

Analysis of Responses to Engagement on Strengthening Scottish Charity Law

Final Report

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The opinions expressed in this report are those provided by survey respondents.

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Executive Summary

1. This Executive Summary presents an overview of the main themes arising from the follow-up engagement on proposals to [Strengthen Scottish Charity Law](#). The engagement process ran from 20 December 2020 to 19 February 2021.
2. During early 2019, the Scottish Government launched a three-month public consultation on proposed changes to Scottish Charity Law. That consultation focused on 10 proposals for modernising charity law put forward by the Office of the Scottish Charity Regulator (OSCR) based on its experience of regulating charities since legislation was introduced in 2005. The proposals broadly focused on improvements to charity law that would increase transparency and accountability in order to maintain public trust and confidence in charities and OSCR.
3. The [Scottish charity law: consultation analysis report](#) was published in July 2019. Over 300 consultation responses were received to the consultation, and the majority of respondents supported all 10 proposals. However, the responses also highlighted areas where greater consideration and discussion was needed before the Scottish Government could decide on the next steps.
4. A follow-up engagement process was undertaken to further develop and refine the proposals consulted on in 2019. This was with a view to providing stakeholders, including the charity sector, with a further opportunity to help the Scottish Government formulate a position on the way forward with regards to Scottish Charity Law. The latest engagement did not seek to repeat the earlier consultation process progressed by the Scottish Government. Rather, it sought wide-ranging views and feedback on specific issues raised under six of the proposals, to inform the Scottish Government approach. The engagement process included the following strands of activity:
 - An online survey hosted on Citizen Space – this attracted 100 responses.
 - Roundtable discussions hosted by Scottish Council for Voluntary Organisations (SCVO) and Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO).
 - A roundtable discussion with members of OSCR's Charities Reference Group.
 - Third Sector Interfaces (TSI) in Scotland were invited to host discussions with their members. Nine responses were received, including a joint response from three TSIs.
5. The findings of the survey and wider engagement process will be used by the Scottish Government to finalise and publish its proposals for the review of Scottish Charity Law.

Strand A: Enhancing transparency and accountability in Scottish charities

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

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

- Mixed views were provided to Question 1. Just over half reported that there should be no dispensation to full annual reports and accounts publication, while the remainder reported that there could be circumstances that necessitate a dispensation.
- A key theme was that no dispensations would improve transparency and accountability across the charity sector, and increase public trust and confidence in the governance of charities.
- An alternative viewpoint was that dispensations could be granted in exceptional circumstances but that full publication should be the default position. Individual/personal safety and the security of premises were the main circumstances identified for dispensation. Guidance on dispensation was considered key, including a non-exhaustive list of examples. The process for requesting dispensation should be widely publicised, transparent and clear.

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

- A majority agreed that some form of annual reports and accounts should always be published. Similar to points raised above, the main argument put forward was that this would strengthen openness and transparency of the charity sector (circa 72%).
- Any personal or sensitive information should be redacted to mitigate risk and uphold rights to privacy and safety. Ensuring redacted or abbreviated reports and accounts were meaningful for the reader and aided understanding was considered crucial. A wider concern raised was around the extent to which redaction might cause additional work for charities.

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

Q3: What information should be included in an internal database?

- There should be a clear purpose for collecting and using the information held on an internal OSCR database. It would also be important to identify the type of information deemed “essential” to allow OSCR to fulfil its duties effectively.
- There was broad support that an internal database should contain information such as name, date of birth, home address, email address, and the names of any person removed as a trustee following an inquiry by OSCR under the 2005 Act or preceding legislation (circa 68%). Wider suggestions were also put forward for consideration.
- Ensuring information in an internal database was relevant, accurate and up-to-date, as well as appropriately stored, protected and controlled was viewed as critical.

Q4: How should the internal database information be kept up to date?

- Keeping information in an internal database up-to-date was considered vital, and the process should be manageable for OSCR, the charity sector, and for smaller organisations in particular.
- The main theme was that the best and most effective way for information in an internal database to be kept up-to-date was through Trustee Annual Return updates (circa 57%).
- Having a mix of options was, however, also viewed as helpful (circa 34%). For example, allowing charities to provide updated information throughout the year (i.e. through OSCR’s online system), and/or where appropriate within a certain timeframe of the change happening.
- It was reiterated that OSCR should make it clear how the information provided would be used (and how long it would be retained for).

Q5: What information should be included in a public list of charity trustees?

- A majority expressed strong support for a reduced external register for public use (i.e. less information than held in an internal database), 75%. There was broad support for the proposal that the public list should include trustee names (including removed trustees) and principal office or trustee contact address against each charity.
- A relatively large proportion of respondents went on to make wider suggestions for information a public list of charity trustees could contain. For example: date of birth, designation, charity email address, list of other charitable appointments were mentioned to varying degrees.
- Wider points raised noted that: appropriate safeguards would be required to protect the privacy of trustees and prevent any data breaches or fraud; and the level/type of information included in a public list might act as a barrier to trustee recruitment.

Q6: In what circumstances should there be an exception to being included in a public list?

- A majority reported that there might be circumstances where there should be an exception to being included in a public list of charity trustees (almost two-thirds). The points raised were largely the same as those raised at Question 1 above.
- The process for requesting an exception to being included in a public list should be widely publicised, transparent and clear.
- More general points raised included the importance of: clearly defining the grounds on which a dispensation might be granted; the development of appropriate training and guidance for the sector, including examples of what would constitute a successful request for an exception; outlining how long the exception was likely to last; and putting in place a mechanism for regular review.

Proposal 2 – List of disqualified trustees (removed by OSCR)

Q7: How long should a disqualified trustee remain on the list?

- Views were relatively mixed on the length of time a disqualified trustee should remain on the list, albeit there was a leaning towards this being time-limited.
- Indeed, the most common response was that it should be time-limited. This ranged from a period of six months to 25 years, and everything in between. The average length of time a disqualified trustee should remain on the list was reported as around eight years. This was followed by those that reported it should be for the term of their disqualification/until conviction is spent.
- A “scale” could be used to guide how long a disqualified trustee should remain on the list. The length of time could be dependent on the nature of the disqualification (i.e. proportionate to the misdemeanor).

Q8: What information should be available in the disqualified trustee list?

- The most common suggestions were a mix of the following: name of trustee; date of birth (i.e. month and year); charity details; other charity/company the trustee was involved in prior to disqualification; date of disqualification order; reason for disqualification; and period of disqualification.
- Some support was expressed for the list to contain the minimum level of information needed to avoid the risk of confusion between different people with the same name.

Some support was also expressed for a “search” facility on OSCR’s website.

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

Q9: What factors should be considered in defining a ‘senior manager’?

- There was recognition of the inherent difficulty in defining a senior manager. Some organisations might find this more difficult than others, and the term could be “open to interpretation”. That being said, a clear definition was considered crucial.
- The function of the position was generally considered to be of most relevance rather than the job title. It was largely considered appropriate to identify the person(s) in operational roles and positions of power/influence/decision-making within an organisation. This was typically framed in terms of functions and activities such as finance, HR, strategic and operational control and oversight, subject to the direction of trustees, etc.

Strand B: Increased regulatory powers for OSCR

Proposal 4 – A power to issue positive directions to charities

Q10: If a positive power of direction were to be specific, what areas should be subject to the power, or are there any areas that should not fall within the power?

- The main suggestions of areas that should be subject to the power to issue positive directions to charities were governance, finance and financial controls, health and safety, and safeguarding.
- The general consensus was that more operational matters of charities should not fall within the power. Where specific examples were provided, this included delivery of a charity's operational activities, policy development, HR, staffing arrangements/employment.
- Further, it was noted that OSCR should not become involved when the area is relevant to trustee duties, unless there is an issue of non-compliance with trustee duties (e.g. submitting accounts, updating annual database, responding to legitimate queries).

Q11: How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction?

- OSCR should have sufficient flexibility in the application of its powers. The length of time a charity should have to comply with a positive power of direction could depend on the context and factors such as: the nature, scale and severity of the issue(s) facing a charity; and the size and capacity of a charity (i.e. staffing level).
- There was reference to various timescales – however, the main point was that the timescale should be realistic and proportionate to the actions required (with milestones identified).

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

Q12: What factors need to be considered to define ‘persistent’ failure to submit annual reports and accounts?

- Persistent failure should be investigated in the first instance. It was noted that this highlighted the importance of OSCR having access to an up-to-date internal database of charity trustees.
- There might be valid mitigating factors and circumstances behind why a charity has not submitted its annual report and accounts. This is considered a different scenario to a charity/trustee that are failing to acknowledge/engage with OSCR.
- There was general support for a “strikes” out approach following repeat offences (e.g. two or three years of failing to submit accounts); failing to reply to any direction by OSCR; and failing to get in touch with OSCR to explain any mitigating circumstances.

Q13: What steps should OSCR take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

- There was broad support for a positive direction to provide accounts prior to a decision to remove a charity from the Scottish Register (75%).
- There is clear and strong support for charities to be given a chance to rectify the issue. There could therefore be steps alongside issuing a positive direction – for example, giving charities the opportunity to seek help from a finance professional and/or from a TSI.

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

Q14: What factors should be considered when defining what ‘have and retain a connection to Scotland’ means? Does this have to require a physical presence in Scotland, such as an office address or trustee address?

- There was strong support expressed for charities to require a physical presence in Scotland, such as an office address or trustee address (88%).
- However, some others noted that a physical link might not be the best measurement of connection with Scotland given the shift towards more home-working resulting from the coronavirus pandemic (COVID-19). Further, there was feedback that a quota/percentage of trustees might be a better indicator.
- There was general agreement that activities, beneficiaries and fundraising would all be appropriate, and that management and control could be another useful indicator of a connection in Scotland – particularly for organisations whose operations are outwith Scotland (e.g. International Development).

1. Introduction

Introduction

1.1 This report presents the independent analysis of responses to the follow-up survey and wider engagement on proposals to [Strengthen Scottish Charity Law](#). The engagement process ran from 20 December 2020 to 19 February 2021.

