

Consents and Notifications

How to seek consent from or notify OSCR in relation to changes under sections 11, 16 and 17 of the Charities and Trustee Investment (Scotland) Act 2005

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1. Introduction

The Charities and Trustee Investment (Scotland) Act 2005 (“the Act”) which came into force in April 2006 reforms and modernises charity law in Scotland. The Act introduces new duties and responsibilities for the Office of the Scottish Charity Regulator (OSCR), such as the duty to keep a Scottish Charity Register. The legislation also clarifies the responsibilities that charity trustees have and introduces new responsibilities, such as the requirement to seek consent from OSCR in relation to certain actions a charity may wish to take.

This booklet is intended as a practical guide to the consent and notification procedures introduced under sections 11, 16 and 17 of the Act.

The Act introduces a new statutory definition of a charity in Scotland as “a body entered in the Register” (s.106).¹ Throughout this guidance therefore, when we speak about a charity, this refers to a body entered in the Scottish Charity Register which can be accessed from the OSCR website: www.oscr.org.uk.

This guide explains:

- when a charity needs to obtain OSCR’s consent before taking a certain action
- when a charity needs to notify OSCR of any change that it has made
- the process involved in seeking consent or notifying OSCR
- what documentation we need to see, and
- what we will consider before granting consent.

This booklet is a practical guide only, and not a statement of the law. It should be read in conjunction with the legislation. To help you we have included the text of sections 10, 11, 16 and 17 of the Act in the Appendix to this Guidance.

2. Overview of sections 11, 16 and 17 of the Act

2.1 Actions that require OSCR consent (sections 11 and 16)

Under sections 11 and 16, a charity that wishes to:

- change its name
- amend its charitable purposes
- amalgamate with another body
- wind itself up or dissolve itself, or
- apply to the court in relation to amending its purposes, amalgamating or winding up can do so only with OSCR’s consent.

¹In this Guidance document, as in all OSCR Guidance, the small ‘s’ in s.106 or s.11 refers to a section of an Act, in this case section 106 of the Charities and Trustee Investment (Scotland) Act 2005.

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A charity can only make such changes if its constitution² allows the charity trustees³ to do so. This follows from the general principle that charity trustees must act in accordance with the specific terms of the constitution of the charity.

It will therefore be important to establish whether there are sufficient powers in the constitution to allow the charity trustees to make the desired change. This can be established by reading the constitution, which might say, for example, that the charity trustees can make changes to the constitution provided this is decided by a majority of the charity trustees, or agreed by a majority of the members.

Where the constitution does not allow for the desired changes to be made, it may be possible to use the reorganisation provisions of sections 39-43 of the Act.

2.2 Reorganisation schemes (sections 39-43)

Sections 39-43 allow charities which do not otherwise have the power in their constitutions to reorganise themselves to do so with OSCR's approval. Under section 39 OSCR may approve a reorganisation scheme of such a charity as long as certain criteria are satisfied (referred to as the 'reorganisation conditions' and set out in section 42(2)).

Sections 39-43 have not yet come into force, as Regulations are required that will set out the detailed procedures for how OSCR should deal with these applications, and these are not yet available. For further information on how to proceed if the charity's constitution does not allow the charity trustees to make the changes envisaged, please contact the Consents Team at OSCR.

2.3 Changes that need to be notified to OSCR (section 17)

Section 17 of the Charities and Trustee Investment (Scotland) Act 2005 states that charities must notify OSCR of the following changes within three months of the date the change took effect:

- change to principal office of the charity (or change to the name/address of the charity trustee specified in the Register if there is no office)
- any change in other details set out in its entry in the Register

²The Act, in section 106, gives a full explanation of what is meant by the term 'constitution' when used in the Act. This depends on the legal form of the charity, for example, in the case of a charitable company it will be its memorandum and articles, in the case of a charitable trust it will be the trust deed, and in other cases it is the document which sets out how the body is set up and what its purposes are.

³The Act uses the term 'charity trustees' as a generic term to describe 'the persons having the general control and management of the administration of a charity' (section 106). In an individual charity the charity trustees may be referred to differently, for example if the charity is a company, the charity trustees will be the directors; if it is a trust, it will be the trustees; and if it is an unincorporated association, it will be the (management) committee members.

- any change to the constitution (other than one relating to the charity's purposes)
- any action taken to amalgamate, wind up or dissolve itself, or to apply to the court to do so.

