

DIRECTORY OF SOCIAL CHANGE

INFORMATION AND TRAINING FOR THE VOLUNTARY SECTOR

DSC Response to OSCR's Consultation Invitation to Comment on Targeted Regulation of Scottish Charities

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About the Directory of Social Change

The Directory of Social Change (DSC) has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with thousands of organisations each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations. We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

Summary of main points and recommendations

We have responded to each of the consultation questions in the final section of this document, which follows the sections on background and DSC's general views and interest in this area.

In summary, the key points we want to make in response to this consultation are:

- 1) **The necessity of clear, concise guidance to support the new format annual return** – The new annual return would seem to fulfil the remit of the Scottish regulator in increasing confidence in charities; improving legal compliance; and supporting a more efficient and effective use of resources.

However, accurate and accessible information will only be given in response to the annual return's questions if trustees fully understand their legal obligations. It is essential that guidance is produced alongside the introduction of the new form and separate concise guidance is available to small charities that either requires no further reference to other documentation, or very clearly signposts to further guidance documents. We also consider it essential to provide guidance and/or examples alongside the questions in the form of notes to aid completion.

- 2) **Declarations by trustees e.g. campaigning and providing trustees' details** – We recognise that the OSCR is not asking for a breakdown of spend on campaigning activities, (as the Commission might require) but nevertheless, DSC does not see this as a priority and it is problematic in definitional terms. The declaration that these activities are undertaken can mean further compliance requirements, just as the non-declaration can mean that the trustees are not compliant. Should the requirement be introduced, charity trustees need to be absolutely clear whether or not their activities constitute campaigning and whether this needs to be declared in order to comply with the regulator's requirements. Specific guidance needs to be produced for Scottish charities, with separate information, if appropriate, for smaller charities.

Charity trustees should be clear about which charities will not have their personal details published at any time in the future, this might be women's refuges, certain campaigning charities and others. Also, individual dispensations should be explained, those given to individual trustees who are considered to be in a potentially dangerous situation.

- 3) **Protection of beneficiaries/staff/volunteers/trustees** – Compliance questions should ensure that all beneficiaries are protected including those considered vulnerable and that staff and trustees are included in measures such as DBS checks.
- 4) **Registration procedures** – We know from the activities of the Commission, that with the introduction of model governing documents and guidance on the registration of new charities, registration is in many cases a very quick process with proposed activities being scrutinised and questioned less thoroughly than before. It is thought that if more resources were used at the registration stage, instances of non-compliance and breaches of trust would be fewer.

DSC's interest in responding to the consultation

The Directory of Social Change (DSC) has a vision of an independent voluntary sector at the heart of social change. We believe that the activities of charities and other voluntary organisations are crucial to the health of our society.

Through our publications, courses and conferences, we come in contact with, and scrutinise the annual reports and accounts of thousands of charities each year. The majority are small to medium-sized, rely on volunteers and are constantly struggling to maintain and improve the services they provide.

We are not a membership body. Our public commentary and the policy positions we take are based on clear principles, and are informed by the contact we have with these organisations.

We also undertake campaigns on issues that affect them or which evolve out of our research.

We view our role as that of a 'concerned citizen', acting as a champion on behalf of the voluntary sector in its widest sense. We ask critical questions, challenge the prevailing view, and try to promote debate on issues we consider to be important.

DSC has another particular interest in the publication of charities' reports and accounts. The comprehensive research we undertake on grant-making charities informs our products and services, e.g. books and other publications, subscription websites, bespoke research reports, training, responses to public enquiries, and help, advice and support to charity trustees, staff and beneficiaries.

Through our policy work we have devised a number of policy principles upon which we base our actions, judgements and recommendations. One of our policy principles calls for responsible regulation.

DSC's principle of Responsible Regulation

DSC believes that voluntary activity should be regulated responsibly. Some regulation is necessary to safeguard and maintain the interests of the general public, the beneficiary, and of the organisations and individuals being regulated. However, it should have a demonstrable benefit and should aim to empower and strengthen voluntary activity rather than control it unnecessarily.

We believe that:

- a) **Regulation should be proportionate** – it must strike a balance between perceived risk and intended benefit. It should recognise the diversity of voluntary sector activity and be

developed and applied in a proportionate way.

- b) **Regulation should be appropriate** – it must be informed by the characteristics, capacity, and needs of the organisations and individuals that are being regulated. Insofar as is possible it should be focussed, rather than acting as a blunt instrument that has unintended effects.
- c) **Regulation should be enabling** – it should seek to empower rather than control voluntary activity. The reasons for the regulation and the regulation itself must be properly understood by those institutions which are applying it. It should be accessible and intelligible to those being regulated. It should seek as far as possible to encourage self-regulation rather than focus simply on enforcement.

