

CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) ACT 2023

EXPLANATORY NOTES

COMMENTARY ON PROVISIONS

Connection to Scotland

Section 18 – Charities which it is not appropriate for OSCR to regulate

110. Originally, there was no requirement that a charity had to have a particular link with Scotland in order to be entered on the Register. Section 5 of the 2005 Act sets out when a body must, and must not, be entered in the Register. In short—
- an applicant body could be entered in the Register only if it met the charity test,
 - some less fundamental requirements also had to be met: the body could not be entered in the Register if its name was objectionable or if regulations under section 6 of the 2005 Act required the application to be rejected,
 - otherwise, OSCR was required to enter an applicant in the Register and did not have the discretion to refuse an application.
111. This section of the Act adjusts this rule. It provides that OSCR must also reject an applicant where OSCR considers that it would not be appropriate for it to regulate the applicant because the applicant has or will have no, or only negligible, connection to Scotland.
112. There are various factors to which OSCR is required to have regard when deciding what connection there is or will be with Scotland (if any), but this list is not exhaustive and neither is any one factor on it determinative. For example, if a charity which otherwise had no connection to Scotland were to hold one short charity trustee meeting in Gretna Green but then return to England then that might not be considered to carry much weight. It should be noted though that, while carrying out charitable activities in Scotland can be relevant, this is not a pre-requisite and other factors can establish the necessary Scottish connection. Under section 7 of the 2005 Act, there is no requirement that the public benefit that a charity provides is provided in Scotland. As such, it would continue to be possible for Scottish charity trustees, or a charity which otherwise has links to Scotland, to run an overseas aid charity from Scotland. The assessment which OSCR carries out will be one that looks at all factors in the round and takes account of individual facts and circumstances.
113. There is a power for the Scottish Ministers to modify this section by regulations (subject to the affirmative procedure) in order to make further (or different) provision about the factors to which OSCR is, or is not, to have regard.
114. This section of the Act also makes provision in relation to bodies which have been entered onto the Register and gained charity status. Where circumstances later change and the charity's connection with Scotland is lost or becomes negligible, such that it

*These notes relate to the Charities (Regulation and Administration)
(Scotland) Act 2023 (asp 5) which received Royal Assent on 9 August 2023*

becomes inappropriate for OSCR to regulate the charity, OSCR is given the ability to remedy this. However, this can only be done as part of the inquiry process which is already provided for in the 2005 Act.

115. Where OSCR concludes, following an inquiry, that it is not appropriate for OSCR to continue to regulate the charity because the charity has no or only negligible connection to Scotland, OSCR can direct the charity to take steps to establish the necessary connection. Just as with a decision under section 5 of the 2005 Act, the list of factors to which OSCR must have regard applies but these are not exhaustive and nor are any of them determinative (and there is the same ability for the factors which OSCR is, or is not, to consider to be adjusted by regulations subject to the affirmative procedure).
116. As with other comparable direction-making powers in the 2005 Act, any such direction can be varied but only by relaxing either what is required under it or the deadline by which it is required. It can also be revoked. The content and deadline set in a direction will be informed by OSCR's general duty under section 1(9) of the 2005 Act to be (among other things) proportionate, consistent and target its regulatory activities only at cases in which action is needed. If a charity fails to comply with a direction, OSCR must remove it from the Register.
117. However, changes made to sections 71 and 73 of the 2005 Act mean that any decision to issue a direction or decision to remove a charity for failure to comply with a direction can be appealed. Further, the effect of such a decision is suspended until the period for making such an appeal has expired and, if an appeal is brought during that time, the appeal is finally determined.
118. Any decision to issue a direction under this new power will be noted on the charity's Register entry under changes made to section 3 of the 2005 Act. In addition, where the result of an inquiry is a decision to take action, a report on the inquiry must be published under changes made to section 33 of the 2005 Act.