

Via online survey
19 February 2021

Dear Sir/Madam,

Strengthening Scottish Charity Law Survey

On behalf of ICSA: The Chartered Governance Institute (the Institute) I am pleased to provide feedback on the Strengthening Scottish Charity Law Survey.

The Institute is the international professional body for governance, with more than 125 years' experience and with members in all sectors. Our purpose is defined in our Royal Charter as 'leadership in the effective governance and efficient administration of commerce, industry and public affairs' and we work with regulators and policy-makers to champion high standards of governance, providing qualifications, training and guidance.

We are the professional membership and qualifying body supporting chartered secretaries and governance, risk and compliance professionals in all sectors of the economy. Members are educated in a range of topics including finance, company law, administration and governance, which enables them to add value to any organisation.

The Institute has an extensive pedigree in the governance arena, advising governments and regulators on company law, charity law and governance issues. The breadth and experience of our membership enables the Institute to access a variety of applied experience in order to provide insights into effective practices across a range of organisations. Our members' wealth of expertise and experience has informed our response.

Specific questions raised in the survey**In what circumstances should there be a dispensation to full annual reports and accounts publication?**

In the interests of transparency and accountability and in maintaining trust in the sector, it is important that the public has access to information about a charity's activities and use of charitable funds. The annual report and accounts are a key mechanism for providing this information. Ideally, such documents would be provided by individual charities on their website. Additionally, having the documents on the OSCR website represents another means by which the public can access that information, especially where the annual report and accounts cannot be found easily on the charity's website (if, indeed, they have one).

The Institute acknowledges there are circumstances in which the publication of trustees' names would be inadvisable, perhaps owing to the sensitivity of the area in which the charity operates. However, we are of the view that this argument does not extend to the publication of the charity's report and accounts. The public needs to know what charities are doing to meet their objects and these documents are a vital mechanism for that.



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

Yes, comprehensive accounts of the charity's activities and the expenditure of resources should be publicly available. It is not the Institute's view that dispensations should be a regular occurrence but accept that there may be a need in very specific circumstances related to the nature of the charity's activities. In such cases, there is a need to balance the desire to protect a small number of individuals against ensuring an appropriate level of transparency and accountability for those entities in receipt of a dispensation. As such, the fullest information should be provided in the form of the annual report and accounts about the work of the charity.

Where an organisation seeks, and gains, tax advantages from registering as a charity, there should be a corresponding level of public accountability. The Institute therefore urges the use of dispensations to be carefully considered and any benefits balanced by any potentially adverse impact on the sector in terms of public confidence and trust. Furthermore, any approach should take into account the FATF guidelines to ensure that regulatory measures are suitably robust to prevent and counter abuse of the sector.

All charities should be held to account for the way they raise and apply their resources. A minimum level of information regarding their effectiveness should therefore be available to the public regardless of how they fund their activities (for example, via public fundraising or being reliant on a private donor for all funds). Within company law there is a comprehensive regime for obtaining confidentiality orders for directors and this may be helpful in developing your approach ([Applying to protect your personal information on the Companies House register - GOV.UK \(www.gov.uk\)](#)).

What information should be included in an internal database?

The Institute considers it essential to OSCR fulfilling its role as the regulator of charities in Scotland that it has and maintains an accurate and up-to-date register of trustees.

OSCR should consider collecting the following information for the internal register: name, contact details (other than the chosen registered address of the charity, unless redacted for specific reasons, such as where the charity operates a refuge or other activity that may be subject to potential violence by a group motivated to act against such an entity or activity), date of birth, commencement of trusteeship, and other trusteeships held.

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

The details of a charity's trustees could be confirmed each year as part of the annual return. Additionally, a facility for individual charities to update these details as and when they change would provide OSCR with the most accurate data with which to carry out its regulatory duties and provide the public with the most useful information on the charities in which they are interested. Moreover, if a change of details prompted the provision of new or additional information and guidance from OSCR, this would improve the interaction between the regulator and charities and their trustees. It is also likely to offer the public better insights into how modern charities are governed and managed.

