be a lack of clarity regarding what was meant by “have and retain a connection with Scotland” – e.g. did it mean a requirement to have a physical base in Scotland, that all charitable activities need to take place in Scotland, etc.
- Concerns were raised around the implication this proposal might have for charities with a registered base in Scotland but where the area of benefit is overseas.
- In terms of “connection with Scotland”, it was reported that this connection should be at the time of the charity’s formation, with some questions raised around the need to maintain such a connection (subject to meeting OSCR obligations, etc.).



## Section 7

### Inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities

#### Context

The Court of Session, on application from OSCR, has the power to permanently disqualify individuals from being charity trustees (e.g. former charity trustees of a body which is no longer a charity or of 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).

OSCR does not have the power to make inquiries into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist. This means that if OSCR is not aware of potential misconduct before a charity ceases to exist, before the charity is removed from the Scottish Charity Register, or while a body was controlled by a charity, OSCR cannot open an inquiry if information subsequently comes to light. If OSCR cannot open an inquiry, it cannot gather the necessary evidence to allow it to make an application to the Court of Session. This poses a risk that trustees who are guilty of serious misconduct could go on to be trustees of other charities if the misconduct was only discovered after the charity in question ceased to exist or was removed from the Register.

#### Table 22: 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?**

	Yes	No	Not Answered	Total
Individuals	85%	8%	7%	127
Charity Sector	84%	5%	12%	164
Other	69%	6%	25%	16
<b>Total</b>	<b>83%</b>	<b>6%</b>	<b>10%</b>	<b>307</b>

The vast majority of the respondents SUPPORTED the proposal that OSCR should 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 (83%).

On balance, the granting of such a power to OSCR was considered prudent, conducive to effective regulation, and that it would strengthen the legislation as it currently stood.

Much of the feedback was that this would strengthen transparency and accountability and foster public trust in the charity sector – “The integrity of the charity sector and the public’s confidence in it rests to a significant degree on ensuring that those charged with running charities are fit to do so”.

The majority of respondents emphasised the importance of OSCR having sufficient powers at its disposal and greater scope to investigate potential wrong-doing and misconduct, and to take appropriate enforcement action where required. It was reported that this would help ensure that former trustees were not able to evade investigation or regulatory scrutiny by OSCR, and from a due diligence perspective it would mitigate the risk of trustees that were found guilty of serious misconduct becoming trustees of another charity.

The main benefits of the proposal reported by many respondents included that it would:

- Protect and safeguard charitable assets.
- Protect the reputation of the charity sector in Scotland.
- Strengthen public confidence in charity regulation.
- Protect and safeguard the public and beneficiaries.

A few respondents mentioned that the expansion of such powers granted to OSCR might have a detrimental impact on individuals coming forward to become involved as charitable trustees. A few others mentioned that the additional administrative cost of OSCR undertaking this role could be substantial.

While there was overall support for the proposal that OSCR be able to undertake inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities, some wider points worth noting included that:

- There would need to be a transparent process/framework put in place, including clear articulation of the conditions under which this power could be used.
- That OSCR would require to satisfy itself that it had sufficient evidence/reasonable grounds regarding potential misconduct that justified the need for an inquiry to be undertaken. For example, a few respondents highlighted that some charities “close for good reason”, and that it was not always to do with bad/poor management, misappropriation of funds, etc.
- That any powers should be proportionate and time-limited (however, a few felt that there should be no time bar set).
- That there would need to be a rights of appeal process.

- That enforcing co-operation of former trustees might be extremely difficult, especially where significant time had passed. Others highlighted that the passage of time would also present challenges in terms of finding evidence of misconduct, etc.

A wider point noted related to the implications of this proposal for cross-border charities. For charities registered in multiple jurisdictions it was proposed that “any such action should only be taken by the lead regulator and such a power conferred to OSCR should not result in multiple investigations and sanctions in relation to one incident or issue”.

Only 6% of respondents DID NOT SUPPORT the proposal for OSCR to make inquiries into former trustees as detailed above.

