

A Consultation on the Future of Land Reform in Scotland

1. Introduction

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') as a Non-Ministerial Department (NMD) forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 23,500 charities registered in Scotland.

Our approach as regulator is to be positive, preventative and proportionate. Our strategic objectives and their link to our statutory functions are set out in our [Corporate Plan](#). Underpinning all we do (and therefore our response to this consultation) is our overall vision of “**charities you can trust and that provide public benefit**”.

The consultation on the Future of Land Reform outlines a series of consultation questions covering a number of areas. OSCR's response is specifically on: **Proposal 6: Duty of community engagement on charitable trustees when taking decision on land management** and our response covers the four questions asked.

2. Consultation response

2.1 Question 20: Do you think a trustee of a charity should be required to engage with the local community before taking a decision on the management, use or transfer of land under the charity's control?

OSCR currently regulates over 23,500 charities, and this will include landowning charities of varying types including Universities, conservation charities, trusts and churches. The duty proposed is that charity trustees must when considering the management, use, or transfer of any land under the charity's control, engage with the local community and consider the potential impact on the local community before taking any decision. Charity trustee annual reports and accounts do not require charities to specify what kind of heritable property they hold, and OSCR does not collect specific data on landowning charities. We cannot therefore provide an exact figure for how many charities will be impacted by the proposed duty.

The duty proposed is one on the trustees of charities, and trustees already have a number of other general and specific duties imposed on them by section 66 of the 2005 Act. Their fundamental duty is to act in the interests of the charity. More specifically they must (among other things):

- ensure the charity acts consistently with its purposes

- act with the care and diligence reasonably to be expected of someone managing the affairs of another person.

The 2005 Act provides that these duties are without prejudice to any other duties incumbent on a charity trustee

OSCR's view is that it is clearly desirable for charity trustees to engage with stakeholders on decisions impacting on them and we would regard this as best practice for charity trustees. The proposed duty is specific to landowning charities, but charity trustee engagement with stakeholders in other situations is something we would regard as equally important, and would encourage as best practice. Feedback suggests many charities already do this.

2.2 Question 21: What do you think the advantages and disadvantages would be?

2.2.1 Policy intention & legislative effectiveness

The policy intention is to improve transparency and accountability in land ownership and ensure charities engage with the communities in their areas of landholding. As stated above, we support this general aspiration which is consistent with good governance. We have no evidence about the extent of any such problem - where recent concerns have been raised with OSCR in respect of landowning charities, these have been more in respect specifically of openness of membership of such charities (we did not, incidentally, find that there was misconduct in relation to these cases). We would also note that guidance may also be an effective way of achieving the policy aims: a duty applying across what could be a small number of landowning charities of variable type may be difficult to enforce.

It is also not clear from the proposal whether the intention is to impose the duty through an amendment to section 66 of the 2005 Act, or as a standalone duty in a Land Reform Act. If the duty was provided for in some other enactment, such as a Land Reform Act, we are concerned that we would in each case require to establish our standing to deal with it in terms of the existing 2005 Act trustee duties. OSCR's view is that, if it is decided to proceed with the proposal for charities, if OSCR has to enforce this new duty, this would be best done through an amendment to section 66 of the 2005 Act to add an additional duty on trustees. This would be the most effective way to establish OSCR's powers to deal with such issues. However as detailed in response to question 23 below our current powers of enforcement may not secure the outcome Ministers wish to achieve.

2.2.2 OSCR Resource Impact

As the duty is one on charity trustees it would suggest that OSCR could be responsible for its enforcement. If so, this will be an additional area of work for OSCR, and although the number of concerns raised may not be significant, it could prove a complex area of inquiry. It will also most likely involve engagement activity and specific guidance. Together this could have a substantial financial impact on OSCR both in terms of staff time and possible legal costs depending on how far inquiries are taken.

2.2.3 Charity and community interests

However the proposed duty were to be enacted, any decision by OSCR as to whether a breach of the new duty constituted misconduct in a particular case would require us to balance what was required of trustees under that duty against what was required of them under the existing duties. For example, one issue that may arise is where a charity engages with the community, but the interests (objectives) of the community do not align with the charity's purposes. Section 66 of the 2005 Act states that trustees must work in the interests of the charity, so although they may comply with a duty to engage, the decision subsequently taken may not be supported by the community, but the charity trustees believe it is in the interests of the charity and is consistent with their purposes. If engagement has taken place and views considered will this be enough to fulfil the duty? Examples where conflict of this nature may arise are in relation to conservation charities, where a purpose prioritising biodiversity in a particular area may be genuinely hard to reconcile with agricultural or development priorities in a particular community.