Prior Consultation

1.2 During early 2019, the Scottish Government launched a three-month public consultation on proposed changes to Scottish Charity Law. That consultation focused on 10 proposals for modernising charity law put forward by the Office of the Scottish Charity Regulator (OSCR) based on its experience of regulating charities since legislation was introduced in 2005. The proposals broadly focused on two main areas:

- Improvements to charity law that would increase transparency and accountability in order to maintain public trust and confidence in charities and OSCR.
- Proposals that would increase regulatory powers for OSCR.

1.3 The [Scottish charity law: consultation analysis report](#) was published in July 2019.

1.4 A total of 307 consultation responses were received and the majority of respondents supported all 10 proposals. However, the responses also highlighted areas where greater consideration and discussion was needed before the Scottish Government could decide on the next steps.

Follow-up Engagement

1.5 A follow-up engagement process was undertaken to further develop and refine the proposals consulted on in 2019. This was with a view to providing stakeholders, including the charity sector, with a further opportunity to help the Scottish Government formulate a position on the way forward with Scottish Charity Law.

1.6 The latest engagement did not seek to repeat the earlier consultation process progressed by the Scottish Government. Rather, it sought wide-ranging views and feedback on specific issues raised, to inform the Scottish Government approach. The engagement process included the following strands of activity:

- An online survey hosted on Citizen Space – this attracted 100 responses.
- Roundtable discussions hosted by Scottish Council for Voluntary Organisations (SCVO) and Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO), involving a range of delegates from the charity sector.
- A roundtable discussion was held with OSCR's Charities Reference Group.

- Third Sector Interfaces (TSI) in Scotland were invited to host discussions with their members. Nine responses were received from TSIs, including a joint response from three neighbouring TSIs).
- 1.7 The findings of the survey and wider engagement process will be used by the Scottish Government to finalise and publish its proposals for the review of Scottish Charity Law.

Report Structure

- 1.8 [Section 2](#) provides details of the engagement methodology and responses.
- 1.9 Strand A: enhancing transparency and accountability in Scottish charities is covered in:
- [Section 3](#): Proposal 1 - Publishing annual reports and accounts in full for all charities on the Scottish Charity Register.
 - [Section 4](#): Proposal 2 - An internal database and external register of charity trustees.
 - [Section 5](#): Proposal 3 - Criteria for automatic disqualification of charity trustees and individuals in senior management positions in charities.
- 1.10 Strand B: increased regulatory powers for OSCR is covered in:
- [Section 6](#): Proposal 4 - A power to issue positive directions to charities.
 - [Section 7](#): Proposal 5 - Removal of Charities from the Scottish Charity Register that are persistently failing to submit annual reports and accounts and may no longer exist.
 - [Section 8](#): Proposal 6 - All charities in the Scottish Charity Register to have and retain a connection in Scotland.
- 1.11 [Section 9](#) provides a summary overview of key messages arising from the discussion events.

2. Engagement Methodology

Introduction

- 2.1 An Engagement Plan was prepared by the Scottish Government Third Sector Unit to guide the follow-up engagement with the charity sector and other key stakeholders to finalise its proposals for reviewing Scottish Charity Law.
- 2.2 Planned engagement activity was delayed due to the coronavirus pandemic (COVID-19). Scotland, like many other countries across the world, has been subject to lockdown restrictions (in various forms) since March 2020. Stay at home and work from home restrictions meant that all of the follow-up engagement activity has been undertaken remotely.
- 2.3 The overall purpose of the engagement process was to help:
 - Scottish Government refine the proposals consulted on in 2019 and formulate a position on the way forward with charity law.
 - Gain insights to assist with preparing impact assessments.

Engagement Activities

- 2.4 The main engagement activities undertaken are considered in turn below.

Online Survey

- 2.5 The Scottish Government promoted an online survey on Strengthening Charity Law on its Consultation Hub website (Citizen Space). The survey ran from 21 December 2020 to 19 February 2021.
- 2.6 The vast majority of survey responses were submitted through the Scottish Government's online portal. Only a few were submitted to the Scottish Government directly, for example, by email. Where this was the case, the Scottish Government logged and added each response directly to Citizen Space.
- 2.7 All responses received were checked and moderated by the Scottish Government prior to providing EKOS Ltd access to Citizen Space. EKOS exported consultation responses from Citizen Space into Microsoft Excel for data cleaning, review and analysis.
- 2.8 A total of 101 responses were received but included two responses from the same individual. The two responses were merged into a single composite response
- 2.9 A total of **100 responses** were therefore received to the online survey, with the majority submitted by individuals (60%), **Table 1**. Three-quarters of organisation responses were from the charity sector.
- 2.10 No campaign responses were identified.

Table 1: Profile of Online Survey Respondents

| Respondent | Number | % |
|------------------------------|---------------|------------|
| Individual | 60 | 60% |
| Organisation | 40 | 40% |
| Charity Sector Organisations | 30 | 75% |
| Other Organisations | 10 | 25% |

N=100.

2.11 Where an organisation response did not specify the organisation name and it was not possible to deduce this from the email address (i.e. personal email address), these were re-categorised as an individual rather than organisation response (three).

2.12 “Other” includes e.g. regulators, solicitors, local authorities and consultants.

2.13 Organisations with a national or local remit were more likely to have responded to the online survey, **Table 2**. Note: this includes national organisations include UK or international charities

Table 2: Profile of Organisation Respondents

| Organisation Respondent | Number | % |
|-----------------------------------|---------------|----------|
| National | 20 | 50% |
| Local | 10 | 25% |
| Membership or Professional Bodies | 7 | 18% |
| Third Sector Interfaces | 3 | 8% |

N=40.

Roundtable Discussions

2.14 A series of online roundtable discussions were hosted by key partners to supplement the online survey and to reach a wider audience. The events followed the same question set as the online survey, and each focused on a different audience:

- SCVO and ACOSVO – a roundtable discussion was undertaken with 23 charity leaders and umbrella bodies. There were 25 participants (including three from the same organisation).
- OSCR: Charities Reference Group, 35 charities representing a cross-section of the sector.
- TSI: responses were submitted by a number of TSIs in Scotland that undertook discussions with members (local and smaller charities):
 - Edinburgh Voluntary Organisations' Council (EVOC).
 - Fife Voluntary Action.
 - Glasgow Council for the Voluntary Sector (GCVS).
 - Highland TSI (HTSI).
 - Stirlingshire Voluntary Enterprise (response reflects joint events with other neighbouring TSIs - Clackmannanshire TSI and Council for Voluntary Sector, Falkirk).
 - TSI North Ayrshire.

- TSI Moray (tsiMoray).
 - Voluntary Action North Lanarkshire (VANL).
 - Voluntary Action South Lanarkshire (VASLAN).
- 2.15 In most cases, the name/number of organisations/participants that attended these discussions was not provided within submissions to the Scottish Government.

Survey Analysis

- 2.16 The analysis seeks to identify the most common themes and issues. It does not report on every single point raised in the survey responses. Equal weighting has been given to responses. This includes the views of, on the one hand, large charities with a national remit or membership, and, on the other, smaller charities with a more local focus (or an individual's viewpoint). All of the online survey questions were open-ended, and we have tried to theme and quantify responses where appropriate. The analysis identifies key themes by respondent group where appropriate.

Survey Limitations

- 2.17 Respondents to any survey are self-selecting.
- 2.18 The depth of responses to survey questions varied – some respondents have provided full and detailed responses, while others have provided short or even single word responses. Not every respondent answered each and every question.
- 2.19 The phrasing of some questions made the analysis more difficult. For example, there are instances where two sub-questions are asked within a single overall open-ended question.
- 2.20 Notes of events held were largely bullet points of all points raised. All views were therefore recorded – as such some responses appeared contradictory in places.

3. Proposal 1

Context

- 3.1 **Proposal 1:** Publishing annual reports and accounts in full for all charities on the Scottish Charity Register.
- 3.2 **Proposal summary:** All charities registered in Scotland are under a legal duty to prepare annual reports and accounts, and submit them to OSCR. There is currently no legal requirement for reports and accounts to be published on the Scottish Charity Register. Currently OSCR publishes the accounts of charities with an income over £25,000 and all Scottish Charitable Incorporated Organisations (SCIOs). OSCR redacts all personal information before publishing to comply with data protection legislation (i.e. charity trustee names and signatures, photographs, and the signatures and personal details of independent examiners and auditors). The proposal is for OSCR to publish all annual reports and accounts in full on the Register.
- 3.3 **2019 Consultation response summary:** 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. Concerns were raised that publication should be compliant with data protection legislation and that charities SHOULD be allowed to apply for a dispensation from having their annual reports and accounts published in full in “exceptional circumstances”.

Question 1

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

- 3.4 Mixed views were provided to **Question 1**.

Main themes expressed by those not in support of a dispensation

- 3.5 More than half of online survey respondents reported that there should be no dispensation to full annual reports and accounts publication (circa 54%). The main feedback was that:
 - This would improve transparency and accountability across the sector, and increase public trust and confidence in the governance of charities.
 - The general public can already access full annual reports and accounts by contacting a charity directly.
 - The process currently undertaken by OSCR to redact all personal information before publishing annual reports and accounts to comply with data protection legislation was broadly considered sufficient (e.g. it helps prevent fraudulent use, it protects identities, any sensitive information and data is withheld).

3.6 Further, strong support was expressed by these respondents for publishing annual reports and accounts in full for all charities on the Scottish Charity Register to be the default position i.e. a presumption towards full disclosure for all charities, with all information in the public domain.

Main themes expressed by those in support of a dispensation

3.7 A relatively large proportion of survey respondents reported that there should be a dispensation to full annual reports and accounts publication (circa 45%).

3.8 It was considered important that there was provision for, and a process or mechanism put in place for, requesting a dispensation to full annual reports and accounts publication (e.g. similar to the Charity Commission for England and Wales). Aligned to this were requests for a clear definition to be provided of the reasons for applying for, and granting of, a dispensation (i.e. parameters and safeguards specified).

3.9 There was, however, broad support within these responses that the granting of a dispensation to full annual reports and accounts publication should only be in exceptional circumstances. This aligns with the feedback to the 2019 consultation.

3.10 Where “by exception” was further defined within consultation responses, the main circumstance noted was to prevent putting a person or people (or premises) in personal physical or mental danger (i.e. risk from a health and wellbeing, safety or security perspective) due to type of activity. Individual/personal safety and the security of premises were by far the top reasons identified for dispensation (e.g. charities working with individuals with protected characteristics; those dealing with sensitive issues and/or vulnerable groups such as women’s refuge; those operating in politically sensitive geographies).