Charities must notify OSCR of the following changes within one month from the date the change took effect:

- any administration order or an order for winding up made by the court in respect of a charity
- the appointment of a receiver in respect of any of the charity's property.

Section 17 requires charities to notify OSCR of changes in respect of which they also need to seek OSCR consent under section 16. This is because it is possible to seek and be given consent for an action which is not followed through (for example, the charity trustees have sought consent to a proposed change which needs to be agreed at the charity's AGM, and the proposed change is not accepted at the AGM). OSCR therefore needs to be notified separately of whether and when the action to which it consented took effect.

3. Timescales and giving notice

3.1 When to give notice

Both sections 11 and 16 provide that a charity must give notice to OSCR of the proposed change or course of action not less than 42 days before the date on which the action is to be taken.

This means, in practice, that a charity wishing to take any of the actions which require consent must submit a *complete* application to OSCR, i.e. an application containing all the documentation and information required by OSCR in relation to the relevant process and needed to make a decision, at least 42 days before the meeting at which the charity formally takes the proposed action.

For example, if the constitution states that a decision to dissolve the charity can only be taken by more than two-thirds of the charity's supporters/members/subscribers at the AGM or EGM, then the committee or board of directors (the charity trustees) must give notice by means of a complete application to OSCR of the proposed action not less than 42 days before the date of the AGM.

3.2 Silent consent

Sections 11 and 16 of the Act both allow silent consent to be given in respect of the above actions. This means that, if OSCR does not communicate a decision within 28 days of the required notice (i.e. a *complete* application) being given by the charity, consent can be

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assumed to have been given. OSCR intends to make decisions under sections 11 and 16 and communicate these to the applicants within 28 days of the complete application having been submitted.

The exception to this is where a charity proposes to make a change to its purposes. In that case silent consent does not apply, and the charity can only make such a change if and when explicit consent has been received from OSCR. The 28 days rule therefore does not apply in these cases, but it is our intention to deal with such applications to the same timescales.

3.3 How to give notice

Giving notice of a proposed change of name, of any of the actions for which consent is required under section 16, or giving notice of a change covered by section 17 are formal communications in terms of section 100 of the Act. Formal communications must be made in writing.

If a charity wants to ensure that notice is given in such a way that silent consent could be relied on, it should deliver the notice (the complete application) in person to OSCR, send it by post in a prepaid registered letter or by recorded delivery, or send it by electronic means.

Notice will only be given if and when all of the necessary documentation and information required by OSCR to process the relevant application for consent is included with the notice.

4. Change of charity name: Section 11

Section 11 of the Act provides that a charity wishing to change its name can only do so with OSCR's consent. Section 11(4) states that OSCR may only refuse consent to a name change where it considers that the proposed new name is objectionable under any of the categories given in section 10. OSCR will not be able to consider an application if the terms of the charity's constitution specifically prevent it from changing its name.

4.1 Summary of the process for change of name under section 11

- Charity gives notice of proposed change by submitting complete application to OSCR not less than 42 days before it intends to make the change
- OSCR checks there is no prohibition on name change in charity's constitution
- OSCR considers whether the name is objectionable under section 10
- Within 28 days of complete application having been received OSCR will either (a) notify the charity that consent has been granted or (b) issue a direction to the charity not to change its name
- If consent is granted, the charity can make the change at any time after the 42 day period from when OSCR received the application

- Once the charity has made the name change, in accordance with the terms of its constitution, it needs to notify OSCR of this under section 17 within three months of having changed the name

4.2 Timescales

Section 11 provides that a charity wishing to change its name must, not less than 42 days before doing so, give notice to OSCR of the proposals, specifying its proposed new name.

The possibility of silent consent (see 3.2 above) applies to consent for a name change. If no decision has been received from OSCR within 28 days of the charity having given proper notice OSCR is to be taken as having given consent. OSCR intends to make decisions under section 11 and communicate these to the applicants within 28 days of the complete application having been submitted.

If OSCR considers the proposed name to fall within section 10, it will, in the first instance, alert the applicant to this and discuss how this may be overcome, before deciding whether to direct the charity not to change its name.

4.3 Making an application for consent to name change

A charity wishing to obtain OSCR's consent for a change of name will need to submit to OSCR a completed application form⁴ and a copy of its constitution.