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

The information which is published on the public register need not be particularly detailed and would not cover all of the data held on the internal register. It need not contain, for example, the amount of data published for directors on the Companies House website. It would suffice to provide the names of each trustee for each charity as well as other trusteeships held by each individual to enable transparency as regards conflicts of interest.

These pieces of information are provided on the Charity Commission for England and Wales website. One useful addition – which is currently published by Companies House – is the date on which a post was taken up. This would provide a clear indication of how long a trustee has been in service. This information might be of use to the wider public and those with an interest in how charities are run, specifically relating to the tenure of trustees.



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

While we are in favour of applying the greatest degree of transparency and accountability to details of trusteeships held, we understand that circumstances can exist where providing the identities of trustees on a public register would be inappropriate or might lead to adverse consequences. This might be due, for example, to the nature of the area of the charity's activities. Trustees of charities assisting victims of domestic violence or charities involved in or linked to medical research or family planning, for instance, might benefit from their names being withheld from the public. A similar approach to that used by Companies House might be appropriate, if only to identify good practice that might be appropriate for charities registered in Scotland.

OSCR should define the grounds on which a dispensation might be granted adopting an approach that dispensation will be rarely agreed. Dispensation criteria should include factors such as the work of the charity, the profile of the trustees (age and vulnerability may be of relevance), and take into account the potential risks to individual trustees and the wider public for the dispensation. Examples of what would constitute a successful request would be helpful, including linking the request to the achievement of charitable and strategic aims (a business case or rationale) and an outline as to how long the dispensation is likely to last. It would not be prudent to offer dispensations in perpetuity, but should be subject to regular review to ensure the criteria and business case still remain valid.

Additionally, an appeal process should also be in place to allow trustees to challenge a decision not to grant dispensation. This should be made clear as part of the dispensation application.

How long should a disqualified trustee remain on the list?

The details of the disqualified trustee should be retained for the duration of the disqualification.

What information should be available in the disqualified trustee list?

Similar information to that collected for existing trustees should be captured for those who are disqualified, along with details as to when the disqualification came into effect and when it is due to end. It may also be useful, for regulatory purposes, to categorise the reason for disqualification.

What factors should be considered in defining a 'senior manager'?

Bringing the automatic disqualification criteria into line with that elsewhere in the United Kingdom would be a positive move. It is important to safeguard public trust in the sector by ensuring that those responsible for leading charities are seen as fit to do so and enforcing appropriate restrictions on who may take up trusteeships and senior management roles is a key part of this.

The public rightly expects that the charity sector is protected from those individuals who are not suitable or eligible to run organisations that support some of the most vulnerable in society, and/or rely on public funds. The concern that Scotland might be seen as a 'soft touch' if its criteria for disqualification covered fewer offences is a reasonable one. It is fair to assume that the jurisdiction might be targeted by those who would be unable to take up a position at a charity in England or Wales, for example. Consistency across jurisdictions is clearly a desirable state, both in terms of public understanding of what is expected of trustees and senior managers and also when considering the more specific relevance to charities which operate cross-border.

There may be some concerns that the extended disqualification criteria will present a further obstacle to trusteeship for affected individuals, depriving charities of valuable lived experience. Consequently, a waiver process will be a key mechanism for ensuring that, where appropriate, those with value to add to a charity may still serve, but the public can be reassured that OSCR has applied the correct safeguards.



The definition of a 'senior manager' is likely to be nuanced and may benefit from looking at other sectors and organisations for comparable definitions, especially the NHS and HMRC. We support the extension of the disqualification criteria to those exercising senior management functions within a charity. Senior managers have a more hands-on role within a charity and generally have greater exposure to a charity's assets and beneficiaries than do the trustees. As such, it is essential that they are of the correct character to fulfil that role. It is worth noting, as a related issue, the influence from a governance perspective which some notable chief executives, for example, have had over the decision making within charities which was rightly the preserve of the trustees.

A searchable register of disqualified trustees would be an essential part of enforcing this extension and assisting charities in performing adequate due diligence when recruiting new trustees.