The main feedback from these respondents included that (note: absolute numbers were small):

- Some concerns were raised that OSCR could undertake inquiries “on a whim or based on a rumour” without having robust evidence of potential wrongdoing or misconduct. It was further reported that the reasoning behind making such inquiries must be made clear and be in the public interest.
- It was felt that information relating to any potential historical criminal offences should be re-directed to the most appropriate agency (e.g. Police, Home Office, etc.).
- It was felt that consideration could be given to what The Charity Commission for England and Wales’ policy was for undertaking inquiries into the former charity trustees of bodies which have ceased to exist and bodies which are no longer charities.

While not reported in many cases, there was feedback that the proposal was too broad, with preference for OSCR to be able to seek a court order to be able to access information and make inquiries.

## Section 8

### De-registered charities assets and public benefit

#### Context

If a charity is removed from the Scottish Charity Register but continues to operate as a non-charitable body, it is under a duty to use the assets it held before it de-registered for the charitable purposes then set out in its Register entry. The former trustees are also under a duty to submit statements of account for the pre-removal assets of the body to OSCR on an annual basis. OSCR continues to monitor the assets until they are spent or become negligible.

While any such “pre-removal” assets must be used for charitable purposes, there is no requirement for them to be used to provide public benefit. This means that assets that have been built up during the life of the charity could potentially be used in ways that did not provide public benefit and for private gain.

**Table 23: Question 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	No	Not Answered	Total
Individuals	71%	22%	7%	127
Charity Sector	69%	15%	16%	164
Other	63%	0%	38%	16
<b>Total</b>	<b>69%</b>	<b>17%</b>	<b>13%</b>	<b>307</b>

Over two-thirds of respondents SUPPORTED the proposal that bodies that have de-registered as charities should be required to continue to use the assets held at the time of removal from the Scottish Charity Register to provide public benefit (69%).

Wider comments provided by respondents showed strong support for this proposal. The following quote is reflective of many of the comments shared – “Assets that have been built up during the life of a charity should be required to be used to provide public benefit and not for private gain”.

The majority of feedback highlighted the importance of accumulated income and assets secured/generated by bodies that have de-registered as charities continuing to be used for the intended charitable purpose(s) (or as close as is possible to those for which they were given).

The main feedback was that there was an inherent duty or obligation to safeguard charitable assets and ensure continued public benefit rather than use for private gain – “Assets should always be asset locked for the purpose they were donated or fundraised for”.

Here, many respondents commented that if assets were subsequently used for private gain that this would be misleading to donors/public who had awarded/donated monies on the “good faith” that their contribution would be used for public benefit. It was felt that this would have a negative impact on public trust and confidence in the charity sector.

Charity sector organisations mentioned that many charities’ constitution or memorandum and articles of association would already contain a provision that in the event of the charity being wound up or otherwise de-registering, that the assets should be transferred to another charity which has aims as close as possible to the de-registering charity. If this was not the case, then it was suggested that there would require to be a “direction to encourage all forms of charities to have appropriate dissolution clauses in their governing document and to ensure that public benefit must form part of the transfer or continued use of assets following de-registration”.

Indeed, the point regarding the potential to transfer assets to another charity with similar aims and objectives (area of operation) was commonly reported. Here, it was suggested that the requirement to continue to use the assets to provide public benefit did not need to rest with the de-registered charity, and that “the same outcome could be achieved by handing over assets to another organisation with a similar charitable mission”. Others suggested transfer of assets to a central fund held by the relevant local authority or governmental department to be used for the public good.

A few charity sector organisations mentioned, however, that additional restrictions, in some cases, might be required, as illustrated by the following quote “For example, some collections held by Trusts that should not be capable of being sold for cash even if this is for charitable or public benefit. This will be specified in the charities’ articles and should only be overturned by an appropriate court order or Act of Parliament”.

A few highlighted that some terms used in the proposal required further clarification/ definition – this included the meaning and scope of “assets” (e.g. fixed/disposable, minimum requirement in terms of value) and “public benefit”, as well as associated guidance/parameters and reasonable timeframes. Plus, more information on how it would work in practice (and how it would be monitored and enforced).