The application form can be requested directly from OSCR or downloaded from the OSCR website. This will ask for:

- Current name and charity number
- Principal contact details for the charity (as set out in the Register)
- Contact details of applicant (if different from charity contact details)
- Proposed new name
- Proposed effective date of new name (to ensure OSCR has been given notice at least 42 days before the name is changed)
- Charity Commission registration number (relevant to cross-border charities only)
- Other regulators that need to consent to the name change (if relevant)

A copy of the charity's constitution needs to be included to allow OSCR to establish whether there is a prohibition on the charity changing its name and whether or not the proposed new name may be misleading (see below).

If any of the required information is not included, we will contact the applicant within five working days of receipt and ask for the information to be provided. Charities should be

⁴We have developed application forms to make the process easier for charities and to ensure we get all the information we need as soon as possible. Where applications are made through correspondence but without the form, and all the necessary information is included, this will constitute a complete application and will be considered.

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aware that the 28-day period in which OSCR needs to make a decision (see 3.2 above) will only start when proper notice (i.e. a complete application with all requested information) is received by OSCR.

We will also expect the applicant to have submitted the most recent Annual Return or Monitoring Return on time or offer adequate explanation as to why they have not done so.

4.4 Full consideration: Objectionable names (section 10)

OSCR will consider whether the proposed new name is acceptable under section 10 of the Act. Section 10(1) states that a name is objectionable if it is:

- (a) the same as, or too like, the name of another charity,
- (b) likely to mislead the public as to the true nature of the purposes of the body or of the activities which it carries on, or intends to carry on, in pursuit of those purposes,
- (c) likely to give the impression that the body is connected in some way to the Scottish Administration, Her Majesty's Government in the United Kingdom or any local authority, or with any other person, when it is not so connected, or
- (d) offensive.

OSCR will make its decisions on whether a name is objectionable in accordance with the guidance set out below. Over time we may issue more detailed guidance in this area on the basis of cases we have considered.

(i) The same and similar names

OSCR will consider a charity's name to be too like that of another if a reasonable person might mistake one charity for another or might believe that both names apply to the same charity.

A charity in this context is a charity in terms of the Charities and Trustee Investment (Scotland) Act 2005: a body entered in the Register. We will therefore run a check on the same and similar names on the Scottish Charity Register in order to establish whether a name is too like another charity name. We will not, however, run a check on similar names in any other Registers, such as that of Companies House or the Charity Commission. OSCR has no power to refuse a name change solely on the basis that the proposed new name is the same as that of a company (which is not a charity) or a body registered with the Charity Commission.

(ii) Misleading names

The names of many charities say nothing or very little about the purposes set out in their constitution or about their activities – they do not need to. In not doing so they do not necessarily mislead. OSCR is aware that charities that pursue various purposes or strands of activity can find it difficult to choose a name which captures the full range of their activities.

However, a name could be misleading if it can make an average person believe that the charity has other purposes or activities than is actually the case or that it pursues some of its purposes or activities in preference or exclusion to others, when it does not.

In order to establish whether the name may be misleading as to the true nature of the purposes or activities, OSCR will consult the charity's constitution and, if necessary, any other information that may be available to OSCR (for example the Annual Return or Monitoring Return, or publicly available information).

(iii) Names likely to give the impression of a particular connection

A charity may not adopt a name which suggests a connection with (and therefore endorsement by) the Scottish Administration, the UK Government, any local authority or any person, if this is not the case. An implied association with a well-known popular figure (such as a sportsman or actor) would fall into this category unless it was genuine.

(iv) Offensive names

Generally speaking, OSCR will consider a name to be offensive if it can give offence to persons of average sensibility. For example, OSCR would consider a charity name to be offensive if it considers the name to be:

- vulgar (which would include names whose initial letters form vulgar acronyms)
- contemptuous for a particular religion or deity, or
- discriminatory or to describe certain persons, class of persons or certain activities in a derogatory manner

4.5 Other regulators

Charities that are also registered with the Charity Commission will need to establish the requirements of the Charity Commission in relation to changing their name. If a charity has indicated on the application form that they are also registered with the Charity Commission, OSCR will contact the Commission with a view to a joint approach being taken to the request for a name change.

Some charities may also have to seek consent from other regulators, for example Companies House or Communities Scotland. It is the responsibility of the charity to establish the requirements of these regulators in relation to changing their name. The basis on which other regulators may grant or refuse consent to a name change is not identical to the criteria of the Charities and Trustee Investment (Scotland) Act 2005. We ask to be made aware of any other regulators that need to consent to the name change so we can discuss this with the applicant and seek to try and take account of this in our processing of the application, for example if timescales of other regulators require a decision to be taken by a specific date.

