Written submission from OSCR

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 forming part of the Scottish Administration. OSCR is the registrar and regulator of over 23,800 charities in Scotland.

The Committee issued a call for written evidence on the Land Reform (Scotland) Bill (the Bill) in June 2014, and below is OSCR’s submission which is focused on Part 4 and Part 5 of the Bill. OSCR welcomes the opportunity to provide comment on the Bill having previously commented on the Scottish Government consultation and liaised with Scottish Government colleagues for some time on the topic. In forming our view we have considered our overall vision, which is of charities you can trust and that provide public benefit, underpinned by the effective delivery of our regulatory role.

2. **Written evidence - Part 4 Section 37 – Guidance on engaging communities in decisions relating to land**

2.1 **Guidance on Community Engagement**

Part 4 of the Bill states that Scottish Ministers must issue guidance about engaging communities in decisions relating to land which affect communities. It states what information the guidance should include, and requires Scottish Ministers to consult prior to issuing the guidance.

OSCR currently regulates over 23,800 charities, with landowning charities of varying types including Universities, conservation charities, charities holding land under the community ‘right-to-buy’, trusts and churches. OSCR’s view is that it is clearly desirable for charities to engage with stakeholders on decisions impacting on them (including land management). This is consistent with good governance, and feedback suggests many charities are proactive in doing so. 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 welcome the inclusion of the duty on Scottish Ministers to issue guidance and see this as being an additional toolkit for landowning charities to help them understand better what is expected from them in respect of community engagement on issues of land management, and to help spread best practice in the sector.

We also welcome the requirement for Scottish Ministers to consult prior to issuing this guidance. A round-table discussion on the original proposals for charities elicited many views, and it is right that all stakeholders are involved in the development of what will be a key piece of guidance.

2.2 **OSCR’s role**

Consequences for those who don’t consider or follow guidance are explored in the Bill’s supporting Policy Memorandum (PM). Generally, a lack of consideration of the
guidance could be a factor that Scottish Ministers would consider as part of the evidence provided by a community body to support an application for the right to buy land. However, for charitable landowners further consequences are outlined. It is stated that the ‘guidance issued by Scottish Ministers will also provide guidance that OSCR can take into consideration in relation to charities that own land, when carrying out their regulatory and oversight functions under the 2005 Act’.

While it is true that lack of observance of the Ministers’ guidance could amount to misconduct under the 2005 Act, the PM does not accurately reflect how this might be the case. The PM correctly references\(^1\) section 66 of the 2005 Act, covering charity trustee general duties, but appears to confuse the use of sections 66(1) and 66(2).

<table>
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<th>Section 66(1) states charity trustees must specifically</th>
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<td>a) Ensure the charity acts consistently with its purposes</td>
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<td>b) Act with the care and diligence reasonably to be expected of someone managing the affairs of another person.</td>
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<td>c) In circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee</td>
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<td>I. Put the interests of the charity before those of the other person</td>
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<td>II. Where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.</td>
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| Section 66(2) states that the charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act. |

Our view is that, should we receive a concern that a landowning charity had not engaged appropriately, including not taking account of the guidance, we would review this in line with our Inquiry Policy and potentially open an inquiry under section 28 of the 2005 Act where we identified issues of a regulatory nature that required to be followed up.

We would then need to look at the constitution of the charity, the trustees’ actions and assess the overall evidence available. Subsequently, we would then have to decide whether not considering the guidance was a breach of charity trustee duties under section 66 (1), and therefore amounted to misconduct or mismanagement. This would be done on a case by case basis, and be dependant on the evidence. Examples of how this could work are given below.

\(^1\) Paragraphs 173-175
As we pointed out in our response to the earlier SG consultation, without prejudice to our views on the merits, amending the 2005 Act to add a specific duty on trustees to engage with communities would be likely to provide a clearer and more direct route to addressing the policy objective than relying on the current trustee duties.

If, following an inquiry, we conclude that there has been a breach of charity trustee duties, our powers to act are set out in section 31 of the 2005 Act. These include suspending any person concerned in the management and control of the charity. Under section 34 of the 2005 Act, OSCR can also apply to the Court of Session for certain actions to be taken. Any action we take has to be detailed in an inquiry report and be published.

The PM suggests that one action OSCR could take is to recommend that a charity engage with a community and pay appropriate regard to the guidance issued. We can indeed make informal recommendations to charities, and we have done so in a number of cases, but such recommendations are not directly enforceable. OSCR does not at present have the positive power to direct charities to take particular actions (although we have previously noted that we would regard such powers as being helpful for dealing with some circumstances). Therefore, we could not, with our current powers, direct the charity to engage further with communities, nor direct them to revoke a decision it had taken as a result of lack of community engagement, or failure to comply with Scottish Ministers' Guidance.

Section 66(2) as referred to throughout the PM would not apply. Firstly it refers to a charity’s compliance with the 2005 Act, and secondly it would not cover ‘a recommendation’ as this would not amount to a direction, requirement notice or duty imposed by the 2005 Act.

Example 1: If charity trustees had not engaged and/or considered the guidance could they be said to have not acted in the interests of the charity? Specifically, did they fail to act with care and diligence (s66 (1) (b))?  

Example 2: Where it could become more complex is if a community raised a concern with us about a decision taken by a landowning charity that could not be reconciled with the views of the local community (for instance where a conservation charity found that pursuing its conservation purposes could not be aligned with a community’s views on the best use of the charity’s land). The charity in this case may still have fulfilled its duty to engage. The decision following engagement would be one for the charity trustees. Although a decision may not align with the community’s views, if the charity trustees have taken that decision in good faith, believing it to be in the charity’s interests, then there may be no grounds for our finding that they have breached their trustee duties.
2.3 Other landowners

The PM sets out the possible mechanism through OSCR for action to be taken against landowning charities which fail to engage with local communities. However, we note that there are no comparable mechanisms suggested for other types of landowner if fail to engage.

2.4 Financial Memorandum

There is no reference to OSCR in the Financial Memorandum supporting the Bill. OSCR is specifically highlighted in the PM as an avenue communities may take if they have a concern in this area, and therefore it is reasonable to expect a possible increase in concerns of this nature. Although the number of concerns raised may not be significant, it could provide a complex area of inquiry work and have a direct financial impact on OSCR both in terms of staff time and possible legal costs depending on how far inquiries are taken.

3. Part 5 – Right to buy land to further sustainable development

Section 42 of the Bill provides a definition for Community Body that includes Scottish Charitable Incorporated Organisations (SCIOs). OSCR is satisfied that this mirrors what is included in the Community Empowerment (Scotland) Bill. It is a requirement of charity law that surplus assets of a SCIO at the point of wind up must be used for purposes which are the same as or which resemble closely those of a SCIO, and this adds the additional requirement that they must be used for the benefit of the community and community must be defined within the SCIOs.

4. Overall

OSCR welcomes the opportunity to give a view on the development of this Bill, and hopes the Committee finds it useful. OSCR supports the development of guidance that will support charity trustee engagement with stakeholders on land management issues. Accountability and transparency in respect of decisions made in this area are key drivers of public trust in charities. We do, however, outline possible issues with respect to how compliance with this guidance could be enforced by OSCR in our work with charities. Should there be any further questions please contact Nicola McBain (Engagement Manager, Policy and Partnerships) at nicola.mcbain@oscr.org.uk