3.11 Wider circumstances mentioned, but to a lesser degree, included:

- Charities with a small annual income (but greater than the current £25,000).
- During a national crisis or global pandemic.
- Formal financial investigation or legal disputes.
- Release of a Statutory Auditor.

Question 2

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

Majority support some form of annual reports and accounts always being published

- 3.12 A majority of online survey respondents agreed with the proposal that if dispensations are made, then some form of annual reports and accounts should always be published (circa 72%).
- 3.13 Much of the wider feedback in support of the proposal fell into two categories: that adopting such an approach would support openness and transparency within the charity sector; and that it was of vital importance that the work of charities and financial information was published and readily available in the public domain.
- 3.14 It should be noted that a relatively large proportion of these respondents simply stated “yes” in their response to **Question 2** – i.e. not all went on to provide a view on whether these annual reports and accounts should be published in a redacted or abbreviated form. This equates to almost one-third of respondents referred to at **Section 3.12** above. Where further commentary was provided, it shows very strong support for:
 - Personal or sensitive information, data and photographs to be redacted. Redaction should focus on information which may create risk, and upholding rights to privacy and safety. Further, it was noted that consideration could be given to permitting typed signatures on annual reports and accounts, rather than having to redact handwritten signatures.
 - Ensuring that redacted or abbreviated reports and accounts remained meaningful for the reader and aided their understanding. Here, the main points raised were around:
 - Avoiding the risk of abbreviating published information to the extent that it was then hard for the public and stakeholders to follow what a charity was doing.
 - Avoiding a perception that something was being hidden by a charity.
 - Giving consideration to abbreviating reports and accounts in line with company law.
- 3.15 A wider point raised, but not by many, was around aligning arrangements in Scotland with that of the Charity Commission for England and Wales.

Alternative viewpoints expressed

- 3.16 Almost one-fifth (20%) of online survey respondents simply reiterated points raised at **Question 1**. Namely that there should be no dispensation to full annual reports and accounts publication from a public interest perspective.
- 3.17 Finally, a small handful of online survey respondents explicitly answered “no” to **Question 2** (four). Namely that if dispensations were to be made, then redacted or abbreviated annual reports and accounts did not always require to be published.

4. Proposal 2

Context

- 4.1 **Proposal 2:** An Internal Database and External Register of Charity Trustees.
- 4.2 **Proposal summary:** OSCR currently holds limited information on the 180,000+ charity trustees involved in over 25,000 charities in Scotland. The law only requires the Scottish Charity Register to set out the principal office of the charity or the name and address of one of its trustees. The option proposed is for OSCR to establish a new register of trustees to provide valuable and relevant information to better support effective regulation of charities and their trustees, through improved compliance, investigation and engagement work. The proposals include:
- An internal database for OSCR's use only i.e. name, date of birth (for identification purposes), home address, email address. This register could also include the names of any person removed as a trustee following an inquiry by OSCR under the 2005 Act or preceding legislation.
 - A reduced external register for public use. This could contain trustee names (including removed trustees) and a principal office or trustee contact address against each charity.
- 4.3 **2019 Consultation response summary:** The majority of respondents reported that OSCR SHOULD be able to collect trustee information for use in an internal database. Some 71% of respondents SUPPORTED the proposal for the names of trustees to be published on the external public register.
- 4.4 List of disqualified trustees (removed by OSCR): 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%).

Question 3

What information should be included in an internal database?

- Broad support for the type of information proposed by the Scottish Government***
- 4.5 There was broad support within online survey responses that the internal database should contain information such as name, date of birth, home address, email address, as well as the names of any person removed as a trustee following an inquiry by OSCR under the 2005 Act or preceding legislation (circa 68%).

Concerns raised

- 4.6 A further one-fifth were broadly supportive of the proposal in principle, but had some concerns and/or requested greater clarity.
- 4.7 Where there was any hesitation regarding the specific proposals, this typically centred on the sharing of home addresses and personal email addresses for the purposes of the internal database (e.g. "could OSCR hold the address of the charity rather than the Trustees' home address?").

- 4.8 A common theme was that a “proportionate” approach should be adopted, and that an internal database should only capture the type of information needed to support OSCR to undertake effective regulation of charities and their trustees (i.e. information deemed “essential”, “minimum amount necessary”).
- 4.9 The importance of ensuring information on an internal database was relevant, accurate and up-to-date, as well as appropriately stored, protected and controlled was also emphasised.

4.10 Wider concerns raised, but to a lesser extent, were:

- The administrative burden on charities, especially small charities.
- The effect on charity trustee recruitment.
- A need for a more detailed justification for an internal database to be provided to explain how it would assist OSCR in the exercise of its functions.

Additional information that could be considered for the internal database

4.11 A relatively large proportion of online survey respondents went onto suggest additional information that the Scottish Government could consider recording on the internal database (circa 33%). The most common additional suggestions proposed included:

- Telephone number.
- Trustee appointment and resignation dates.
- Trustee role (e.g. Trustee/Secretary/Treasurer).
- Current and/or previous trustee of any other charity (and/or Director position held), and duration of service.
- Profession/occupation.

4.12 Wider suggestions mentioned, but to a lesser extent than those noted above, included:

- Trustees suitability for the role (including a copy of signed declarations).
- Criminal record check (e.g. any unspent convictions)
- Disclosure and Barring Service (DBS) check/certificate.
- Bankruptcy history.
- Attendance record for the previous year.
- Conflict of interest statement.
- Whether related to another trustee(s) in the same organisation.

- Any removal from being a trustee by the Charity Commission for England and Wales.

Wider points raised

4.13 There was some reference for the information on an internal database to match what is collected by Companies House for its register, but this was limited.

4.14 A very small number of online survey respondents were not supportive of an expanded internal database at all.

Question 4

How should the internal database information be kept up-to-date?

Two main views provided

4.15 The main theme that emerged from the online survey was that the best and most effective way for information on the internal database to be kept up-to-date was through Trustee Annual Return updates – aligned with submission of Annual Reports and Accounts (circa 57%), and done through OSCR’s online system.

4.16 Another viewpoint was that the system adopted could allow or encourage charities to make electronic “event-based reports throughout the year” (circa 34%). These respondents were supportive of having an option to update OSCR throughout the year, and/or statutory obligations to update OSCR, including on any “significant changes” within a specified time period. Where a time period was mentioned, this varied and ranged from 14 days (e.g. similar to Companies House), to one month, within 60 days or within three months.

“Whatever time limit is chosen, any change must be accompanied by clear messaging from OSCR that compliance with the notification requirement is a specific legal duty imposed upon charity trustees, and should be further accompanied by a strong emphasis on education of the sector on the need for compliance”.

Charity Law Association

4.17 Having a mix of options for keeping the internal database information up-to-date was considered beneficial from the perspective that it could:

- Help to minimise the administrative burden on charity trustees.
- Provide OSCR with the most up-to-date and accurate data with which to carry out its regulatory duties.
- Improve the interaction between the regulator and charities/trustees.

Wider points raised

- 4.18 The inherent challenge of balancing the need to ensure accuracy of the internal database against the administrative burden to charities, and particularly smaller charities, was again acknowledged within the responses.
- 4.19 A point noted by another regulator in Scotland was that it would also be important to minimise duplication in information requests (e.g. through the use of Memorandum of Understanding).
- 4.20 Finally, a small number of online survey respondents commented that information on the internal database should be kept up-to-date in the same way adopted by Companies House.

Question 5

What information should be included in a public list of charity trustees?

Strong support for a public list of charity trustees

4.21 First, as was the case in the 2019 consultation, strong support was expressed for a reduced external register for public use within the online survey (circa 75%). Additionally, some online survey respondents expressed partial support for the proposals (e.g. name only to be published).

4.22 Many of the points raised in support of a public register focused on the following:

- It would strengthen transparency regarding who is in management and control of charities.
- It would bring OSCR in line with the practice of other UK Charity Regulators.
- The information was already available within charity annual accounts and therefore in the public domain.
- That the information was also currently available for charities that were registered via Companies House, and that consistency of approach would be sensible.

4.23 Second, these respondents also typically concurred with the proposal that a public list of charity trustees should include:

- Trustee names (including removed trustees).
- A principal office or trustee contact address against each charity.

4.24 Publicly available information on all trusteeships previously/currently held was considered important for cross-referencing.

Main concern raised

4.25 There was some concern/opposition raised around the use of trustee private home addresses. This mirrors feedback provided to earlier questions, and the importance of ensuring individual/personal privacy and safety.

Additional suggestions for information to be included in a public list

4.26 Further, around one-third of respondents that reported support for a reduced external register for public use went onto propose additional information that could be included on the public list of charity trustees. The most frequently reported suggestions included:

- Trustee appointment and resignation dates.
- Trustee status - current, retired or disqualified.
- Position of office.

- Date of birth (i.e. month and year for identification purposes).
- Nationality.
- Occupation.
- Public offices currently held/directorships of private businesses related to any charities for which the person is a current trustee which might create a potential conflict of interest.
- Charity telephone number/email address.

Views of those not in support of a public list of charity trustees

4.27 Fewer online survey respondents reported that there should not be a public list of charity trustees (circa 11%). The main points raised were that:

- The general public could access this information directly through charity annual accounts, and that contact addresses for charities were published on the Scottish Charity Register (i.e. there was an existing point of contact).
- Appropriate safeguards would be required to protect the privacy of trustees and prevent any data breaches or fraud. Note – this point was also raised by online survey respondents that supported the proposals for the public list of charity trustees.
- There should be a right to dispensation if publicly available information would put a trustee at risk.
- It might have a negative effect on charity trustee recruitment.

Question 6

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

Two main viewpoints expressed

4.28 Online survey responses in the main fell into two camps:

- Around two-thirds felt there should be exceptions to being included in a public list.
- Over one-quarter reported there should not be any exceptions (27%).