The additional burden that this proposal might place on de-registered bodies was acknowledged in a handful of cases – with the suggestion (as highlighted above) that where there were difficulties, assets should be transferred to another charity who could use them for similar purposes. Despite any additional burden it might cause, maintaining public trust was viewed as a key priority.

Just less than one-fifth of respondents DID NOT SUPPORT a requirement for 'pre-removal' assets to be used to provide public benefit if a body de-registers as a charity (17%). Within the charity sector, membership/professional bodies and local charities were more likely to not support the proposal.

The main feedback provided by these respondents included the following:

- Concerns were raised regarding complexities and challenges for long-established charities with assets acquired prior to the 2005 Act (i.e. prior to the introduction of public benefit) – “they did not have to provide public benefit” at the time of acquisition and therefore “it would be wrong for these assets to be diverted to another purpose simply because of a subsequent, different, interpretation” of public benefit.
- That the definition of “public benefit” is open to interpretation and relatively fluid - there was concerns that “in the event of future legislation ever altering the definition of public benefit, situations could arise where funds were frozen and could not be used for the purposes intended by the original donors”.
- The accumulated income and assets secured/generated by bodies that have de-registered should be passed to another charity and/or transferred to a general fund that could be managed and distributed across the charity sector by an appropriate organisation – “Monies were given for specific charitable purposes and that should be respected”.
- If not already, then it should be made clear in an organisation’s memorandum and articles how any assets should be dealt with upon dissolution.

Wider feedback reported included:

- It was felt that in most instances the sums concerned would be small and with the growing use of SCIOs as a legal vehicle this might become less of an issue.
- There would be potential implications for independent schools - “If private schools lose their charitable status because they are not considered to provide a public benefit, would they then lose their buildings and assets?”, “How can (independent schools) provide public benefit in any ongoing way if the law is changed to prevent them so doing in terms of legislation?”
- It was felt that the monitoring and enforcement of this proposal would be costly and potentially unworkable.

As highlighted above, some membership/professional bodies which responded to the consultation did not support this proposal - “intrinsically and fundamentally unfair for a former charity, which has ceased to enjoy the benefits of charitable status, to be required to continue to meet the Charity Test in respect of the assets in question”. Some felt it would be inappropriate - “to impose a continuing obligation that such assets must be used for public benefit would mean that the former charity would still have to meet the full charity test after de-registration as a charity”.

Further, these respondents highlighted that the meaning of the phrase “public benefit is likely to be fluid. What constitutes “public benefit” in 2019 may not be deemed to do so in 2029”.

## Section 9

### The speed and efficiency of OSCR's powers to gather information when making enquiries

#### Context

OSCR can legally require any person (third party) to provide information which it considers necessary for its inquiries about charities. If OSCR requests such information about a charity from a third party, it must also give notice to the charity in question that it is the subject of the request, and provide the charity with the right to review. However, the legislation does not take account of situations where the body in respect of which information is sought is not a charity (e.g. a body or individual that is misrepresenting themselves as a charity). The effect of this is that OSCR cannot require a third party to provide information as it cannot serve the required notice on a charity. This potentially hinders OSCR inquiries as it cannot access all the information it may require.

In the situations where OSCR is requesting information from a third party about a charity to help with its inquiries, and there is a charity to notify that they have made the request, OSCR must adhere to three notice periods. The legislation could perhaps be clearer on whether all three notice periods need to have expired in full (i.e. 56 days) before OSCR can see the information from the third party, and whether a charity, which does not request a review within 21 days of receiving the notice, can see the information from the third party once that 21 day period has expired. As there is potential ambiguity in the legislation, OSCR's current approach is to wait for all three time periods to expire in full before viewing the information from the third party. This potentially increases the amount of time it takes for OSCR to make its inquiries, which can be detrimental to all parties involved.

**Table 24: 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?**

	Yes	No	Not Answered	Total
Individuals	88%	4%	8%	127
Charity Sector	86%	1%	13%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>87%</b>	<b>2%</b>	<b>11%</b>	<b>307</b>



The vast majority of respondents SUPPORTED the proposal for OSCR to 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 (87%).