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4.6 After consent has been granted

Once a charity has obtained OSCR's consent, it will be entitled to change its name at any time after the expiry of the 42-day period from which it gave notice (made its full application) to OSCR.

It is the responsibility of the charity trustees to ensure that the decision to change the charity's name is made in accordance with the decision-making procedures laid down in the charity's constitution.

Once the decision to change the charity's name is formally taken, the charity's only remaining requirement is to notify OSCR of this change to its constitution within three months of the decision being taken, in accordance with section 17 of the Act (see 9 below).

4.7 If consent is refused

If OSCR decides that the name is objectionable under the terms of s.10 of the Act (see 4.4 above), we will issue a direction to the charity not to change its name. OSCR must show on the Scottish Charity Register that such a direction has been given.

The charity can, within 21 days, request OSCR to review its decision. For more information see OSCR guidance on Reviews and Appeals.

4.8 Consequences of not seeking consent

Section 11 states that a charity may change its name only with OSCR's consent. If a charity has changed its name without obtaining OSCR's consent, the name change will be contrary to the terms of the Act. If the name is objectionable in terms of section 10 of the Act, OSCR has the power to direct the charity to change it.

A failure to notify OSCR of a proposed change of name is a breach of the charity trustees' duties under section 66, and therefore misconduct on the part of the charity trustees, possibly warranting intervention or sanction by OSCR.

5. Section 16 consents – general

Section 16 sets out the actions a charity can take only with OSCR's consent:

- (a) amending its constitution so far as it relates to its purposes,
- (b) amalgamating with another body,
- (c) winding itself up or dissolving itself,
- (d) applying to the court in relation to any action set out in paragraphs (a) to (c).

A charity can only use the provisions of section 16 if the charity's constitution gives the charity trustees sufficient powers to make the desired change. If they do not have such

power, the charity trustees would need to consider either sections 39-43 of the Act (see 2.2 above), sections 10 and 11 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 or cy-près application to the Court of Session. Consent by OSCR under section 16 would not empower the charity trustees to carry out an otherwise *ultra vires* act.

It is therefore important to establish whether there are sufficient powers in the constitution for the desired change to be made. This could be established by reading the constitution, which might say, for example, that the charity trustees can make changes to the constitution provided that this is decided by a majority of the charity trustees, or by a qualified majority (such as two-thirds) of the charity trustees, or members.

5.1 General criteria for giving consent under s.16

The purpose of section 16 is to allow charities to make certain changes provided that they have sufficient power within their constitution to make such changes. The Act does not set out any specific criteria that OSCR needs to consider before granting or refusing consent under s.16.

However, OSCR will need to be satisfied that the following general criteria are met in respect of every change proposed under s.16 that:

- the proposed action is allowed under the terms of the applicant charity's constitution (if not, then ss 39-43 may be available)
- the change will not result in the charity's purposes being non-charitable or the charity in some other way no longer meeting the charity test
- the decision to give effect to the proposed action is taken in accordance with the requirements of the charity's constitution, and
- the change will not result in the assets being applied for non-charitable purposes or in a way not allowed for by its constitution.

5.2 Protecting charitable assets

Before giving consent under section 16, particularly where a charity wants to wind up or amalgamate, OSCR will have to be satisfied that the assets of a charity continue to be applied for charitable purposes only. OSCR will therefore pay close attention to the ultimate destination of the assets. Where the assets are destined to end up under the control of another charity, OSCR will be satisfied in this context that the assets will continue to be applied for charitable purposes. OSCR will be less-easily satisfied as to this where the assets will ultimately be controlled by a non-charity. In this instance OSCR will require a high level of reassurance that the assets will only be applied for charitable purposes. While OSCR will make its assessment on a case by case basis there are a number of factors that it will consider. These include:

- the purposes of the recipient body and its ability to amend these
- whether or not the recipient body is subject to regulation by another regulator and if so the nature of such regulation

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- any past relationship between the recipient body and the charity
- the planned use of the assets and the nature of any restrictions on the use of the assets, and
- the nature of the assets – it is unlikely that OSCR will consent to a proposal which will result in heritable property residing indefinitely outwith the control of a charity regulator.