Responses to the consultation questions

Question 1: We welcome comments on the new questions being posed specifically:

- (a) Are the questions clear and understandable?**
- (b) Is more guidance needed to help understand what the questions mean? – if so, please explain which questions need this.**
- (c) Will the new questions affect the ease of use of the Annual Return?**

(a) The questions are clear and understandable except for:

A1: 'supply changes'. Although not a new question, this term is perhaps ambiguous and should be qualified with examples.

A3: Details of acting trustees. We understand that initially this information will only be used for internal purposes and only accessible to OSCR staff. However, ultimately the names of trustees will be published. Although this is currently available on the Charity Commission for England & Wales' (the Commission) web site, it should be made clear to trustees of Scottish charities (alongside the question in notes on the form), what the ultimate intention is, and that in the interim, their names and the signatures and contact details of independent examiners/auditors will be redacted. We do though agree that names of trustees, except in exceptional circumstances, should be available as in England and Wales.

A6: (*1st bullet point*) 'Provide grants or donations to others'. This could be specifically separated into: 'Provide grants or donations to organisations' and 'Provide grants or donations to individuals'.

(*5th bullet point*) Campaigning. This is important information for trustees to get right. Guidance from government departments on most subjects tends to be necessarily lengthy for clarity but as a result can ironically be less accessible for the lay person; it can often be ignored or forgotten about after the initial compliance. For example the introduction of the requirement to explain public benefit in trustees' reports has in some cases produced a standard paragraph in the annual report stating that the charity has complied with legislation in this respect, rather than describing the year's activities to validate the declaration.

Campaigning is a tricky subject and the legislative requirements of declaring campaigning potentially complex. What counts as campaigning? How does it fit with advocacy, media work, lobbying, promotion of services, policy development, and research which influences public attitudes or perceptions? This would be a headache for charities to negotiate – especially smaller ones. Without a clear understanding of what we want this question to tell us, any comparative data is meaningless.

Charity trustees need to be absolutely clear whether or not they need to declare that campaigning is undertaken in order to comply with the regulator's requirements. In turn, the regulator needs to clearly define what they mean by 'campaigning' in order to enable trustees to make a valid response. The declaration that these activities are undertaken, can mean further compliance requirements, just as the non-declaration can mean that the trustees are not compliant. Specific guidance needs to be produced for Scottish charities, with separate information, if appropriate, for smaller charities. It would assist trustees, particularly those that do not have access to professional advice, to have examples listed, or a concise explanation in the notes alongside the question.

A7: If the regulator is considering asking for details of mixed-motive investments, it could be included here.

For those charities with an income over £25,000

B1 As this is rarely the case, we consider that the response 'It is not possible for our charity to change the governing document' should be preceded by the words 'We consider that'. This would enable the regulator to offer advice where changing the document requires a relatively complex legal process or if it's the case that the trustees simply do not understand how to amend.

B2 We consider it more appropriate to ask: 'How many charity trustee meetings were held in this accounting year?' and 'How many charity trustee meetings are required to be held each year?' with the options listed for both questions.

B3 The responses to these questions are particularly useful for potential funders who often require that these procedures and protocols are in place.

We would suggest that DBS checks for staff and trustees should be included in these questions; and also that procedures and protocols are in place for the employment of trustees/staff and their relatives or firms/employers, for services provided to the charity.

B4 For ease of reference, the question, 'What is the current number of trustees?' should be asked alongside this question.

B5 This needs further clarification. There should be a definition of 'structured' training, for example, does it need to be accredited in any way? This sort of clarification makes it much easier for trustees to declare honestly what they provide in the way of trustee training.

B8 The wording of this question is unclear in that 'connection' is not defined in any way. Again, trustees might not be clear about what a 'connection' constitutes. Further clarification is needed within the form.

C2 This breakdown should include the example of governance costs and also of administration costs. During our research we have found that trustees and others can confuse one with another.

(b) More guidance is needed – see responses to individual questions. Booklets should also be available with separate guidance for small charities.

(c) Although we understand that there are either fewer or the same number of questions, some charities will find the new questions require more resources to respond to and this will prove problematic for some (in particular smaller) charities.

Question 2: As some of the questions are quite different from those previously asked, is there more that the Scottish Charity Regulator could do to support charities in terms of producing guidance or self-help resources?

Please see above. We consider that it is essential that concise information is available and that charity trustees are clear about what they need to declare. This is particularly true for small charities which often not only have no access to professional advice but have few or no staff, all compliance information being collated and reported by just the trustees. For the reasons given at A6 we think it important that there are notes and/or examples given alongside the questions to assist in the completion of the form. Terms need to be clearly defined, not just to enable charities to answer, but for OSCR to get accurate data.