A number of themes emerged from the feedback from respondents who supported this proposal.

Firstly, it was considered vital that OSCR had effective powers of investigation (and was able to undertake inquiries in a timely fashion), and that the granting of such a power was in the best interests of strengthening transparency and accountability of the charity sector. As such, the proposal was generally viewed as a reasonable extension to OSCR's powers - "It is critical that OSCR has the power to move quickly where there is any doubt about a charity's operation or governance".

Secondly, it was felt that the granting of such a power would have a positive impact on strengthening public reassurance, trust and confidence in charities. In particular it was emphasised that "society supports charities because it is believed that they will at all times be fulfilling charitable purposes and providing public benefit".

Aligned to these points, was the need to: tighten the legislation to ensure that OSCR's ability to obtain the information it needed to undertake inquiries was not hindered in any way. And that this would support more effective regulation of the charity sector, and protect the sector's reputation and integrity – "important to preserve and uphold the charity brand".

Wider points raised included that granting OSCR this power would help to prevent unscrupulous individuals evading investigation, prevent fraudulent activity, and that it was also important for lessons to be learned to prevent the abuse of Scottish charity legislation.

A further point noted in a couple of cases was that the use of this power should be subject to a public interest test, and that there might be a risk of OSCR straying into areas that were "not within its jurisdiction to regulate". An example provided was where a body or individual misrepresents themselves as a charity that this would appear to be a police matter rather than a matter for OSCR.

A further point raised, but not by many, was around the importance of setting clear parameters around the use of this power, and that there should be time limits applied to this power.

Where challenges were reported (not in many cases) this centred on circumstances where the likelihood of recovering information might be difficult, that the power might be difficult to enforce, and the potential resource implications for OSCR.

Only 2% of respondents DID NOT SUPPORT the proposal.

It should be noted that the feedback provided by respondents who were not supportive of the proposal for OSCR to 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 was limited to a few respondents.

The feedback largely focused on two points:

- That there would require to be a reasonable time limitation regarding the length of time after the alleged incident or after the cessation of the charity that OSCR could reasonably be expected to adhere to.
- That in certain cases it was felt that it might be outwith the remit of OSCR to undertake an inquiry, and that there were other, more appropriately placed bodies who should assume responsibility.

### Table 25: Question 21

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

	Yes	No	Not Answered	Total
Individuals	84%	4%	12%	127
Charity Sector	80%	2%	18%	164
Other	81%	0%	19%	16
<b>Total</b>	<b>82%</b>	<b>3%</b>	<b>15%</b>	<b>307</b>

The vast majority of respondents SUPPORTED clarification for charities, which are subject to a request for information, that notice periods can overlap (82%).

Much of the feedback provided by respondents was that there was a need to strengthen current legislation and/or address any perceived ambiguity in the way notice periods were presented in the legislation - either through the issuing of guidance to provide clarity, or by amending the legislation itself, as reflected in the following quote - "The ambiguity in legislation is not helpful and currently leads to OSCR erring on the side of caution in allowing all three time periods to expire. This does not appear the most efficient use of (limited) resources by OSCR and in addition, potentially delays action being taken against a body or individual that is misrepresenting themselves as a charity. It is important that action is taken as soon as practically possible in these situations in order to maintain the trust the general public has in charities and the voluntary sector".

It was considered essential that OSCR was allowed to undertake investigations in a timely and appropriate manner (to avoid any unnecessary delays), and that this was in the public interest – “Allowing investigations to happen quickly and efficiently, whilst ensuring enough time is given to allow for appeal and proper consideration, is essential. Delaying the process where it could be avoided is not good for the charity, the public or the regulator”.