Due consideration needs to be given to employment law matters affecting such a proposal, but looking at the experience of the Charity Commission for England and Wales in their adoption and implementation of this power would be useful in ensuring that such matters are respected.

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?

OSCR would need to give careful thought to the specific direction to be provided and its potential impact not just on the individual charity, but on the wider sector and the general public. In some circumstances a specific power will be most advantageous, but in other situations something more wide ranging would be more appropriate. Any specific power should be confined to the legitimate actions afforded to trustees and the regulator under relevant legislation and should be grounded in a desire to act in the best interests of the charity, the sector and/or to protect the public.

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

Given that trustees are unpaid and may not meet as regularly as required, especially in the current pandemic and with lockdown requirements, it may be necessary to allow a sufficient period of time for them to act on the direction. However, the time allowed should vary according to the seriousness of the issue and the potential dangers to beneficiaries, other stakeholders and the wider public.

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

A recognised pattern of a failure to produce the annual report and accounts, or other statutory or regulatory returns, would easily be identified as persistent. As a minimum, persistent is likely to mean that the charity has not produced annual report and accounts for two consecutive years. However, it could also mean a pattern of intermittent failure over a longer period (such as five years). It would also be useful to align any definition with that applied to defunct or dormant companies registered with Companies House and the criteria it would apply to remove companies from its register.

What steps should the Scottish Charity Regulator (OSCR) take prior to a decision to remove? Should a positive direction to provide accounts always be required first?

We agree that OSCR should have the ability to remove charities from the Register if they fail to fulfil their legal duties to prepare their annual report and accounts. This information is important both in terms of transparency and public trust and OSCR's regulatory function.

The first step must be to ensure that the regulator does have current details of trustees in the form of an appropriate Register. OSCR could then be reasonably confident that its endeavours to obtain annual reports and accounts were directed at the relevant individuals. Issuing a positive direction to prepare accounts would be of limited effectiveness if OSCR does not hold accurate relevant details. Failure to provide these in accordance with the timeframe requested could then lead to removal from the Register or other enforcement actions. Of course, other powers may be necessary in order to remove a charity from the register in exceptional circumstances and where the process above would take too long or present an unacceptable level of risk.



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?

Defining a connection could include a charity that is ‘managed or controlled wholly or mainly’ within Scotland, or occupies land or premises in Scotland and/or carries out activities in ‘any shop or similar premises in Scotland, as detailed in the previous consultation on this topic. For the purposes of establishing what a connection is, it might, for example, be worth considering any activities or services which are not delivered through a ‘shop or similar premises’. There are a variety of methods of providing charitable services which do not require premises of any kind, much less a shop. For example, a charity registered in England and Wales may be collaborating with a charity registered in Scotland to deliver a specific, time-limited project to clients in Scotland. That project may include the transfer of assets from the Scottish charity to the other (via a grant or service level agreement). However, it is unclear as to whether the charity registered in England and Wales would be deemed to have a connection to Scotland for purposes of charity oversight.

Another factor which might warrant consideration is where a charity previously provided services or otherwise operated within Scotland, but for one reason or another is presently, perhaps temporarily, inactive in those activities in Scotland. This may be a charity registered in another jurisdiction but with cross-border activities. Similarly, a cross-border charity may have registered with OSCR in anticipation of extending its activities into Scotland – in a sense, pre-registering. It could be argued, however, that such registration should only take place when the organisation is in a position to undertake such activities.

There are many charities registered in England and Wales which will have a small number of supporters in Scotland, and those supporters may be part of various activities to fundraise or to support the provision of charitable activity locally. However, the charity itself may not have any other formal connection to Scotland, by way of trustee or senior manager or physical office. The questions to be asked are: does the lack of local regulatory oversight present an unacceptable risk to the charity sector in, and people of, Scotland; Would the requirement of such charities without a formal connection to Scotland to register with OSCR be a proportionate response to the potential risks presented; and could the potential risk be better managed by enhanced cross-border co-operation between the different regulators?

I trust the above comments help with the development of Scottish charity law. Should you require any clarification or have questions relating to this submission, please do not hesitate to contact me directly.

Yours faithfully,

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