5.3 Conditions that may be attached to section 16 consent

Section 16(1) allows OSCR to attach conditions when it gives consent to the actions a charity proposes to take. The conditions that OSCR may attach will depend on the individual circumstances of the applicant charity, but will be related to ensuring that the general criteria as set out under 5.1 are met. In particular, OSCR may attach conditions on how the (remaining) assets will be used and administrative conditions to ensure that the decision is taken in accordance with the constitution and duly notified to OSCR.

(i) Conditions on how the (remaining) charitable assets will be used

As noted above, where a charity wants to wind up or dissolve itself, or amalgamate with another body, OSCR will want to ensure that the (remaining) charitable assets will continue to be used for charitable purposes only. It may be that OSCR in consenting will impose conditions to ensure this, such as for example obliging the transferring charity to transfer the assets as a restricted fund, restricting the use of the assets to a specific charitable purpose.

(ii) Administrative conditions

OSCR will usually attach administrative conditions to the granting of consent to any of the actions in section 16. These will include:

- that the change be given effect to within 12 months of consent having been given. If the change is made within that timescale consent will have to be sought anew.
- a requirement to be notified when the change has taken effect. This will allow OSCR to update the Register and comply with its requirements regarding the information to be held on each charity in the Register. In most instances the charity will also be obliged by section 17 to notify OSCR of the change once it has been made (see 9 below)
- a requirement to submit to OSCR, when notifying us that the change has taken effect, documentation showing that the change has been made in accordance with the decision making procedures laid down in the charity's constitution, for example a signed minute of the meeting of charity trustees or of the AGM at which the proposed change was formally agreed
- a requirement to submit to OSCR a final set of accounts within 9 months of the removal, if the action would result in the removal of the charity from the Register (e.g. a wind-up).

(iii) Publicity conditions

OSCR will, in the vast majority of cases, not attach publicity conditions to consents granted under section 16. However, there may be exceptional circumstances in which we may wish to do so, for example to ensure that the supporters of the charity are sufficiently aware of the proposed changes, if we have well-founded reasons to believe that they may not be.

5.4 Other regulators

Charities will need to establish whether they also need to seek consent from other regulators or notify any other organisations in relation to the action they propose to take. For example, consent may also be required from the Charity Commission (for charities also registered in England), from the Financial Services Authority (for charities that are industrial and provident societies) or from Communities Scotland (for charities that are registered social landlords).

We ask to be made aware of any other regulators that need to consent to the proposed change so we can discuss this with the applicant and seek to try and take account of this in our processing of the application, for example if timescales of other regulators require a decision to be taken by a specific date. It is the responsibility of the charity to establish the requirements of these regulators in relation to the proposed change or action. The requirements of other regulatory regimes are not identical to those of the Charities and Trustee Investment (Scotland) Act 2005.

5.5 If consent is refused

If OSCR refuses to give its consent to the proposed action the charity can, within 21 days, request OSCR to review its decision. For more information see OSCR guidance on Reviews and Appeals.

5.6 Consequences of not seeking consent under s.16

Section 16 states that a charity may take the actions listed only with OSCR's consent. Technically, this can be given silently (as set out in 3.2 above), but this is only relevant if the charity has actually given OSCR notice of its proposal to take the action, i.e. if the charity has applied to OSCR for consent. Silent consent does not apply to changes to the purposes of the charity.

Taking an action listed in section 16 without notifying OSCR of intention to do so or without OSCR consenting to it will be contrary to the terms of that section and a breach of the charity trustees' duties under section 66. This will amount to misconduct on the part of the charity trustees, possibly warranting intervention or sanction by OSCR. This can have significant implications for the charity, the charity trustees and for anyone dealing with the charity.

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6. Process for constitution change in relation to purposes under section 16

6.1 Summary of the process for amendment of purposes under section 16(2)(a)

- Charity to give notice of its proposal to amend its purposes by submitting complete application to OSCR not less than 42 days before the date on which it intends to take this action
- OSCR checks whether or not the current constitution gives charity trustees sufficient power to amend the purposes
- OSCR considers whether the proposed new constitution will allow the charity to meet the charity test
- OSCR will then either notify the charity that consent has been granted or notify the charity that consent is refused. Under s.16(5), a charity can only change its purposes with OSCR's active consent. There is no provision for silent consent in relation to change of purposes
- If consent is granted, the charity can make the change after the expiry of the 42-day period from when OSCR received the initial application
- OSCR will attach a standard administrative condition to every consent to amendment of purposes to notify OSCR within three months of the change having taken effect.