Wider points raised by many respondents included that clarification that notice periods could overlap would be helpful for the following reasons:

- It would ensure greater transparency and accountability of the process among all parties involved.
- To ensure the investigation process is effective and efficient - it would enable OSCR to address issues of mismanagement in a timely manner. To allow investigations to progress and be concluded more quickly – “should allow for a quicker and more efficient process when submissions are made before each time period has elapsed”, “help OSCR to access required information sooner and complete inquiries earlier”.
- To help streamline the process, and make it as easy as possible for charities to be compliant.
- To make the process as clear as possible for all parties involved (i.e. to avoid any confusion, misunderstanding, etc.).

A number of respondents emphasised the importance of ensuring maximum transparency and accountability in the process, and the impact that long delays between alleged charity misconduct and regulatory investigation and reporting could have on undermining public trust and confidence in the charity sector and in the effective regulation of charities.

A few respondents highlighted the importance of providing organisations and individuals with “reasonable and fair time periods” to comply with requests for information and request a review should they wish to – “This process is likely to put an amount of stress on an organisation that has found itself at the centre of an enquiry. Having clarity of time periods, when they are able to make requests for review and when the process reaches its conclusion would provide the organisation with clear timeframes to work to. If the organisation is unaware that these time periods can overlap there could a risk of missing the window of opportunity to request a review of the decision to request information”.

Another point raised, but not in many cases, was around clarifying whether the days related to working days or calendar days.

Only 3% of respondents felt that there SHOULD NOT be clarity that notice periods can overlap for charities that are subject to a request for information.

No common themes emerged from the feedback. Individual points raised, however, included:

- That clarification of the legislation had the potential to make the situation more complicated for charities.
- The 56-day process as a whole was deemed too long and should be shortened if possible.

## Section 10

### The reorganisation of charities established under royal charter, warrant or enactment

#### Context

Reorganisation can be a valuable tool for certain charities in Scotland. A reorganisation scheme can enable charities to modernise their governance or 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, it is not clear in the legislation whether it is competent for OSCR to approve reorganisation schemes proposed by certain charities established under a royal charter, warrant, or enactment. While this issue only affects a very small number of charities, there has been substantial expense to the charities involved and consequent use of parliamentary time, putting through private bills that could have been avoided if the legislation was less ambiguous.

**Table 26: Question 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	No	Not Answered	Total
Individuals	82%	4%	14%	127
Charity Sector	74%	4%	21%	164
Other	75%	0%	25%	16
<b>Total</b>	<b>78%</b>	<b>4%</b>	<b>19%</b>	<b>307</b>

Note: Percentages have been rounded therefore percentage totals may not equal 100%.

Over three-quarters of respondents SUPPORTED the proposal to clarify the legislation to make clear whether OSCR can approve reorganisation schemes for certain charities that have been established by royal charter, warrant or enactment (78%).

Similar to the previous question, the general view provided by respondents was that clarifying the legislation and removing any existing ambiguity would be a good thing. Further, there was considered merit in simplifying and modernising this aspect of charity regulation. Taken together, the proposal was welcomed by most respondents.

While there was recognition among respondents that the proposal would only affect a very small number of charities, it was reported that the reorganisation of such charities could be complex, costly in terms of legal fees, and time consuming.

As such, there was strong support for the proposal as it was reported that this would potentially save these charities time and money (and save the use of parliamentary time too) if it dispensed with the need for private bills.

Some felt that the “current system is a misuse of parliamentary time and charities funds which would be better employed on public benefit”. It was felt that it was not an appropriate use of charitable resources to resolve such issues, where legislation could clarify the matter for the benefit of everyone.

Making the process streamlined, faster and more efficient was also referenced by many respondents, and that it would enable such charities to adapt to changing circumstances.

There was also considered to be value in OSCR having the same level of authority over all charities, regardless of the how they were established, and that this should be brought into line with standard OSCR processes - “The regulatory basis for all charities in Scotland (and by virtue, England and Wales and Northern Ireland) should be the same - whether a charity was established by royal charter, warrant or enactment”.

It was reported by some respondents that affording OSCR the ability to approve reorganisation schemes for such charities would provide a simpler route for organisations wishing to modernise their aims and objectives. As highlighted above, comments included that this proposal should expedite and rationalise the process for those involved.

