

Consultation Response

Consultation: GDPR consent guidance

Response from the Scottish Charity Regulator

1. Background

1.1 The Scottish Charity Regulator

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.

1.2 The Scottish charity sector

Of the 24,000 charities on the Scottish Charity Register, **54% have an income of less than £25,000**, 30% of all Scottish charities have an income of less than £5000 and 18% of all charities have an income of less than £2000. The vast majority of charity trustees serve as unpaid volunteers.

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%

Unlike charity law in England and Wales there is no financial threshold for charity registration in Scotland, nor are there any exemptions or exceptions. To be a charity in Scotland a body must be on the Scottish Charity Register.

In practice this means Scottish charities are often very small, completely voluntary led organisations. The size and scope of the Scottish charity sector is very different to that in England and Wales.

2. Consultation response

Our consultation response focuses on the potential impact to the Scottish Charity sector in relation to direct marketing and fundraising. Charities will be impacted by the introduction of GDPR in many other ways and to differing degrees depending on the activities of the individual charity, but for the purposes of this short consultation OSCR's concern is how easy the guidance will be for small and medium charities to understand in relation to their fundraising activities.

As the Scottish Charity Regulator we are concerned with charity trustees understanding and fulfilling their trustee duties as set out in section 66 the 2005 Act. [Our Guidance and good practice for Charity Trustees](#) sets out the practical application of these duties, the overarching duty being to act in the interests of the charity. The 2005 Act also sets out specific duties in relation to the fundraising activities of charities.

We welcome the opt in examples provided in the draft guidance and would encourage the ICO to either provide more examples for different scenarios or produce separate (short) guidance on opt in methods.

As Regulator we are aware that many small charities struggle to understand existing data protection requirements and are unlikely to be prepared for GDPR. We welcome the awareness raising campaign that the ICO Scotland office has been doing with the Scottish Council for Voluntary Organisations (SCVO) and hope that this kind of targeted work will continue in the future.

We understand that data protection is principles based legislation and applies to the processing of personal data by any data controller. However, we would highlight OSCR's proportionate approach to assessing compliance with the 2005 Act, taking into consideration the size and nature of the charity as well as the legal duty for charity trustees to act in the best interests of the charity. Acting in the best interests of the charity and its beneficiaries can sometimes (on the surface) seem at odds with other legal requirements.

We would question whether the use of the phrase 'granular' throughout the guidance is helpful. Granular in this context is not plain language and some may not understand what this means in practice. We wonder if separate or specific consent would be a more meaningful description.

OSCR would welcome guidance targeted at small organisations, not just charities, and would be willing to assist the ICO in producing guidance for small charities.

2.1 Fundraising Preference Service

We are concerned about the ICO's interpretation of the proposed Fundraising Preference Service (FPS) provided as an example at the end of the guidance:

'Example

The Fundraising Regulator has set up the Fundraising Preference Service (FPS). The FPS operates as a sector-wide withdrawal of consent to charity fundraising. If an individual wishes to stop receiving marketing from charities, they can use the FPS to withdraw consent from all charities at once.'

We understand that this is not the approach the Fundraising Regulator intends to take and that individuals will select specific named charities rather than the FPS being blanket opt out from all charities, which would put the charity sector at a disadvantage compared to others.

The FPS will apply to charities registered in England and Wales, not Scottish **only** charities. Part of the reason for that decision was the existence of established preference services, namely TPS and MPS, and the existing rights afforded under the Data Protection Act 1998 and the Privacy and Electronic Communications (EC Directive) Regulations 2003. Further detail on the position can be found at: <http://www.scvo.org.uk/media-release/scottish-fundraising-working-group-recommends-that-charities-in-scotland-do-not-use-fundraising-preference-service/>.

Therefore this example is misleading in its scope as the FPS will not apply to **Scottish only registered charities** although it will apply to the majority¹ of charities registered both with OSCR and with the Charity Commission for England and Wales (known as Cross-Border charities). There are currently 1040 Cross-Border charities, which includes those the ICO have taken action on.

We understand the ICO has previously stated that it views an FPS registration as a request under Section 11 of the DPA to cease processing personal data for direct marketing purposes. OSCR would be interested to explore how this relates to 'mistaken' FPS registrations for Scottish charities.

3. Conclusion

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

¹ There are a small number of cross-border charities for whom OSCR is the lead regulator, who will not be caught by FPS despite registration in England and Wales.