6.2 Timescales

Section 16 provides that a charity wishing to amend its purposes must, not less than 42 days before doing so, give notice to OSCR of the proposals, specifying the date on which it intends the change to take effect. Therefore, in practice, a charity wishing to amend its purposes must submit a complete application with all of the required documentation and information to OSCR at least 42 days before the meeting at which it formally intends to adopt the new constitution.

The legislation does not oblige OSCR to make a decision regarding an amendment of purposes within a set timescale. Additionally, the legislation prohibits⁵ the charity from proceeding with such an action unless and until OSCR has given its consent. However, OSCR is aware that a long delay in such a decision being taken may cause difficulty for the charity, and therefore intends to make a decision within 28 days after all the necessary information has been received.

If it appears that OSCR may not be able to consent to the proposed change to the constitution, OSCR will in the first instance alert the applicant to this and discuss how this may be overcome, before it makes a decision to refuse consent. Whether a decision can be

⁵Section 16(5)

taken within 28 days will therefore depend on the extent and nature of communication necessary with an individual applicant charity.

6.3 Making an application for consent to amend a charity's purposes

A charity wishing to obtain OSCR's consent to amend its constitution so far as it relates to its purposes needs to notify OSCR by submitting a completed application form⁶ and a copy of its current and its proposed new constitution.

The application form can be requested directly from OSCR or downloaded from the OSCR website. This will ask for:

- Current name and charity number
- Principal contact details for the charity (as set out in the Register)
- Contact details of applicant (if different from charity contact details)
- Brief outline of the proposed amendment
- Proposed effective date of new constitution (to ensure OSCR has been given notice at least 42 days before proposed change is made)
- Charity Commission registration number (relevant to cross-border charities only)
- Other regulators that need to consent to the change (if relevant)

A copy of both the charity's current and proposed new constitutions needs to be included to allow OSCR to establish the exact nature of the change proposed and whether these might prevent the charity from meeting the charity test.

If any of the required information is not included, we will contact the applicant within five working days and ask for the information to be provided. Charities should be aware that the 28-day period in which OSCR intends to make a decision will only start when a complete application with all requested information is received by OSCR. We will also expect the applicant to have submitted the most recent Annual Return or Monitoring Return on time or offer adequate explanation as to why they have not done so.

6.4 Full consideration

OSCR will need to be satisfied that the charity's constitution allows it to amend its purposes. Once this has been established we will then give full consideration to the proposed changes. We will need to consider whether the amended purposes are all charitable.

OSCR cannot consent to a change that will mean that the organisation will have non charitable purposes, as it would then no longer be able to meet the charity test. For further information on the charity test and how OSCR will apply it, please refer to our guidance on meeting the charity test.

⁶We have developed application forms to make the process easier for charities and to ensure we get all the information we need as soon as possible. Where applications are made through correspondence but without the form, and all the necessary information is included, this will constitute a complete application and will be considered.

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6.5 After consent has been granted

Once a charity has obtained OSCR's consent, it will be entitled to make the change after the expiry of the 42-day period from when it gave notice (made its full application) to OSCR.

OSCR will usually attach administrative conditions as outlined in 5.3(ii) above to ensure that OSCR is told when the change has taken effect, and to ensure that the change has been made in accordance with the requirements of the charity's constitution.

7. Process for amalgamation or winding up under section 16

7.1 Summary of process for amalgamation or winding up under s.16(2)(b) or (c)

- Charity to give notice of its proposal for amalgamation or winding up by submitting complete application to OSCR (not less than 42 days before the date on which it intends to take this action)
- OSCR checks whether or not the current constitution gives charity trustees sufficient power to take the proposed action
- In the case of amalgamation, OSCR considers whether the organisation that will be created as a consequence of the amalgamation will only be able to apply the charitable assets for charitable purposes (see 5.2 above)
- In the case of winding up or dissolving the charity, OSCR considers whether the remaining charitable assets will be applied for charitable purposes only (see 5.2 above)
- Within 28 days of the complete application having been received OSCR will either (a) notify the charity that consent has been granted, or (b) issue a direction not to take the action for a period of not more than six months, or (c) refuse consent
- If consent is granted, the charity can take the action after the 42-day period from when OSCR received the application
- The charity must notify OSCR within three months of having taken the action that has been given consent to, in accordance with section 17.