4.29 A common theme was that an exception should only be granted in exceptional circumstances.

Circumstances where there should be an exception

4.30 The main circumstances identified for there to be an exception to being included in a public list were:

- If disclosure could lead to harm to mental or physical health or wellbeing or could otherwise place an individual at serious risk.
- If disclosure jeopardised the safety or security of any person or where any person might be targeted as a result of discrimination or prejudice. The profile of trustees was mentioned, with age, ethnicity and vulnerability relevant factors.
- If it posed a serious risk or violence or intimidation because of the nature of a charity's activities (e.g. medical research, human rights, domestic abuse, sexual abuse, family planning, ethnic minorities).

4.31 Wider circumstances noted, but to a lesser extent, included:

- Where withholding was otherwise permitted under company law (regardless of whether the charity is incorporated or not).
- Witness protection.
- Where a trustee is part of a formal inquiry or investigation.

4.32 Wider feedback, albeit again not mentioned by a majority, was that the circumstances for there to be an exception to being included in a public list could match that used elsewhere (e.g. those raised at **Question 1** for dispensation to full annual reports and accounts publication, by other UK Charity Regulators, by Companies House). A further point made was that existing provision at section 3(4) of the 2005 Act could be replicated or expanded to incorporate the external trustee database.

General points raised

4.33 More general points raised were that OSCR would require to:

- Clearly define the grounds on which a dispensation might be granted.
- Adopt an approach that ensures each request was considered on a case-by-case basis.
- Provide assurance that the information would be appropriately stored, protected and controlled.
- Develop appropriate training and guidance for the sector, including examples of what would constitute a successful request for exception.
- Outline how long the dispensation/exception was likely to last and put in place a mechanism for regular review to ensure the criteria and business case remains valid.

4.34 Finally, a small handful of online survey respondents reiterated their opposition to there being a public list of charity trustees at all.

Question 7

How long should a disqualified trustee remain on the list?

Mixed views on length of time a disqualified trustee should remain on the list

4.35 Views were relatively mixed on the length of time a disqualified trustee should remain on the list, albeit there was a leaning towards this being time-limited:

- Around 17% reported that disqualified trustees should remain on the public list permanently.
- Circa 43% reported that it should be time-limited. This ranged from a period of six months to 25 years, and everything in between. The average length of time reported was around eight years.
- Some 22% reported that a disqualified trustee should remain on the list for the term of their disqualification/until conviction is spent. Further, a few went onto to propose that inclusion on the list should continue for a certain period of time beyond when the disqualification comes to an end.
- Around 16% said that it should depend on, or be proportionate to, the severity of the reason for disqualification, with some suggesting that a tiered approach could be considered (maximum = permanent).
- A couple of respondents stated that the disqualified trustee should be removed immediately from the list.

4.36 In order to ensure consistency of approach, there was some (but limited) reference to alignment with the practice of others – e.g. Charity Commission for England and Wales, Companies House.

4.37 A wider point raised was that a process would require to be put in place to remove the name of a disqualified trustee following death.

Some support for a search facility rather than list

4.38 There was some, but limited, support explicitly expressed for a search facility rather than a list – points raised are reflected in the OSCR response:

“..... there would be a search facility on our website which would allow a user to enter a person’s name and address to check if they have been removed. We would only propose to publish the names of those persons removed as charity trustees under the 2005 Act (or by the Scottish Charities Office under the preceding legislation). By making this information publicly available, charities will be able to undertake the necessary due diligence in terms of the trustees they have on their board. There are of course other reasons why a person may be disqualified as a charity trustee. As such we would also propose to produce guidance with links to the other relevant databases to assist charities to carry out full checks.

The other databases include the Companies House Register of Disqualified Directors, CCEW’s Register of Removed Trustees and the AiB’s Register of Insolvencies.

In terms of the 2005 Act there is currently no time limit on the period an individual is disqualified from acting as a charity trustee by the Court of Session following an application by OSCR for their removal. In the circumstances the individual would remain on the list of removed charity trustees unless or until their removal was waived following an application to OSCR".

Question 8

What information should be available in the disqualified trustee list?

4.39 Almost 90% of online survey respondents provided a response to **Question 8**.

4.40 A strong and common theme was that the information available would require to be sufficient to avoid the risk of confusion between different people with the same name (i.e. there should be no doubt or ambiguity about identification). It was reported this would protect charities against the risk of recruiting a trustee or office bearer who might pose a risk to the charity's financial position or public reputation.

Two main viewpoints expressed

4.41 There were two main viewpoints:

- First, that information publicly available should be minimal, and not compromise an individual's right for privacy under GDPR - but as noted above, sufficient to avoid the risk of confusion between different people with the same name. Here, there was broader support for a search facility such as that used by UK Charity Regulators.
- Second, that more detailed information should be made publicly available, such as details pertaining to the disqualification. For example, information similar to that published by Companies House.

Varied views on the type of information to be made publicly available

4.42 Responses were, however, particularly varied and mixed regarding the level of detail that should or should not be made publicly available.

4.43 Where suggestions were provided on the nature and type of information that should be available in the disqualified trustee list, by far the most common responses were a mix of some and/or all of the following:

- Name of trustee.
- Date of birth (i.e. month and year).
- Name of charity, charity number, charity status, and correspondence details.
- Names of any other charity/company the trustee was involved in prior to disqualification.
- Date of disqualification order.
- Reason for / category of disqualification
- Period of disqualification.

- Wider suggestions, but not mentioned to any great extent, were:
- Whether the individual accepted the OSCR decision.
- Whether the charity objected or accepted the OSCR decision.
- Whether they have the court's permission to continue to act as a trustee/director.
- Local authority.
- Role (e.g. Trustee, Secretary) / paid or unpaid role.
- Link to disqualification ruling.

“A system similar to that in England and Wales, where there is no public register/list of disqualified trustees but where the Charity Commission has a system which provides for a name to be input and identifies whether there is a match, would appear to better accord with the data protection principles set out in the Data Protection Act 2018”.

The Church of Scotland

“The Charity Commission for England and Wales discloses name, date of disqualification order, charity number, charity name, and charity status (i.e. whether registered or not). There is then an ability to double check with the Charity Commission against a particular name if an enquirer wishes to clarify the identity of a person who may be disqualified. A similar approach could easily be followed in Scotland, although on balance we believe that the name of the charity trustee and the date of disqualification may be sufficient, provided that there is then an ability to enquire further of OSCR to clarify the identity of a disqualified trustee”.

Charity Law Association

“...we envisage a search facility rather than a list as such. If there was a partial match with a removed trustee but the user was not sure if they were the same person, they would be advised to contact OSCR for further information. We could then verify, whether the person they were checking was the individual removed as a charity trustee where the information we held enabled us to do so. We are legally required to publish an inquiry report where we use our power to suspend a trustee.”

Where we have applied to the Court of Session for the suspension or removal of a charity trustee we would also publish an inquiry report about the action taken. The names of those removed are, therefore, already in the public domain but not in a format that would facilitate an easy search by names. We wish to make this information available to the public in a more useable and useful format”.

OSCR

5. Proposal 3

Context

- 5.1 **Proposal 3:** Criteria for automatic disqualification of charity trustees and individuals in senior management positions in charities.
- 5.2 **Proposal summary:** Changes to the charity legislation for England and Wales have extended disqualification criteria for charity trustees and senior employees (Chief Executive and Chief Financial Officer). To ensure criteria in Scotland are fit for purpose, the option proposed is to extend the criteria for 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.
- 5.3 **2019 Consultation response summary:** 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%).
- 5.4 Some 79% respondents SUPPORTED plans to extend the criteria for disqualification and removal to those in senior management positions.
- 5.5 The responses highlighted a number of concerns, namely what is meant by “certain senior management roles” and how this applies to small charities with few/no paid staff.
- 5.6 There were concerns about the implications for ex-offenders recruited by charities as staff or trustees and whether the proposal could “deprive charities of valuable lived experience”. 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.

Question 9

What factors should be considered in defining a ‘senior manager’?

Function of role more relevant than job title

- 5.7 In defining a “senior manager”, the function of the position was considered to be of most relevance rather than the job title (e.g. management and control functions, The Charities Act 2011 provides a definition of a senior management function).
- 5.8 The following factors were most commonly reported in online survey responses to help support the charity sector identify relevant senior manager positions (i.e. reported by a majority):
 - Chief Executive, Chief Financial Officer, and Chief Operating Officer (or similar).

- Delegated responsibility for leading and managing a charity on a day-to-day basis (e.g. "key management personnel" as defined in the Statement of Recommended Practice (SORP) and Financial Reporting Standard FRS102).
- Delegated responsibility for controlling the charity's finances.
- Direct reporting line to the board of trustees / person from whom the board of trustees takes advice.
- Staff recognised internally as part of the Senior Management Team (e.g. as outlined within a charity's organisational structure).
- Financial and/or strategic involvement at a decision-making level (i.e. budget responsibility, strategic responsibility, policy responsibility).

Wider points raised

5.9 Wider factors noted, but to a lesser extent than those noted above, include:

- Management responsibility for staff and/or volunteers.
- Office bearers and trustees.
- That the size of the charity should be taken into account (i.e. income bracket).
- Paid position / anyone whose remuneration falls into the declarable bands required by SORP / FRS102

5.10 Finally, a small handful of online survey responses suggested that there could be broad alignment with UK Charity Regulators guidance for senior managers that are affected by disqualification.

6. Proposal 4

Context

- 6.1 **Proposal 4:** A power to issue positive directions to charities.
- 6.2 **Proposal summary:** OSCR has legal powers to issue specific types of direction to charities and charity trustees. Most of OSCR's powers are preventative, requiring charity trustees or others not to take particular actions. OSCR cannot direct charity trustees to take a specified positive action to remedy non-compliance or protect charitable assets.
- 6.3 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.
- 6.4 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.
- 6.5 **2019 Consultation response summary:** The vast majority of respondents reported that OSCR SHOULD be given a power to issue positive directions (83%). 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 reported that OSCR should be given power and a remit to issue positive directions stated that this should be WIDE-RANGING.

Question 10

If a positive power of direction were to be specific, what areas should be subject to the power, or are there any areas that should not fall within the power?

- 6.6 Around 85% of online survey respondents answered **Question 10**.

Points raised were similar to the 2019 consultation

- 6.7 First, there were a variety of comments within online survey responses that reiterated points raised in the 2019 consultation, and which were not directly related to the question posed at **Question 10**. This included:
 - Preference for whether the power to issue positive directions should be wide-ranging or a specific power.
 - There were a handful of respondents who did not think a positive power of direction was necessary, and that OSCR's current powers were said to be adequate and appropriate.