However, a few of these respondents mentioned that charities governed by a Royal Charter have obligations to the Privy Council to seek approvals in certain circumstances (e.g. amending a Royal Charter), and that the views of such organisations would need to be listened to regarding the proposals outlined in the consultation.

Some wider points of note included that “there may be a need to consider how OSCR's jurisdiction and any revisions of the 2005 Act will sit alongside the rights and duties of the Privy Council or of Parliament to ensure that those rights and duties are not totally elided. Presumably any revisions to the rules would be made in full consultation with the relevant bodies and office-holders”.

Further, a few respondents felt that the 42-day notice period for OSCR's consent for reorganisation schemes for charities generally (rather than a specific issue for Royal Charters, etc.) was too long and caused unnecessary delays. There were some calls for the notice period to be reduced.

Only 4% of respondents DID NOT SUPPORT the proposal that the legislation should be clarified to make clear whether OSCR can approve reorganisation schemes for certain charities established by royal charter, warrant or enactment.

The main feedback (i.e. from charities established under royal charter, warrant or enactment) was that it was considered important that such charities “retain and respect their long and privileged connections” with, for example, the Scottish Parliament or Privy Council – and that any changes might undermine existing legislative frameworks and processes.

Such charities therefore felt it was not appropriate for OSCR to have the ability to approve reorganisation schemes for certain charities established by royal charter, warrant or enactment.

Wider feedback reported, but in a handful of cases, included that:

- There was not considered to be any ambiguity in the legislation, that existing arrangements were considered appropriate and should not be amended.
- There was felt to be no need for clarification given that the legislation affects such a small number of charities.
- It was proposed that further consultation on the proposal would be required and/or the potential for some exemptions to the rule.

# Section 11

## Wider Issues Raised

This final Section outlines wider issues raised by respondents.

It should be noted that several consultation responses contained extensive lists of proposed amendments to the 2005 Act, with the main themes summarised below.

The consultation was very much welcomed, and some respondents reported that it was long overdue, and that the environment in which charities operate had changed significantly over the last decade or so.

However, it was felt that an opportunity had been missed for a comprehensive and wider review of Scottish charity law. Others were disappointed that there was not an explicit opportunity within the consultation questions for respondents to provide additional suggestions/changes that could be considered.

The main issue raised related to the scope of the Consultation on Scottish Charity Law, and that the consultation was “very narrowly framed” or “of limited scope”.

Here, respondents felt that a much wider review of Scottish charity law was required which went beyond the suggestions outlined by OSCR in its “Proposal for Modernisation of the 2005 Act” – “it would be appropriate to conduct a more thorough review of the legislative framework to ensure it is entirely fit for purpose and reflects the modern requirements of charity law, how modern charities are run, governed and want to report, now and in the foreseeable future”. In addition, it was felt that there should have been consideration of how the Scottish Charity sector fits within the wider UK legislative framework.

Taken together, the feedback was that a wider review would have been of more value to ensure that Scottish charity law is appropriately updated and future-proofed – this would have provided an opportunity to “bring legislation into line with current and future developments in the sector” and ensured that the “legislative framework is fit for purpose and is protecting and serving the public interest”.

Some specific areas of the 2005 Act highlighted by respondents which were said to require further review (as well as wider issues raised) included:

- It was considered important that the statutory definition of the Scottish Charity Test be reviewed to ensure it remains fit for purpose, reflects wider changes in the charity sector, and meets current and future aspirations of the sector. For example, review the sixteen charitable purposes to determine whether they are still relevant or whether there is there a need for any further amendments/additions.



Other examples put forward included the following: “the charity sector is continually transforming” and the Charity Test needs to be reviewed to ensure a strong fit with the growth of social enterprises in Scotland.

