

Consultation Response

Consultation on Improving transparency in land ownership in Scotland: a consultation on controlling interests in land

Response from the Scottish Charity Regulator

1. Background

1.1 The Scottish Charity Regulator

The Office of the Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Department forming part of the Scottish Administration. OSCR is the registrar and regulator of charities in Scotland. There are currently over 24,000 charities registered in Scotland.

2. Consultation response

In terms of our response to this consultation we have focused on Workstream I: Defining controlling interest. The two main questions which underlie the notion of ‘controlling interest’ in landowners and tenants are:

- Who is in control of the decision-making in relation to the land in question?
- Who benefits financially from, and takes financial risks, in relation to the land in question?

2.1 Make-up of the Scottish Charity sector

OSCR currently regulates over 24,000 charities, with landowning charities of varying types including Universities, conservation charities, charities holding land under the community ‘right-to-buy’, trusts and churches. It is not possible to identify how many of the 24,000 charities own land or have long-term leases on land and property in Scotland. Land will often have been held in trust by charities continuously for long periods and may therefore be less likely to appear in the Land Register.

The main types of legal form or structure for Scottish charities are:

Legal form	Percentage of charities
Unincorporated associations	49%
Companies	20%
Trusts	15%
Scottish Charitable Incorporated Organisation (SCIOs)	9%

However, it should be noted that charities use other legal forms which will also be caught by the proposed regulations, namely: Community Benefit Society, Registered Society and Statutory Corporation.

2.2 Decision making in charities

In charity law the charity trustees are the people in management and control of the charity. However, the powers of charity trustees to hold title to land and exercise control over land differ across the various legal forms::

- a. An unincorporated association cannot hold land in its own right. Where there is land for the use of the charity, the charity trustees may as individuals hold the land in trust for the charity's purposes. In other cases, a separate body of trustees may hold the land in trust for the charity's purposes. An example of this would be the Church of Scotland General Trustees who hold heritable property on behalf of some individual Church of Scotland parishes. In many village hall charities the management committee (trustees) will be in control of the day to day decision making, but the heritable property may be vested in an entirely separate body of property trustees.
- b. In charitable trusts, the trustees are in day to day control of the charity including making decisions on heritable property. However, the trust deed will often constrain the powers of trustees to dispose of heritable property.
- c. In charitable companies (usually limited by guarantee) the directors (charity trustees) will be in control of the day to day decision making. The Articles of Association will determine the role of the members in respect of any heritable property but this is usually limited to determining how remaining property will be dealt with on wind up. Members of charitable companies will usually be natural persons, sometimes large numbers of them. It is less usual for bodies corporate to be members of charities. Where this is the case, the bodies will often be other charities, local authorities, public bodies, or in some cases Scottish Ministers.
- d. In SCIO's once again the charity trustees will be in control of the day to day decision making. There are two structures available for the SCIO; a two tier and single tier. The two tier is similar to that of a company by limited guarantee, where it is the membership of the organisation that appoint trustees and may have some powers of control in relation to disposal of heritable property. The single tier structure is similar to a trust in that trustees appoint new trustees and don't have to answer to a wider body.

In their dealing with charity property all charity trustees are under a general duty to act in the interest of the charity (section 66 of the 2005 Act).

2.3 Financial benefits and risks

All the assets of a charity (everything a charity owns; property, money, equipment, including heritable property (such as land and buildings and rights attached to it) must only be used for the charitable purposes for which the charity is established.

In all charities it should be the charity and its beneficiaries (either the public at large or a section of it) who will benefit from the land in question either through revenue raised from the land or by using the land to undertake its charitable activities. In many cases narrowing down individuals that benefit financially from the land in question maybe particularly onerous, if not impossible.

In order to obtain charitable status a body must provide public benefit in furtherance of its charitable purposes; once a charity is on the Scottish Charity Register it is subject to our regulation (section 8 of the 2005 Act). Charity trustees or members as private individuals may only benefit incidentally from the activities of a charity.

It is important to note therefore that in the case of charity trustees in a charity owning heritable property, control of the property does not imply beneficial ownership of it.

2.4 Practicalities and proportionality

We understand the aim of improving transparency in land ownership and the intentions behind the regulations. However, we would be concerned if questions of proportionality were to be overlooked in the drafting of the regulations.

- We would particularly stress the size and income profile of the Scottish charity sector. Of the 24,000 charities in Scotland, 52% have an income of less than £25,000, and the vast majority of charity trustees serve unpaid. While there are large charities which hold significant amounts of heritable property, more typical are the village halls, churches and scouting and guiding associations, which hold one or two buildings where charitable activities are carried out.
- We are concerned that the proposal for a register of controlling interests adds to the burden of regulation and reporting for charity trustees who may have to register with Registers of Scotland as well as with OSCR and possibly other registrars and regulators. This is particularly unfortunate in the case of SCIOs, where one of the major policy drivers for introducing this legal form was to remove multiple reporting by providing a single regulator and registrar for the new legal form.
- We are also concerned about the cumulative impact of the proposed regulations and other legislative requirements currently in progress, in particular the Fourth Money Laundering Directive (4MLD) and People with Significant Control (PSC

register), which in future are likely to include SCIOs as well as charitable companies. There is major potential for confusion between these initiatives and the proposed Register of Controlling Interests in land. This could be compounded if the definition of persons with a controlling interest in land were to differ significantly from that used by the PSC Register, although we note this is not Scottish Government's intention.

- We would note that existing regulation already provides for a greater degree of transparency for charitable holders of heritable property: under section 23 of the 2005 Act, charities are required to supply a copy of their constitution and/or the latest examined or audited accounts to anyone who makes a reasonable request for them. We are also publishing online the accounts of all SCIOs, and of other charities with an annual income of at least £25,000.

2.5 Compliance

Whatever the eventual definition or reporting mechanism, we are concerned about likely levels of awareness and understanding of this issue among charity trustees and the charitable sector generally. Deciding who has a controlling interest in land may not be particularly straightforward. Clear guidance would be required with examples to support charities. If not, compliance could be an issue.

Finally, as an aside, for the purposes of the fulfilment of our own regulatory duties it would be beneficial if the Land Register did detail, when looking at unincorporated bodies (trusts and unincorporated associations), which charity the individuals are holding the property on behalf of so that a land register search could be done against the charity name.

3. Conclusion

OSCR has welcomed the opportunity to respond to this consultation and looks forward to the development of the regulations. Given the potential impact of the draft regulations on many charities it is important that OSCR and the Scottish charitable sector continue to be consulted as this area develops.

Should you wish to discuss any aspect of the response please contact:

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