

OSCR

The Scottish Charity Regulator

1. Background

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) as a Non-Ministerial Office and part of the Scottish Administration. We are independent of Scottish Government and report directly to the Scottish Parliament.

We are the independent regulator and registrar for around 25,000 Scottish charities including community groups, religious charities, schools, universities, grant-giving charities and major care providers. Our work as Regulator ultimately supports public trust and confidence in charities.

2. OSCR's response

We welcome the opportunity to submit our views on the Redress for Survivors (Historical Child Abuse in Care) (Scotland) Bill. We also welcome the engagement we have had with Scottish Government to date as the Bill has been crafted.

We fully understand the desire to remove any real or perceived barriers faced by charities who wish to participate in the scheme, and appreciate the need to address the harms of the past.

However, we have some concerns and comments. We will focus on sections 14, 15 and 45 of the Bill:

- Section 14 applies where a charity makes a financial contribution to the Redress Scheme and sets out how such a contribution should be treated.
- Section 15 gives Scottish Ministers the power to make regulations regarding charities' use of restricted funds to make financial contributions to the Redress Scheme.
- Section 45 provides that, in order to receive a redress payment under the Redress Scheme, an applicant must agree to abandon any relevant civil proceedings, and to waive their right to raise such proceedings in the future.

We have also set out our response to the specific questions posed in the Call for Views where relevant.

2.1 Section 14

Charity trustees have legal duties under the Charities and Trustee Investment (Scotland) Act 2005 ("2005 Act"). These duties include the duty to act in the interests

of the charity and to act with the care and diligence that is reasonable to expect of someone managing the affairs of another person.

We have some concerns that the effect of the provisions at section 14 might undermine charity trustee's duties as set out in the 2005 Act. For example charity trustees, following detailed consideration of the impact on their charitable activities, might reach the view that, on balance, a significant contribution to the Redress Scheme is not in the interests of the charity due to the adverse impact it might have on current and future services and beneficiaries. However, given the nature of these provisions charity trustees may feel compelled to do so. Should this be the result this could undermine the voluntary nature of the scheme.

We have offered to assist SG in producing guidance for charities on what the regulations mean in practice and how they interact with the 2005 Act and trustee duties. This is a complex area and the ability to explain trustee duties and OSCR's role in this context should provide reassurance to charities – we are not proposing that this should be statutory guidance.

2.2 Section 15

Restricted funds

In our view, the proposed use of restricted funds to contribute to the Redress Scheme raises some fundamental issues. Restricted funds are given to a charity for a specific purpose – sometimes to deliver a special project or a distinct piece of work or to be used only for one charitable purpose where the charity has more than one. The person or organisation giving those funds has done so on the understanding that the charity will use the funds for that reason and no other.

There is a major possible unintended consequence. Legislating to remove donor conditions on restricted funds and enabling them to be used in a manner which does not further the charity's purposes may affect donor, funder and public confidence in charities. Legislating in this way may undermine the fundamental principle of trust that underpins charitable giving and could impact on future donations –

not just for the charities covered by the Redress Scheme but more widely. Such an unintended consequence would be extremely unfortunate given the perilous financial position many charities currently find themselves in.

Legislating to remove donor conditions in the manner proposed in the Redress Bill contradicts and could also be seen to undermine existing charity law. The Charities Restricted Funds Reorganisation (Scotland) Regulations 2012 sets out the clear policy intention for the reorganisation of restricted funds. This is to enable the resources of these funds to be applied to better effect for the charity's purposes only where it is not possible to ascertain the donor's wishes. In the majority of cases

payments to the Redress Scheme will not necessarily further the charity's stated purposes.

Charity trustees have an overriding legal duty to act in the interests of their charity. Whilst providing a statutory basis to enable restricted funds to be used for this purpose may allow charity trustees to consider larger redress contributions it does not (and indeed should not) compel them to do so. In making such a decision the charity trustees must take into account the interests of the charity, be they financial, operational or reputational, in the present context and longer term.

The voluntary nature of a contribution to the Redress Scheme may lose further weight if there is a statutory basis for removing donor conditions and ultimately a charity is faced with no alternative and feels compelled to look to their restricted funds in order to contribute.

In addition, it is important to seek clarity about what such regulations would mean for cross-border charities (that is, charities established under England and Wales law, but registered in Scotland).

There is also potential to open up a major difference in how restricted funds of Scottish charities are treated compared to those in England and Wales or any other jurisdiction.

Current stress on charities

Our recent COVID-19 impact research shows that 85% of charities report some level of threat to their financial viability, with one in five charities reporting that this is a critical threat for them. This figure increases for those working in the area of children and families.

Fundraising capacity and service delivery across the charity sector have been severely impacted. While charities are working hard to adapt, there is no doubt that as the restrictions continue, so many charities will struggle to raise finance and, for many, to respond to the rising demand in their sectors. The longer-term impacts could be serious, particularly when funds for the recovery given by government and independent sources come to an end.

In this environment significant redress contributions from reserves or restricted funds may put charities in a very difficult position, leaving current beneficiaries vulnerable and exacerbating the strain on other third sector organisations

2.3 Section 45

We consider the requirement for any applicant to sign the specified waiver to be extremely important for charities. As noted above, charity trustees must act in the interests of the charity in any decision they make about contributing to the Redress Scheme. When making such a decision they need to consider the whole breadth of

their charity's operations, including the impact of payments on current and future vulnerable beneficiaries. Without the certainty that a waiver could provide, it would be more difficult for charities to commit to a significant contribution, as there would still be a risk of awards of damages being made against them by the Courts. If the charity did not have relevant insurance cover, these payments would have to be made from the charity's reserves and this could have a detrimental effect on the charity, its services, and therefore its beneficiaries.

2.4 Questions posed in the Call for Views

Questions 1 – 6 and 8 - 10

We have no comment in relation to these questions.

Question 7

Again taking into account the duty of charity trustees to put the interests of the charity first, we consider what constitutes a fair and meaningful contribution to be a crucial factor in the decision making process that charity trustees will be required to undertake.

Following correspondence with Scottish Government we have advised we are happy to engage with them regarding the principles that will apply to charities.

3. Conclusion

We understand that the scheme is seeking to remove any real or perceived barriers faced by charities who wish to participate in the scheme. In our response we have raised some concerns about the way in which the Bill might impact on current and future beneficiaries, undermine aspects of Charity Law and ultimately impact on public trust and confidence in charities. We have raised the same concerns with Scottish Government during the crafting of the Bill.

Given the potential impact on some charities and the various consequences the Bill could have on individual charities and ultimately their beneficiaries, it is important that OSCR continues to be involved as the legislation progresses.

We are content for the information we have provided to be released in full, including contact details. Should you wish to discuss any aspect of the response please contact:

Mary Togi - Policy Manager