- That OSCR should not be able to make directions unless (a) it has instituted an inquiry into the charity concerned and (b) is satisfied that its proposed direction is proportionate in terms of securing the application of the charity's resources for its stated purposes and to provide public benefit.
- That there would need to be clear distinction between the powers held by OSCR and the powers of the Court of Session.
- That there should be provision for appeals and exceptions.
- A concern raised was around the resources and capacity available within smaller charities to implement any corrective action (i.e. people and money).

Areas that should be subject to the power of direction

- 6.8 Second, if a positive power of direction was to be a specific power, online survey respondents were more likely to suggest areas that should be subject to the power, rather than areas that should not fall within the power.
- 6.9 Almost half of online survey respondents that answered **Question 10** identified circumstances where a power to issue positive directions could be used by OSCR to “facilitate early support and resolution of problems identified during the course of inquiries”. Here, there was broad support for OSCR to be proportionate in its dealings with charities, and for the positive power of direction to be used “sparingly”, “in exceptional circumstances”, “appropriately”, etc.
- 6.10 The most common areas that were identified for inclusion were around a breach of trust or duty or evidence of other non-compliance, misconduct or mismanagement in terms of the following three areas:
1. Financial management.
 2. Safeguarding.
 3. Governance.
- 6.11 Where more detailed examples were provided, these typically supported OSCR to have a specific power:
- To appoint additional trustees (e.g. in order to form a quorum or meet a minimum specified in a governing document).
 - To remove trustees.
 - To take a specific action in line with the charity's governing document (e.g. to hold an AGM to make a specific decision or take action to remove a trustee in line with the powers they have; failure to hold regular trustee meetings; diversion from charity's objects, misuse of voting rights, when a charity has consistently not adhered to its aims and objectives as per its constitution).
 - To manage a conflict of interest effectively and demonstrably.

- To direct charities to prepare and submit annual accounts.
- To address misconduct in the administration of a charity.
- To preserve a charity's assets or secure their proper application.
- To address issues around misuse of funds and/or misuse of the power by trustees.
- To direct the trustees to transfer all assets of the charity to another charity - and hence, in effect, to bring about the windup of the charity concerned.

6.12 In addition, almost one-fifth of online survey respondents (primarily individuals) reported that no areas should be excluded from the positive power of direction in order to remedy non-compliance and/or protect charity assets - "All areas of the charity should be open for OSCR to investigate".

Areas that should not be subject to the power of direction

6.13 As noted above, very few respondents made explicit reference to areas that should not fall within the power. Where mentioned, this typically centred on:

- The day-to-day operational management of charities – the importance of protecting and maintaining a "charity's independence from political pressures and interference" was emphasised.
- Churches also noted that there was an expectation that such powers would not be exercised in relation to Designated Religious Charities which in effect have their own regime.

"It would not be appropriate for OSCR to be given power to issue positive directions to designated religious charities, which have evidenced that they have an internal organisation such that they exercise supervisory and disciplinary functions in respect of their component elements and are currently exempt from the interdictory/preventative powers contained in sections 28(3), 31(4) and 31(6) of the 2005 Act. Any enactment which would give OSCR a power to issue positive directions should be added to the list of provisions in Section 65(4) of the 2005 Act which do not apply to either designated religious charities or any component element thereof which is itself a charity. This would also be necessary so as to retain the current dis-application of other provisions of the 2005 Act to designated religious charities".

Free Church of Scotland

6.14 Colleges Scotland (Good Governance Steering Group) supported the proposal in principle but requested further clarity regarding the following point:

"....board appointments in the college sector are at the direction of Ministers and as such, college legislation would precede charity legislation in that context. As such we would advise there is a need to ensure that OSCR is clear and consistent in the application of powers and in taking relevant legislation into account".

Question 11

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

Length of time dependent on a number of factors

6.15 In terms of the first question around how long should a charity have to comply with a positive direction, the general consensus among a majority of respondents to the online survey was that this would depend on multiple factors such as the:

- Scale/nature/regularity of non-compliance and complexity of the problem.
- Nature of the direction.
- Specific circumstances of the charity receiving the direction (e.g. the size of the charity, its resources and capacity to comply with the power of direction).

Importance of proportionality and flexibility

6.16 In light of the above points, there was strong support expressed for proportionality and flexibility of approach, with charities given a reasonable timeframe to respond to, and comply with, a positive direction issued by OSCR.

6.17 The main view was that a range of timescales might work best for a charity to comply with a positive direction (i.e. a sliding scale), and to be determined on a case-by-case basis. A few noted support for OSCR to have discretion over how long a charity should be given to comply with a positive direction - this would also align with other UK Charity Regulators.

6.18 It was considered important that a charity was allowed to request a review of these decisions and the power of appeal to First-tier Tribunal for Scotland, Upper Tribunal for Scotland and ultimately the Court of Session.

Specific time period

6.19 Over one-quarter of survey respondents provided a specific time period, and this spanned:

- Less than one year (e.g. one month, six weeks, three months, six months).
- One year.
- More than 12 months (the longest time period proposed was five years).

6.20 Further, a few noted that “a direction may have to last indefinitely, that is until revoked by OSCR” or “until OSCR had satisfied themselves that the positive direction had happened”.

Consequences of non-compliance with a positive direction

6.21 The proposed consequences of non-compliance with a positive direction were most commonly framed in terms of misconduct in the administration of the charity, and that this could result in:

- Disqualification of trustees and senior managers.
- Suspension of the charity pending review of reason for non-compliance or till issue resolved.
- Removal of charitable status.
- Merger with another similar charity.
- Closure of the charity.
- Freeze/seizure of charitable assets.
- OSCR having the power to appoint a trustee/manager specifically to oversee the changes.
- Issues of criminality passed to the police.

6.22 Similar to responses on timeframes, the general consensus was that the scale/severity of the consequences of non-compliance with a positive direction should be proportionate to the scale/nature of non-compliance (e.g. a tiered approach through the use of sanctions and fines). It was considered crucial that OSCR took into account any reasons outwith the control of the charity that affected its ability to comply with the positive direction within certain time limits.

7. Proposal 5

Context

- 7.1 **Proposal 5:** Removal of Charities from the Scottish Register that are persistently failing to submit annual reports and accounts and may no longer exist.
- 7.2 **Proposal summary:** All charities in Scotland are under a legal duty to prepare annual reports and accounts, and submit these to OSCR. Failure to do so can be regarded as misconduct. There are currently a number of charities where OSCR does not have up-to-date reports and accounts - some of which have never submitted accounts. It is thought that some charities no longer exist but have failed to notify OSCR to be removed from the Register.
- 7.3 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.
- 7.4 **2019 Consultation response summary:** 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%). 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.

Question 12

What factors need to be considered to define ‘persistent’ failure to submit annual reports and accounts?

- 7.5 Around 90% of online survey respondents answered **Question 12**.
- 7.6 There was support expressed across the online survey responses for OSCR to assess the failure to submit annual reports and accounts on a case-by-case basis. This would be with a view to understanding whether there were any legitimate reasons a charity might have for non-submission or late submission.

Range of factors to be considered

- 7.7 In terms of factors that would need to be considered to define “persistent” failure to submit annual reports and accounts, these were most commonly framed as:
 - Failure to respond to, engage with, or act on OSCR’s communication (i.e. reminders, adequate prior warning, offer of support).
 - Failure to comply with a positive direction (e.g. compelling trustees to prepare a trustees’ annual report and accounts but no report or accounts were forthcoming).
 - Previous negative regulatory history with OSCR or another regulator.

Two main viewpoints

7.8 Where made explicit in the response, two main views were provided on how to define “persistent”, with a few noting both situations as relevant:

- A single year’s report and accounts which were not lodged despite reminders or formal warnings being issued by OSCR (i.e. it does not need repeated failure to file accounts over more than one financial year before sanctions should arise) – over one-quarter of respondents.
- Multiple occasions where annual reports and accounts have not been submitted and/or have been submitted very late. This was typically framed in terms of two or three consecutive years, or a pattern of submission of inadequate documents and/or no reports and accounts submitted over an extended time period (e.g. a timeframe of five years was most frequently mentioned) – over one-third of respondents.

Wider themes

7.9 Wider common themes that emerged were around:

- The need for OSCR to better understand whether there were any mitigating circumstances or factors that it would consider reasonable to extend a degree of flexibility and an extended deadline to charities.
- The need for OSCR to be satisfied that there has been misconduct. Here, the feedback highlighted the importance of regular dialogue between OSCR and charities that were experiencing difficulties in lodging annual reports and accounts.

Question 13

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

Two main steps for OSCR to take

7.10 The general consensus among online survey respondents was that the following steps should be taken by OSCR:

1. The first step should be for OSCR to make reasonable attempts to establish contact with the charity (i.e. to engage with the main contact as well as other trustees/senior managers as appropriate).

In order to: engage and ascertain the reason for non-submission (e.g. administrative oversight, any mitigating factors); to issue standard reminders prior to the deadline to encourage compliance; and to issue informal warnings; and to offer/signpost to support, advice and guidance before sanction. It was considered important that OSCR was able to determine whether the “failing is a charity’s capacity and capability or an actual contempt for the law”.

2. If the first step resulted in a failure of the charity to engage or respond to contact from OSCR, then the vast majority of online respondents reported that OSCR should have the power to issue a positive direction to the charity to prepare and submit annual reports and accounts within a fair and reasonable revised timescale (circa 75% - this percentage is based on the total number of respondents that provided an explicit “yes”, “no” or “it depends” as part of their response to the sub-questions within **Question 13** i.e. N=68).

This would allow charities to be able to remedy the situation. These respondents were clear/explicit in their responses that a positive direction to provide accounts and reports should always be required before progressing to the removal of charities from the Scottish Charity Register.