2.3 Question 22: How should community be defined?

The question asks how "community" should be defined, however for this duty to be workable, consideration should also be given to the definitions of "engagement" and "management of land".

2.3.1 Community

"Community" is an important term in this duty and needs to be defined so charities are clear to whom they owe the duty of community engagement. No definition is outlined in the consultation, but existing definitions in legislation may be an option.

For charities the term "community" can be wide ranging and will vary by charity; for some it may even be defined in their governing document. This duty is specific to land ownership, so we would expect the definition to refer to the extent and scale of land owned by the charity and give trustees some discretion to reasonably consider the extent of the impact in terms of the geographical areas. Alternatively the duty could be to engage with bodies which are representative of the local community and the Community Empowerment Bill and the Land Reform (Scotland) Act 2003 provide definitions of "community bodies" which could be considered.

2.3.2 Engagement

"Engagement" is another term where statutory definition would be highly desirable. While it may be known that engagement is the process of involving people in decisions that may impact them, there are differing levels and the extent of appropriate engagement will differ on a case by case basis.

The National Standards for Community Engagement is one reference that can be used in setting the definition, but it is important that any definition is tested as part of the legislative consultative process to ensure it is understood by charities and workable for enforcement purposes.

It may also be that “engagement” is not the most suitable term to use and “consult” would be better. The duty to “consult” is used in other legislation including the 2005 Act where there is a requirement in section 9 for OSCR to consult on Charity Test guidance with representatives of the charitable sector and such persons as it sees fit.

2.3.3 Management

“Management” is the final term we consider should be defined. The duty asks charity trustees to engage on matters including the “management, use or transfer” of any land under the charity’s control. The “Management” of land could entail a wide range of decisions, for the duty to be workable it would be helpful to know what types of decisions this duty covers.

2.4 **Question 23:** What remedies should be available should a trustee of a charity fail to engage appropriately with the local community?

As previously noted the duty suggests that OSCR could be the body responsible for enforcing this duty.

If dealing with a case of this nature we would have to consider whether the charity trustees by not engaging had not complied with their other duties outlined in section 66 of the 2005 Act, and we would open an inquiry under section 28.

If following an inquiry we concluded there was a breach of charity trustee duties, the remedies available would be our powers set out in section 31 (4), (6) and (7) of the 2005 Act. This includes suspending any person connected in the management and control of the charity (including a charity trustee) and giving the charity a direction to restrict the transactions or the payments that may be made in the administration of the charity without OSCR’s consent. Any action we do take would have to be detailed in an inquiry report and would be published.

OSCR can also apply to the Court of Session for certain other or further actions to be taken. These actions include temporarily or permanently interdicting the charity from taking prescribed actions, appointing a judicial factor to manage the charity’s affairs, appointing a trustee to a charitable trust, suspending or removing a trustee of the charity or freezing its bank account and property.

The question is whether these remedies will achieve the intention of the duty; engagement with local communities. OSCR does not at present have positive powers to direct charities to take particular actions (though we have previously noted that we would regard such powers as being helpful for dealing with some circumstances of misconduct). Where we found there had been a failure to engage, we could not direct the charity trustees to engage further with communities. Nor could we direct a charity to revoke a decision it had taken as a result of lack of, or flawed engagement with a community.

2.5 Conclusion

OSCR welcomes the opportunity to respond to this consultation. OSCR supports the general principle of charity trustee engagement with stakeholders on issues that impact them and agree the importance of accountability and transparency, viewing these as key drivers towards public trust in charities. In this response however we have outlined possible issues in relation to the duties alignment with other charity trustee duties stated in the 2005 Act, the definition of terms used in the duty and the remedies open to OSCR should we be the body responsible for the duties enforcement. If you have any questions about our response please contact Nicola McBain (Engagement Manager, Policy and Partnerships) at nicola.mcbain@oscr.org.uk.