7.2 Timescales

Section 16 provides that a charity wishing to amalgamate with another body, or wind up or dissolve itself must, not less than 42 days before doing so, give notice to OSCR of the proposals, specifying the date on which it intends to take the action. Therefore, in practice, a charity wishing to amalgamate or wind up must submit a complete application with all of the required documentation and information to OSCR at least 42 days before the meeting at which it intends that the action will be formally agreed.

The possibility of silent consent (see 3.2 above) applies to consent for amalgamation or winding up. If no decision has been received from OSCR within 28 days of the charity

having given proper notice, OSCR is to be taken as having given consent. OSCR intends to make decisions under section 16 and communicate these to the applicants within 28 days of the complete application having been submitted.

However, section 16(6) also allows OSCR to issue a direction to the applicant charity within 28 days not to take the proposed action for a period of not more than six months.

If it appears that OSCR may not be able to consent to the proposed amalgamation or winding up OSCR will in the first instance alert the applicant to this and discuss how this may be overcome, before it makes a decision to refuse consent. At the same time as alerting the applicant to a potential difficulty in granting consent, OSCR will issue a direction to the applicant charity not to take the action for a specified period of time to allow time for the difficulties to be overcome.

7.3 Making an application for consent to amalgamation or winding up

(i) Information required for both amalgamation and winding up

A charity wishing to obtain OSCR's consent to amalgamation or winding up needs to notify OSCR by submitting a completed application form⁷ and a copy of its current constitution.

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The application form can be requested directly from OSCR or downloaded from the OSCR website. It will ask in both cases for:

- Current name and charity number
- Principal contact details for the charity (as set out in the Register)
- Contact details of applicant (if different from charity contact details)
- Brief outline of the proposed action
- Proposed effective date of the amalgamation or winding up (to ensure OSCR has been given notice at least 42 days before proposed change is given effect to)
- Charity Commission registration number (relevant to cross-border charities only)
- Other regulators that need to consent to the proposals (if relevant)

A copy of the current constitution needs to be included to allow OSCR to establish whether the proposed action is allowed under the terms of the applicant charity's constitution.

If any of the required information is not included, we will contact the applicant within five working days and ask for the information to be provided. Charities should be aware that the 28 day period in which OSCR needs to make a decision (or issue a direction) will only start when proper notice (i.e. a complete application with all requested information) is received by OSCR.

⁷We have developed application forms to make the process easier for charities and to ensure we get all the information we need as soon as possible. Where applications are made through correspondence but without the form, and all the necessary information is included, this will constitute a complete application and will be considered.

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We will also expect the applicant to have submitted the most recent Annual Return or Monitoring Return on time or offer adequate explanation as to why they have not done so.

(ii) Additional information required for amalgamations

Amalgamations can vary considerably from case to case, and the exact documents that will be required will be determined by the detail of the proposals. OSCR will assist the applicant(s) in establishing what will be required. It is therefore important to contact OSCR early on, in particular if there is a specific date (for example an AGM) by which OSCR's consent will be needed. Where the amalgamation involves two or more charities, we need to receive the necessary information in respect of all the charities involved. The application forms will allow for joint notification by charities proposing an amalgamation.

Generally speaking, the additional documents that will be required in the case of amalgamation are:

- a statement from the recipient body accepting all liabilities and assets from the charities which are amalgamating
- the (proposed) constitution of the new body.

(iii) Additional information required for winding up

Again, the exact documents that will be required will be determined by the detail of the proposals, but in the case of a proposal for winding up in general, we will also ask for:

- A statement detailing how any remaining liabilities (if there are any) of the charity will be dealt with, and how the remaining assets are intended to be distributed
- A contact address of where the charity's accounts will be kept after the charity has wound up. Charity accounts need to be kept for 6 years.

7.4 Full consideration

OSCR will need to be satisfied that the charity's constitution allows it to take the action that is proposed, whether amalgamating with another body or winding up or dissolving itself. Once this has been established we will then give full consideration to the proposals.

In the case of amalgamation OSCR will need to be satisfied that the body that will result from the amalgamation will only be able to apply the charitable assets for charitable purposes (see 5.2 above). For further information on charitable purposes please refer to our initial guidance on meeting the charity test. OSCR will also need to be satisfied that the recipient body accepts the liabilities and assets of the amalgamating bodies.

In the case of winding up OSCR will need to be satisfied that the remaining assets of the charity that is winding up are distributed in accordance with its constitution, and will continue to be applied for charitable purposes only (see 5.2 above).