- 7.11 The main message was that failure to comply with the positive direction should result in a charity being removed from the Scottish Charity Register (e.g. following the issue of a formal warning/notice that a charity is “in danger in committing an offence” and to “understand the gravity of the situation”). Failure of a charity to fulfil its legal duty to prepare an annual report and accounts was not viewed positively for the sector as a whole – “This information is important both in terms of transparency and public trust and OSCR’s regulatory function”.
- 7.12 In order to be able to undertake the aforementioned steps, the importance of OSCR having access to up-to-date contact information for charities was considered crucial. OSCR would need to exhaust all possible options to establish contact (e.g. through internet searches, engagement with others such as other regulators, TSIs, local government).

Main themes expressed by those who felt that a positive direction to provide accounts was not always required first

- 7.13 Around one-fifth of online survey respondents explicitly stated “no” - a positive direction to provide accounts would not always be required before a charity was removed from the Scottish Charity Register. The main feedback was that:
- Charities know they have to submit accounts when they register – it should not need a positive direction to remind charities of their mandatory/legal obligations/duties. Some noted that the issue of reminders might be sufficient.
 - That OSCR could use existing powers under Section 45 of the 2005 Act.
 - That there would be no purpose served in a positive direction if OSCR does not have access to up-to-date contact information for charities.

“Where we cannot, through internet searches, find the current address of the charity or contact details for current trustees we would be unable to engage with the charity and there would be no purpose served in issuing a positive direction to prepare and submit accounts on the out of date address. In such cases, taking all factors into account, we would remove the charity without first issuing a positive direction”.

Wider point raised

7.14 Finally, a wider point raised by some respondents was that where it was suspected that a charity no longer exists, that there were grounds for removal from the Scottish Charity Register (based on efforts made to locate and contact trustees of that charity prior to removing them).

8. Proposal 6

Context

- 8.1 **Proposal 6:** All charities in the Scottish Charity Register to have and retain a connection in Scotland.
- 8.2 **Proposal summary:** 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.
- 8.3 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.
- 8.4 **2019 Consultation response summary:** 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%).
- 8.5 A strong message from the consultation responses was that what is meant by “to have, and retain, a connection with Scotland” would need to be clearly and sufficiently defined. 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.
- 8.6 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.

Question 14

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

Strong support for the proposal made by the Scottish Government

- 8.7 Based on a review of the online survey responses, a vast majority made explicit agreement with the Scottish Government proposal that a physical presence in Scotland, such as an office address or trustee address, were important factors when defining what “have and retain a connection to Scotland” means (around 88%). A demonstrable relationship with Scotland was considered vital. This is based on a total of 77 responses where there was explicit reference in the response regarding agreement or disagreement with the proposal.

Alternative viewpoint

- 8.8 Few respondents disagreed (12%), including churches and charities with an international remit. These respondents considered that factors such as an office address or trustee address were not important considerations. Points raised are reflected in the following respondent quotes.

“However as an international organisation, this depends on its having Trustees from Scotland willing to serve as Trustees and those Trustees voted by our membership. This may not always be possible. Nor practical. This amendment, if approved would necessitate a change in our constitution meaning we always have one trustee from Scotland, which would give Scotland a disproportionate place on our global board of 18, which is finely balanced with equal representation from all regions of the world. Essentially our European Director would always have to be Scottish. And although our office base is in Scotland, in reality, our work could be carried out remotely, globally. Currently our one staff member is based in Scotland. But this may not always be the case, with the advent of remote working”.

International Association for Community Development

“..the Church of Scotland has congregations and presbyteries outside Scotland which are registered with OSCR. Although they do not hold property, operate in Scotland or have a trustee connection in Scotland their governing body is a Scottish charity. All these component elements of the Church of Scotland participate in the General Assembly of the Church of Scotland, which sits in Scotland, and is the Church's Supreme Court. Any definition would have to be sufficiently wide to enable such congregations and Presbyteries to retain charitable status in Scotland. All of these congregations have 'Scotland' in their name as there is a strong connection with the Church of Scotland”.

The Church of Scotland

“The charity must always be carrying out activities within Scotland not just fundraising in the area. A physical presence, apart from a SCIO, does not need to be required”.

Individual

“It is not our intention to exclude cross border charities (those registered in England, Wales and Northern Ireland) from the Register. The definition would therefore need to be broad enough to ensure these bodies could continue to be dual registered. Factors which could be considered when considering ‘have and retain a connection with Scotland’ would not necessarily require the charity to have a physical presence in Scotland such as an office or trustee address. In light of COVID there will be more homeworking and charities may decide to give up their office premises. A possible test could be: charities established under the law of a country or territory other than Scotland, are managed or controlled wholly or mainly outside of Scotland, do not occupy land or premises in Scotland and do not carry out any activities in Scotland would no longer be able to be entered on the Register”.

OSCR

Additional suggestions for factors that should be considered when defining what ‘have and retain a connection to Scotland’ means

8.9 Almost half of respondents noted wider factors that could help to provide evidence of an “active presence” in Scotland. The main factors were reported as:

- Charitable work, operations, services, activities and fundraising undertaken in Scotland. Albeit, it was reported that charitable activity does not need to be exclusively in Scotland and that a charity might have a broader remit.
- That such charitable work, etc has a public benefit or impact on the people of Scotland.

8.10 Additional factors mentioned included, but to a lesser degree:

- Proportion of trustees normally resident in Scotland.
- Charity’s constitution should clearly stipulate its objectives relating to Scotland.
- Senior staff member or workforce in Scotland.
- In the case of a charity with a membership at least five members in Scotland (or 1% of total membership if fewer).
- In the case of a charity which receives donations, it has received at least one donation from a Scottish donor or a Scottish-based company or organisation in the last year (or expects to do so in the year ahead).

- The charity has organised at least one activity in Scotland in the last three years (or, in the case of a new charity, plans to do so within the three years after registration).
- In the case of a charity that makes grants (or plans to do so) it awarded at least one grant in Scotland in the last three years (or plans to do so in the three years ahead).
- Proportion of funding should come from Scotland.

8.11 Finally, in the current and evolving climate (i.e. Covid-19) there was some reference to “physical presence is a changing notion” (e.g. increased home-working, some charities may decide to give up office premises), and that the Scottish Government would need to reflect on this when defining what ‘have and retain a connection to Scotland’ means in practice.

9. Feedback from Events

Context

- 9.1 This section provides a summary of the findings arising from the events facilitated by external stakeholders as part of the Strengthening Charity Law engagement process. There were many common views to those expressed in the online survey as presented in the previous sections of the report. Rather than repeat all similar findings here, this section provides some key messages and wider points raised.

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

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

- 9.2 There was some reference to support for no dispensations at all (i.e. public confidence, transparency and accountability arguments were put forward).
- 9.3 Where there was support for dispensations, it was generally noted that the bar should be set high for any exemptions to full annual reports and accounts publication. There would only be a very small number and most charities would never need to consider it. Guidance is key, and should include a non-exhaustive list of examples for dispensation.
- 9.4 The importance of giving charities an opportunity to discuss the potential for dispensation with OSCR was emphasised as important. Charities could be required to contact OSCR if they met one of the reasons, or if they were in any doubt.
- 9.5 In considering circumstances for dispensation - the safety and security of people and premises was most frequently mentioned. Comments made included:
- Where a name or address could compromise either a trustee's or beneficiary's safety.
 - Charities that worked with vulnerable groups such as migrants, refugees and abuse survivors, and those involved in national security.
 - Some dispensation around protected services/characteristics.
 - Where publication could cause reputational damage to a charity (e.g. resulting from any adverse publicity or personal behaviour of an individual unrelated to their trustee position).
 - A specific concern over the addresses for Independent Examiners was raised (i.e. many Independent Examiners of small charities will use their home addresses).

- Smaller charities with modest incomes (e.g. less than £10,000). An alternative suggestion was that smaller charities could be required to produce a “simpler” set of reports and accounts than larger charities.
- 9.6 A wider viewpoint was that the current income threshold system for publishing accounts of eligible charities could potentially encourage “unscrupulous charities to fail to declare some income in order to prevent their accounts and annual reports being published”. However, it was added that implementing an income threshold for smaller charities to publish basic financial information could mitigate this potential problem.
- 9.7 Additional points or concerns raised regarding full annual reports and accounts publication for all charities, included:
- GDPR concerns – there is a need to protect people and personal information. Public safety and the security of premises are vital.
 - Identity theft concerns over signatures/photographs being published.
 - Potential to be victims of cybercrime.
 - It might become more difficult for charities to attract new board members.
 - It could place smaller charities at a disadvantage (i.e. less resource, limited IT skills) and/or cause additional administrative work.
- 9.8 There should not be more personal information in reports and accounts than is necessary.
- 9.9 Some specific points were raised regarding charities that were also companies, cross-border charities and/or also subject to regulation by another regulator, for example:
- Where a charity is also a company, it was suggested that OSCR should just keep the link to Companies House rather than OSCR also publishing reports/accounts. The link to companies’ accounts on the register should take you to the correct page on the Companies House register rather than the homepage.
 - Cross-border charities and/or those that are companies the Register should also display their other registration numbers.
 - It could be explored whether it is possible to share data between regulators and Companies House (i.e. one upload of accounts could be used).
- 9.10 The process for requesting dispensation should be widely publicised, transparent and clear.

Question 2: If dispensations are made, should some form of annual reports and accounts always be published, for example in a redacted or abbreviated form?

- 9.11 There was strong support for all charities, regardless of size or legal structure, to have their accounts published in some form. There should be full transparency and accountability particularly where charities have accessed public funding. Financial information should be published (e.g. profit and loss, micro accounts, basic accounting, etc).
- 9.12 Various points were raised regarding the redaction or abbreviation of published annual reports and accounts if dispensations are made.
- 9.13 First, it was suggested that redaction could continue for those charities that include personal information in their reports. However, it was noted that there should not be information about vulnerable beneficiaries in the reports (i.e. there should not be more personal information in reports and accounts than is necessary). It was noted, however, that redaction on a case-by-case basis could be resource intensive for OSCR.
- 9.14 Second, grant giving bodies make use of charity accounts and it was noted that redacted accounts pose additional work for both funders (to request unredacted accounts) and for charities (to provide the full information). Over redaction also made accounts more difficult to understand for the reader.
- 9.15 An option of micro accounts for smaller charities (like Companies House) could be considered. Another suggestion was that a comprehensive template for the Trustees Annual Report (or perhaps a simplified version of the SORP or FRSSE for smaller charities) and accounts could be drafted that clearly directed trustees where they should and should not use personal information.
- 9.16 A wider comment was that abbreviated reports and accounts (rather than redaction) could increase public confidence that information was not being hidden.