It would be helpful to prepare an FAQ section specifically on issues regarding the changes in reporting. For those with no or little internet access such document should be available in hard copy format.

Question 3: Do you support the retention of a threshold of £25,000 for the requirement of more detailed information?

Yes. Taking into account the OSCR's statistic that 56% of Scottish charities fall below the £25,000 income threshold, we consider it is appropriate to maintain this as it means that the majority will not have the added burden of the new, more complex questions contained in the annual return.

As this threshold is a retention of the current requirement and is in line with the Commission's requirements, it makes for more simplified compliance (and guidance) with cross-border charities. There would appear to be no reason for Scottish and charities elsewhere in the UK to have different thresholds.

Question 4: How can OSCR encourage and support all charities to use online services?

Trustees need the availability of an online tool that is easy to navigate and use. Online submission can not only save time but reduce expenditure and is more environmentally friendly. Trustees that do not appear to be online, i.e. those without an email address, should be contacted directly and individually by post to explain the benefits and encourage the use of online services. For those with an income of less than £25,000, the online services would need to be simplified versions, reflecting the requirement for less detailed information.

OSCR might give some consideration to a 'Sample Annual Return Form' readily available to view and also sent out to those without emails to familiarise themselves as part of the explanatory communication.

It may be useful to look into the reasons why online facilities are not used and take those into consideration when advising the charity trustees of online services. (Information from the Equality Impact Assessment could give an indication of what issues could arise here). Also see comment on Q2

Question 5: Would it be helpful for the Scottish Charity Regulator to provide specific guidance on Trustees' Annual Reports for smaller charities?

Yes. We agree with this proposal without reservation. As has been stated in previous answers, smaller charities often have no staff and no volunteers, many being managed by the trustees alone who might often have other full time occupations. Small charities are also

often local and the risk of fraud is possibly less, trustees being members of a small community.

Smaller charities' trustees need to be fully aware of what they need to do to comply and also what is *not* required by the regulator. Guidance should be produced which is tailored for smaller charities and where the introductory notes make it clear that they do not have to refer to another booklet/guidance information, if that is at all possible.

Question 6: Do you agree with the proposal to publish accounts for all charities, beginning with SCIOs and charities with income of £25,000 or more?

Yes. Yes, we would back this initiative again, without reservation. It encourages transparency and openness about a charity's activities and the sector in general, while maintaining a proportionate approach.

We consider that the publication of charities' accounts by OSCR is fundamentally important and long overdue. There would seem to be no good reason for not doing this.

DSC's research team scrutinises, on a daily basis, the accounts of charities - thousands over the course of a year. The availability of the accounts on the Commission's website is of benefit to the public, fundraisers, researchers, grant-makers, the sector and all stakeholders. We consider that charities with an income of less than £25,000 have fewer activities, fewer (sometimes no) staff and volunteers and often have a very close-knit trustee body with a tight rein on activities, expenditure and governance. Although it is difficult to draw a line under a specific amount of income, it seems appropriate, for the sake of transparency and for the detection of fraud or negligence for this to be set at this relatively low level. It is important that the threshold is based on income rather than expenditure.

SCIOs, before the introduction of this legal structure, would often have needed the framework of a charitable company limited by guarantee. This indicates that the charity has a more complex nature with diverse activities and often the employment of staff and volunteers. As it is the case that previously these charities would have had to submit accounts to Companies House and the OSCR, it is prudent that the regulator requires all SCIOs to submit without an income threshold, in particular for the prevention of mismanagement, negligence or fraud.

Question 7: We have given examples of the benefits we expect to achieve from publishing accounts. Are there any others you would highlight or any risks that we should consider?

DSC has campaigned for transparency and openness by charities and charity trustees for many years. This benefits our own beneficiaries directly when they are seeking funding as we produce guides, (based inter alia on published charity accounts), which detail how much a grant-making charity gives and to which charities it gives. This allows fundraisers to better target their approaches to grant-making charities.

It benefits the public enabling them to see where income comes from and how much is spent and on what activities. This is useful for both public confidence and also potential donors. It benefits the regulator enabling it to scrutinise accounts more quickly regarding the application of charitable funds etc.

It benefits grant-makers in making decisions on which charities they choose to fund.

It benefits researchers and people with a public policy interest if more data is accessible and can be analysed, to investigate the trends and characteristics of the sector.

It also benefits the trustees themselves. In understanding and complying with the law as regards reporting, trustees not only make their activities more transparent for others but benefit from the knowledge that they are meeting their responsibilities as custodians of public funds.

Question 8: Would you view published accounts?