- It was also felt that there should be a review of Scottish charity law to clarify the issues around the charitable status of public authorities with a view to ensuring that all such charities operate in the public interest. ALEOs (where councillors might make up a significant proportion of trustees) and Non-Departmental Public Bodies (which need to comply with directions given by Scottish Ministers) were specifically referenced. This was in response to a previous OSCR report that raised potential risks associated with charities that operate within the control of another body.
- The definition of “public benefit” should be reviewed - to re-define what is meant by public benefit and redefine the modern charity.
- The transformational nature of the sector was highlighted, including growth in the social enterprise model. Issues to consider included a lack of legal definition of social enterprise in Scotland, and a need to introduce an appropriate regulatory regime for such organisations.
- There were various points raised regarding SCIOs which included greater clarification of SCIO members’ responsibilities and duties (including guidance from OSCR) and a review of regulations about winding up, insolvency and dissolution of SCIOs.
- There requires to be greater clarity on the role and duties of trustees as there is “still much to be done to ensure existing trustees understand and fulfil their current general and specific duties”. It was felt that trustees’ duties should be reviewed and updated, as well as greater clarity provided on the current statutory provisions of trustee remuneration at section 67 of the Act (2005).
- It was reported that there was no statutory duty or framework for notifiable events, despite OSCR stating that “failure to meet expectations surrounding notifiable events could be regarded as misconduct”. It was further highlighted there was no “express provision in the 2005 Act for the Notifiable Event regime”.
- It was stated that increased consistency of approach across the UK would have a significantly positive impact on cross-border charities. The benefit would be seen in “reducing the cost of compliance” removing an “extra layer of administrative burden” for cross-border charities.
- “The impact of changing technology on the Scottish charity legislation has not really been considered in this review, but had it been the review could have created legislation that would allow charities to not only operate effectively but also be governed effectively and report effectively with appropriately designed legislation and regulation, well into the future”.
- The structure of OSCR should be reviewed, with some suggestions that it should be independent of government and report to the Scottish Parliament rather than to Scottish Ministers.

# Appendix A: Consultation Respondents

Tables A1 to A3 provide details of individuals and organisations who responded to the Consultation on Scottish Charity Law and selected “publish response with name”. Note: this does not represent all 307 respondents, as all other respondents selected either “do not publish response” or “publish response only” (without name).

**Table A1: Individuals**

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A total of 39 individuals selected publish response with name

**Table A2: Organisations - Charity Sector**

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Aberlour Child Care Trust	Circle Scotland CIC
Action on Hearing Loss Scotland	Colleges Scotland
Administration Board of the General Synod of the Scottish Episcopal Church	Community Woodlands Association
Archaeology Scotland	Cyrenians
Argyll and Bute Third Sector Interface	Early Years Scotland
Association of Church Accountants and Treasurers	East Kilbride Christadelphian Ecclesia
Auldgirth Hall	Edinburgh, Lothians and Borders Branch of the Royal Air Forces Association
Ayr Housing Aid Centre	EVOC
Built Environment Forum Scotland	Forth Valley Third Sector Consultation Response
Carnegie Trust for the Universities of Scotland	George Watson's College
Charities Aid Foundation	Grassmarket Community Project
Charities Trust	ICAS
Charity Law Association	Keep Scotland Beautiful

**Table A2: Organisations - Charity Sector (cont'd)**

Law Society of Scotland	Scottish Federation of Housing Associations
Living Streets	Scottish Mentoring Network
Lochgilphead Armed Forces Day Association	Scottish Women's Aid
Move On	SCQF Partnership
National Galleries of Scotland	Social Enterprise Scotland
National Museums Scotland	Society of Antiquaries of Scotland
National Secular Society	St Andrew's First Aid
RC Diocese of Argyll & the Isles	The Church of Scotland
Samaritans Scotland	The Scottish Forestry Trust
Scottish Charity Finance Group	The Scottish Grantmakers and Scotland Funders' Forum
Scottish Community Re:Investment Trust	Volunteer Scotland
Scottish Council for Voluntary Organisations	Weslo Housing Management
Scottish Council of Independent Schools	West Dunbartonshire CVS

**Table A3: Organisations – Other**

Charity Commission for England and Wales	RSM UK Tax and Accounting Limited
J & H Mitchell WS	Scottish Information Commissioner
KF Governance Solutions	The Kubernesis Partnersip LLP
OSCR	



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