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

Question 3: What information should be included in an internal database?

- 9.17 First, there needs to be a clear purpose for collecting and using the information held on an internal OSCR database, and clear rules on security, retention, and third party access. Data protection would be of paramount importance.
- 9.18 Second, OSCR would be best placed to decide what information it needs (but it must be clear on the reasons why the information is needed). A risk assessment could be undertaken by OSCR to better understand the minimum data requirements for internal (and external) databases (e.g. the more information collected the more work for OSCR; maintaining databases can be resource intensive).
- 9.19 Some support was expressed for the internal database to hold more detailed/personal information than the public list (**Question 5**). For example, name of each trustee, address, date of birth, email address, telephone number, profession/occupation, designation, date appointed/retired, current and/or previous trusteeships, reason for leaving charity boards were all suggested to varying degrees. It was suggested that this level of detail could help charities from a safeguarding and due diligence perspective.
- 9.20 An alternative suggestion was that name, date of birth, address might be more appropriate. This relates back to points made about essential or minimum requirements.
- 9.21 The information held by OSCR could be similar to that held by Companies House. Or information provided in the trustee declaration form could be a good basis for the information to be included in an internal database of all trustees.
- 9.22 Mission creep must, however, be avoided.
- 9.23 A number of benefits of OSCR having an internal database were highlighted:
- It would strengthen accountability of the charity sector.
 - It would increase public confidence in Scottish charities that OSCR has access to up-to-date information and contact details.
 - OSCR should be able to contact all charity trustees, especially when there is an issue with a dominant chair or other trustee.
 - It could help to mitigate concerns from community representatives around the potential for too much/sensitive information being made publicly available.

9.24 Wider points raised included:

- It could be part of a formal registration as a charity trustee.
- How would the information be verified?
- Do trustee names stay on the register if they are no longer with the charity?
- Will disqualified trustees information be included?
- It would be helpful to capture equalities data.

Question 4: How should the internal database information be kept up to date?

9.25 The importance of keeping information on the internal database up-to-date was considered vital, and that the process for doing so should be manageable for OSCR, the charity sector, and for smaller organisations in particular.

9.26 A process similar to registering a new director appointment with Companies House could be beneficial in keeping an up-to-date record of serving charity trustees. Further, a charity that is also a company limited by guarantee will already need to provide such information for its directors - it was suggested the streamlining of processes could be beneficial.

9.27 Various suggestions were made on how the internal database information could be kept up-to-date by charities:

- As part of the charity annual return process (e.g. via annual communication from OSCR - email/letter - with the annual return containing an update form to trustees with deadline for submission to OSCR (i.e. confirm current and correct or provide updates)).
- An option for charities to keep OSCR up-to-date throughout the year with any changes (e.g. via a login to portal as part of OSCR Online).
- There could be a duty to update details immediately or within a certain timeframe as changes happen.
- Through independent examiners/auditors.

9.28 All trustees could have access to ensure their details are correct and up to date.

9.29 It was reiterated that OSCR would need to make it clear how the information provided would be used (and how long it would be retained for) – as some charities felt that they provided this type of information regularly.

Question 5: What information should be included in a public list of charity trustees?

9.30 A public list would build public trust and help charities with their due diligence.

There was support for information included in a public list of charity trustees to be “basic”, “light-touch” or “limited” compared with the proposed internal database.

For example: name, date of birth, designation, charity office address, charity email address, list of other charitable appointments were again mentioned to varying extents.

9.31 It was also suggested that only trustee names should be made public. This was largely due to potential sensitivities or concerns regarding detailed personal information being made available in the public domain (e.g. personal addresses, many charities/SCIOs are user-led, etc). Further, the level/type of information included in a public list might act as a barrier to trustee recruitment.

9.32 There was support for the database to have a “searchable function” for information on charity trustees to be found easily.

9.33 A question posed was whether there would be a limit on the number of trustees included in a public list per charity (i.e. what about those charities with a large number of trustees?).

Question 6: In what circumstances should there be an exception to being included in a public list?

9.34 The main points raised can be summarised as follows:

- Where publication could put the safety and security of people and premises at risk.
- Concerns were raised about including details of trustees who have experienced abuse or victims of crime being listed on the public register.
- Businesses with a charitable trust might not be keen to share addresses of trustees (e.g. most of whom are business leaders).
- Smaller charities whose trustee home address was the registered office.
- Where discussed, opinions were divided on whether religious or LGBTQI trustees could apply for exemption. Some were in support of an exception, while others believed taking on a trustee role comes with a responsibility to be registered.
- Formal witness protection programmes (if name not changed).
- Trustees of animal welfare charities, etc.

9.35 The process for requesting an exception to being included in a public list should be widely publicised, transparent and clear.

9.36 Limited reference within event notes to support for no exceptions.

Question 7: How long should a disqualified trustee remain on the list?

9.37 The range of views provided included, for example, that:

- Disqualified trustees should remain on the list for as long as their disqualification lasts. Period remaining on the list thereafter should be in line with spent convictions legislation.
- Five years.
- Another viewpoint was that disqualified trustees should remain on the list for a fixed timeframe of six years (i.e. aligns with bankruptcy criteria).
- The Charity Commission in England and Wales has a recommendation of 15 years, however, this might take into consideration the period of record retention with regards to GDPR where the recommendation is six years.
- Ten years.
- Permanently (e.g. for more serious offences).
- Those who are disqualified should not be made available to the public. An FOI could be made to OSCR if required.

9.38 A wider suggestion was for a “scale” to be used to guide how long a disqualified trustee should remain on the list. Length of time could be dependent on the nature of the disqualification (i.e. proportionate to the misdemeanor).

9.39 Wider points raised were that:

- Such a list should be accessible only to charities (rather than the wider public) for the purpose of making an informed decision on trustee recruitment/ensuring existing trustees have not become disqualified (e.g. accessed only via OSCR online).
- Rather than a viewable list of all disqualified trustees, charities should only be able to search by a name and date of birth to return a result of disqualified or not. This could avoid instances of mistaken identity or potential misuse of information.
- A decision review/appeals process should be put in place.
- There could be exceptions for people with criminal records/addictions who are reformed and wish to support charities that provide services for e.g. people with addictions or mental health issues (i.e. life experience argument).

9.40 Questions posed:

- Will OSCR retain a record of disqualified trustees once the names have lapsed from a public register?
- Will consideration be given to removing people from the list at their time of death?
- How would the list be accessed and who would be able to access it?

Question 8: What information should be available in the list?

9.41 A range of views were provided:

- Information in the list should align with that made available on disqualification by Companies House.
- There was some disagreement noted on whether the reason for disqualification should be included on the public list. Some event participants considered this important while others believed that it was only necessary to know whether a disqualification has been imposed.
- A link to the inquiry report should be included.
- Details of charity, name, address and date of birth of trustee, time served on charity board, date of disqualification were all mentioned - but to varying degrees.

9.42 Some concerns were raised that the extent of information on the public list regarding disqualified trustees could be detrimental to other aspects of an individual's life and could affect trustee recruitment. Listing the name of the organisation could negatively impact the charity/SCIO concerned.

9.43 Where there was narrative around trustee "name" only – there was recognition that this had the potential for confusion over people with the same name, leading to negative impacts for "innocent people". A name on its own might not be sufficient.

9.44 Some suggestion that the list should be accessible via OSCR website for charities to vet prospective trustees.

9.45 A wider point was that it should not be a 'Browsable' list, but a 'Searchable' list.

9.46 Wider questions or concerns raised:

- The difference between disqualification and suspension and whether both would be included on the list.
- Whether this information would be flagged up through a PVG check.

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

Question 9: What factors should be considered in defining a ‘senior manager’?

- 9.47 Key points raised were around the difficulty in defining a senior manager. Some organisations might find this more difficult than others, and the term could be “open to interpretation”. A clear definition was considered crucial. It was suggested that OSCR could create a definition in line with the one developed for trustees.
- 9.48 It was largely considered appropriate to identify the person(s) in operational roles and positions of power/influence/decision-making within an organisation (i.e. functions and activities such as finance, HR, strategic and operational control and oversight, subject to the direction of trustees) rather than the title/paid position. For example: Chief Executive Office, Chief Finance Officer, Secretary, Treasurer, any office bearer.
- 9.49 As a wider example – in a volunteer-led charity it was noted that there will be an unofficial leader based on who makes the decisions rather than who has the title of manager.
- 9.50 It was suggested that “persons with significant control” or “persons with a senior role” might be more useful terms than “senior manager”. There was wider reference to legal definitions of persons with significant control that could be used.
- 9.51 Another suggestion was that senior manager could be defined as the most senior paid person in a charity – this would ensure that the proposal accounts for charities of all sizes and provides flexibility where this role could be a CEO, project manager, development manager, coordinator, etc.

9.52 Wider questions or points raised:

- If OSCR has the power to disqualify senior managers within charities then would this change the role/duties of the Trustees to monitor senior managers and reporting to OSCR?
- How would automatic disqualification of individuals in senior management positions in charities interact with employment rights?
- Some suggested that there should be a requirement for all trustees and employees to have a PVG check.

Proposal 4 – A power to issue positive directions to charities

Question 10: If a positive power of direction were to be specific, what areas should be subject to the power, or are there any areas that should not fall within the power?

9.53 It was noted that powers are only as good as the ability to enforce it – a question raised was whether OSCR has the capability and capacity to expand its powers.

9.54 It was noted that other regulators use these types of powers to good effect (e.g. Scottish Housing Regulator).

9.55 One view was that charities are looking for more than “recommendations” from OSCR as these can be “grey and unclear”. If it is just a recommendation then there is no scope for OSCR to check up following the inquiry. Want a ‘must’ rather than a ‘should’ - OSCR should have the power of enforcement to ensure that the charity sector is held to account. An alternative view was that recommendations could simply be made more specific to overcome the issue of grey or unclear recommendations.