Yes. The DSC research team scrutinises the accounts of thousands of grant-making charities each year in order to meet part of its commitments to its beneficiaries. We understand the challenges that charities, especially the smaller charities, face and what helps them to achieve.

The publication of accounts on the Scottish Charities Register will only improve this activity and the services we provide, which in turn helps our beneficiaries to access funding more easily and effectively, develop as organisations and meet the needs of their own beneficiaries.

Question 9: What benefits and risks would you highlight to OSCR when considering the development of a trustee database?

Benefits:

This facility could prove useful for charities looking for funding enabling them to see what other charities, if any, a trustee is responsible for.

Equally, it could be useful to grant-makers when deciding on which charities it proposes to fund.

The development of a trustee database would clearly help with detecting trustees who have been removed from acting as a trustee (and particularly at the registration stage). This includes trustees who have been suspended or whose charity/ies' assets have been frozen.

Risks:

This may deter potential trustees from applying for/remaining in a post on the trustee body. We note that initially this information will be redacted, however there is the possibility that ultimately names will be published.

It is also noted that there are difficulties with compliance of this requirement centring around the Data Protection Act 1998 and Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) and clearly it would be inappropriate to ever disclose trustees' names where this would put them in potential danger and also for charities such as women's refuges, and possibly some campaigning charities and others, where this information should remain confidential between the trustees and the regulator.

The Commission has long-established procedures in place for dispensations and these should be mirrored in Scotland.

Question 10: Do you think the information stated above is appropriate for OSCR to collect and use for the purposes stated?

Yes. Public confidence in charities is essential for the continuance, development and improvement of the charitable sector. As trustees have the ultimate responsibility for the administration and management of charities, it is important that the public, and

agencies/stakeholders, can easily obtain information regarding the trustees and a charity's activities.

Trusteeship gives a certain standing in the community/society and with this comes accountability. Subject to certain exceptions, e.g. see the response to question 9, the publication of information makes this accountability more transparent.

It should be made clear what information will be shared and to whom it will be available before the requirement is enforced.

Question 11: Do you foresee any difficulties with collecting this information?

Yes. Those charities which already fail to comply, will not be encouraged to comply. This is an opportunity for the regulator to outline the benefits (to many) of greater transparency while also clearly explaining the sanctions for non-compliance.

As this is a new compliance requirement, some trustees might feel that the publication of certain information, in particular personal details is not what they signed up for. There may also be many unforeseen and genuine reasons why this would cause difficulties with the result that some trustees resign and those considering trusteeship are deterred. The regulator needs to make it clear that home addresses (and dates of birth) will never be published, nor the names of those given dispensations.

Question 12: Do you agree that the Scottish Charity Regulator should publish charity trustee names on the Scottish Charity Register?

Yes. Transparency; accountability; contributing to public confidence; determining whether trustees are suitable. All provided certain exceptions are made to protect those trustees in genuinely vulnerable positions.

Question 13: Do you think the Scottish Charity Regulator should introduce Serious Incident Reporting?

Yes. We believe that the overwhelming majority of charity trustees carry out their duties in the best interests of their charity in a responsible, effective and compliant way and that fraud, negligence and mismanagement are rare in relation to the number of charities registered either with the OSCR or the Commission.

In order to protect the interests and reputations of this majority and more importantly the charities for which they are responsible, it is important that regulators have protocols in place to deal with breaches of trust of whatever nature. However, we do have some misgivings. Is every charity going to need a safeguarding policy? Also, reporting 'suspicions' is pretty broadly drawn and potentially problematic. What is the threshold where a suspicion or allegation needs to be reported? This is not clear.

Question 14: Are there any further serious incidents that should be included in the list outlined?

We would suggest that the list of 'serious incidents' should include **all** beneficiaries, with particular reference to those who are considered vulnerable.

We would also suggest that of the numbers 1 to 9, no. 5 includes 'staff' and should read: 'A person disqualified from acting as a trustee has been or is currently acting as a trustee or member of staff of the charity'.

No. 7 should perhaps also include staff as in some charities former users of the services might be employed by the charity for their personal experience and valuable contribution.

Explanatory note 7.2. Trustees should also explain any action that has been taken, *or is proposed*. The provision regarding further inquiry should include a reference to beneficiaries/staff as well as assets that are at risk.

Explanatory note 7.3. The annual return should include a question here regarding the structure of the charity and confirming that there is a direct line of reporting between senior staff and the trustee body which ensures trustees are aware of the state of the charity's affairs on a very regular basis.

Regarding all listed incidents it might be useful to have more specific guidance on the level of knowledge required for each, as the non-compliance with the requirement may be classified as an offence. Currently the words used include 'known', 'suspicion', 'alleged' or 'unverified'. If the trustees are encouraged to report at a level of suspicion, it should be clearly stated at what level.