9.56 OSCR should only get involved “when it has to and not simply because it has the power to”. Some suggestions that could fall within its remit include:

- Governance.
- Finance and financial controls.
- Health and safety.
- Safeguarding.
- Dealing with non-attendance – be strict in removing trustees who do not turn up at three board meetings consecutively without valid reasons if the governance document states this.
- Some actions that might harm the reputation of the sector or the organisation – e.g. non-financial related crime/conduct that could equally be harmful to the organisation, however, current advice from OSCR is that each organisation needs to use their own constitutional powers to manage those matters and could lead to confusion and mismanagement of serious incidents.
- A positive power of direction that extends to assets and being able to freeze charitable assets and bank accounts. If the organisation is in crisis, OSCR should be able to tell the organisation to appoint new trustees with the appropriate skillsets required.
- A positive direction for the disposal of charity funds and managing accumulated reserves to ensure the correct beneficiaries.
- It would be helpful if OSCR could intervene where there was an internal dispute - this would remove any doubt about what the charity should do.

9.57 There was feedback that OSCR “should not stray” into operational matters of charities (e.g. delivery of a charity’s operational activities, policy development, HR, staffing arrangements/ employment were all mentioned). OSCR should not be involved when it is relevant to trustee duties unless they are not complying with trustee duties (e.g. submitting accounts, updating annual database, responding to legitimate queries).

9.58 Counter to this was feedback that “nothing should be out of scope in terms of what the direction could cover”.

9.59 When a positive direction is issued OSCR should ensure that detailed instruction/guidance is provided to help charities comply.

9.60 There would also need to be mechanisms in place such as:

- The publication of inquiry reports.
- Information-sharing agreements with other key organisations.
- An appeals process to challenge any directions.
- An ability to amend a positive direction if the situation changes.

9.61 Wider points or questions raised:

- How would this interface with other regulators who have these powers e.g. Care Inspectorate?
- Is the issue of no consequences down to no capabilities or power for enforcement?
- Concern over the term “positive direction” - is this the same as special measures? Need to clarify what “positive direction” actually means.

Question 11: How long should a charity have to comply? What should be the consequences of non-compliance with a positive direction?

9.62 A key point raised was the importance of OSCR having sufficient flexibility, and that the length of time a charity should have to comply could depend on the context and factors such as:

- The nature, scale and severity of the issue(s) facing a charity.
- The size and capacity of a charity (i.e. staffing level).

9.63 There was reference to various timescales (e.g. proportionate to the actions required) for example:

- Three months.
- Six months.
- Between six months and one year.

- Between 18-24 months.
- For as long as needed as it is dependent on the direction from OSCR.

9.64 Timescales and progress milestones should be agreed between OSCR and the charity.

9.65 There could be steps alongside issuing a positive direction - either specific instructions of what needed to be complied with and giving charities the opportunity to seek help (e.g. from a financial professional, from a TSI).

9.66 Consequences of non-compliance should be proportionate in line with the nature of the non-compliance so as not to unnecessarily put beneficiaries at potential disadvantage.

9.67 If it is the case that there is non compliance and a reluctance to comply with a positive direction, then this should be classed as a breach of responsibilities/mismanagement (i.e. trustees are not putting the interests of the charity at the forefront), and should be dealt with accordingly (e.g. potential disqualification of trustees).

9.68 If a charity fails to comply with a positive direction after a reasonable timeframe, repeated attempts by OSCR to rectify the issue and support they should lose their charitable status. OSCR should, however, reserve the right to remove the charity from the Register as a "last resort".

9.69 Wider points raised:

- How will organisations balance the ask from OSCR and stick to their governing documents?
- Will this be in line with a charity's constitution?
- What happens about non-compliance in England and Wales?

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

Question 12: What factors need to be considered to define ‘persistent’ failure to submit annual reports and accounts?

- 9.70 There was recognition within the event notes that charities must account for how public funding and donations have been used, and that charities have a responsibility and regulatory obligation/duty to prepare and submit annual reports and accounts.
- 9.71 Persistent failure should be investigated in the first instance. It was noted that this further highlight the importance of OSCR having access to an up-to-date internal database of charity trustees.
- 9.72 It was noted that not providing annual reports and accounts might be a sign of wider governance issues, but that it could also be a misunderstanding or that the charity does not have the skills and experience to deal with the issue it faces.
- 9.73 It is considered important that OSCR strikes the right balance in its approach – “firm” “proportionate”, and with “discretion” in how it applies its powers/rules.
- 9.74 There might be valid mitigating factors and circumstances behind why a charity has not submitted its annual report and accounts. This situation is considered different to “avoidance” of engagement with OSCR, and should be handled accordingly and with “careful balance”. For example, a positive direction could benefit the charity and trustees where they are given time to upskill, seek support and guidance to resolve the issue and move forward.
- 9.75 General support for a “strikes” out approach following repeat offences (e.g. two or three years of failing to submit accounts strikes then out); failing to reply to any direction by OSCR; and failing to get in touch with OSCR to explain any mitigating circumstances. There is a difference between charities/trustees who are failing to acknowledge/engage and those trying to rectify the issue but who face particular challenges/obstacles in doing so.
- 9.76 Failure to respond to reminders/adhere to a position direction would require a written warning before removal is considered. If there is an awareness that the charity is still operational and continues to fail to respond then this would be seen as persistently failing to submit and they should be removed from the register.

“All charities sign declarations at the start and on an annual basis that they understand their legal duties and responsibilities. Where these duties have not been complied with on more than 1 but no more than 2 occasions and where failure to rectify or direction provided have been ignored they should be removed”.

9.77 Wider points raised:

- Guidance should be framed as positive rather than as directions or instructions.
- Could perhaps add ‘under active consideration for removal’.
- The consultation does not make reference to the need for accounts to be compliant (pontifical “loophole” to avoid sanction).
- What would happen to the assets of removed charity?
- Does OSCR have the right to check the accounts of charities that have dissolved?
- What happens if the contact information held is wrong or out-of-date?
- Is this discussion warranted by the actual number of defaulting charities?
- Failure of communication can be a big problem – an internal database of trustees should help with this issue.

Question 13: What steps should OSCR take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

9.78 There is clear and strong support for charities to be given a chance to rectify things – first issue a gentle reminder, if the charity engages fine, if there is no response or they are willfully not providing its annual report and accounts that is broadly considered a different scenario.

9.79 Positive direction would be an option as there may be certain circumstances that has prevented the charity from submitting accounts. This could be a lack of awareness that they are a charity, due to the principal contact moving on or possibly have passed away and new trustees come on board and don't have access to the relevant information they require to comply. They should be issued with a positive direction in this case, and signposted for support and guidance.

9.80 Another suggestion was that a charity that did not submit its annual report and accounts could be issued two warning letters (or variety of contact methods), then a final letter giving deadline for return or removed from the Register.

“A flag system should be introduced on the database for non-contact with the power to remove – No response should start a flag for the charity”

9.81 Providing deadlines is considered helpful – “it gives a lever to get things tied down from trustees, accountants, legal advisors, etc”.

9.82 The repercussions of non-engagement and non-compliance should be made clear from the outset.

- 9.83 A positive power of direction should be used first - then remove. Opportunity for dialogue between OSCR and the charity was considered important. There should be a fair opportunity to rectify the issue and charities given fair warning. Charities must show a willingness to comply in a meaningful manner with the direction.
- 9.84 While some felt that sanctions should always be available to OSCR to use, others noted specific opposition to the use of fines.
- 9.85 OSCR could have the potential to freeze bank accounts while investigations are ongoing.
- 9.86 It was noted that OSCR should also have power to restore charities to the register, where appropriate.

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

Q14: What factors should be considered when defining what ‘have and retain a connection to Scotland’ means? Does this have to require a physical presence in Scotland, such as an office address or trustee address?

- 9.87 There was support for the establishment of fixed criteria and clear messaging and explanation of what organisations need to provide. A right to appeal should be established (and possibly waivers for special circumstances).
- 9.88 There must be someone that can be held accountable by OSCR in OSCR’s jurisdiction.
- 9.89 Some feedback noted that there should be an office or trustees address or registered base in Scotland to ensure OSCR can regulate the charity sector effectively. SCIO’s are required have a principle office or connection in Scotland, and so this should be the case for all charities. Physical presence in terms of a registered address but also a declaration as to where the charity operates.

“What legitimate reason would a charity, with no connection (as defined) to Scotland, have in registering as a 'Scottish Charity'?”

- 9.90 Others noted that a physical link might not be the best measurement of connection with Scotland. The 2019 consultation was felt to have been overtaken by recent events, with a move to more online working as a result of the global pandemic. Further, some examples of “purely online charities” have since emerged.
- 9.91 A registered address or one trustee was generally considered to be insufficient in terms of having and retaining a connection to Scotland – “it has to be a significant presence”.
- 9.92 Mixed views were provided from discussions around whether having a trustee in Scotland would be grounds for registration in Scotland. Some noted that this was not the most useful indicator of a connection with Scotland.
- 9.93 Others felt that a certain quota/percentage of trustees could be required to have a Scottish address (and could include senior staff based in Scotland such as a Chief Executive). A hard measure such as a quota of trustees might be easier for OSCR to administer rather than the “woolier broad connection”.
- 9.94 General agreement that ‘Activities, Beneficiaries and Fundraising’ appear to be the most obvious areas for need to register in Scotland. It was noted that these are the areas where most problems are likely to arise and require intervention from OSCR.
- 9.95 General agreement that ‘Management and Control’ might be another useful indicator of a connection – particularly for organisations whose operations are outwith Scotland (e.g. International Development).
- 9.96 Some agreement organisations shouldn’t be able to register ‘just in case’ they may become active in Scotland at a later date.

9.97 Any loopholes should be closed.

9.98 A number of points were raised:

- Some concern was expressed on behalf of organisations whose position may change routinely (e.g. a pause in their work in Scotland). Would they be required to continually re-register, or would registration period last for a determined period?
- Some grey areas highlighted (e.g. if a grantmaker based outwith Scotland made grants to organisations within Scotland).
- Further clarity was needed on how would this work for overseas charities - especially if the majority of trustees are not in Scotland.
- Is there a record of bodies with no link to Scotland registering with OSCR – a couple of cases; this is more of a preventative measure?
- Are we creating an elaborate set of regulations for a problem that doesn't exist – could OSCR use existing powers to remedy the edge cases?
- What about an organisation that is based in England and fundraises in Scotland to support development work overseas?



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