7.5 After consent has been granted

Once a charity has obtained OSCR's consent for amalgamation or winding up, it will be entitled to take the action after the expiry of the 42-day period from when it gave notice (made its full application) to OSCR.

OSCR will usually attach administrative conditions, as outlined in 5.3(ii) above, to ensure that the change has been given effect to in accordance with the requirements of the charity's constitution and to ensure that OSCR is told within three months of the action having been taken, as required by section 17.

OSCR may also attach conditions on how the charitable assets will be used, as outlined in 5.3(i) above.

8. Seeking consent to make an application to the court (section 16)

Section 16(2)(d) requires charities that wish to make an application to the court in respect of amending their constitution in relation to the purposes, amalgamating with another body or winding up or dissolving themselves to seek consent from OSCR before doing so. This is relevant in particular to charities that can only take such action through making a *cy près* application to the court.

In these situations the process and OSCR's consideration will be the same as described above for the relevant section 16 consent.

The process and timescales are as set out in 7.1 and 7.2 above. We have not developed a specific application form for seeking consent to make an application to the court. The applicant charity may use the application form relevant to the action in relation to which they wish to apply to the court (indicating to OSCR that an application to the court is intended), or it may wish to deal with the matter by correspondence. If taking the latter approach, the information required before OSCR can make a decision is as outlined above in 6.3 or 7.3 respectively.

9. Notification of changes under section 17

9.1 Changes that need to be notified to OSCR

Section 17 of the Charities and Trustee Investment (Scotland) Act 2005 states that charities must notify OSCR of the following changes **within three months** of the date the change or action took effect:

- change to the principal office of the charity (or change to the name/address of the charity trustee specified in the Register if there is no office)

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- any change in other details set out in its entry in the Register
- any change to the constitution
- any action to amalgamate, wind up or dissolve itself, or to apply to the court to do so.

Charities must notify OSCR of the following matters **within one month** from the date on which they occurred:

- any administration order or an order for winding up made by the court in respect of a charity
- the appointment of a receiver in respect of any of the charity's property.

The requirement to notify OSCR of changes within three months does not apply in relation to the action of amending the constitution so far as it relates to the purposes of the charity. However, as a charity can only amend its constitution in this respect with OSCR's active consent (see 6.2 above), OSCR will attach a standard administrative condition to such consents to notify OSCR when the amendment has taken effect (see 5.3(ii) above).

9.2 How to notify OSCR of changes and other matters

Changes of details set out in the Register (including the principal office address) can be notified to OSCR through the Annual Return process, if the Annual Return captures the change within the three-month period.

However, as section 17 requires the charity to notify OSCR of the change, action or other matter within three months or one month of it having taken place, this can clearly not capture all the changes, nor does the Annual Return form ask for every category of information listed in section 17. OSCR will therefore need to be told of these separately.

The information OSCR needs in order to accept a notification of a change, action or other matter is:

- the charity name and number
- the details of the change, the action that has been taken, the court order or the appointment of a receiver
- a clear statement of the date this has taken effect
- the name and signature of a charity trustee.

In the case of any change to the constitution, an administration order or the appointment of a receiver, the charity will also require to forward a copy of the new constitution, the court order or the letter of appointment of the receiver.

A form is available for section 17 notifications to make notifying OSCR of changes as easy as possible. The form can be requested directly from OSCR or downloaded from the OSCR

website. Using this will ensure all the necessary information is provided to allow OSCR to process the notification.

9.3 Checking by OSCR

In the case of changes to the constitution, OSCR will check the constitution to ensure that no changes have been made that:

- affect whether or not charity will be able to meet the charity test (such as for example including a clause which allows property of the charity to be distributed for non-charitable purposes when winding up)
- would have required consent under sections 11 or 16 without such consent having been sought, and
- are otherwise in breach of the Act.

Should OSCR identify any cause for concern on the basis of the changes made to the constitution, OSCR will contact the charity in the first instance to alert them to the difficulty.

4.8 and 5.6 above describe the consequences of changes having been made to the constitution or actions having been taken which would have required OSCR's consent where such consent was not sought.

9.4 Consequences of failing to notify OSCR

A failure to notify OSCR under section 17 of a change, an action or another relevant matter will be contrary to the terms of that section and a breach of the charity trustees' duties under section 66. This will amount to misconduct on the part of the charity trustees, possibly warranting intervention or sanction by OSCR. Where it appears that there are repeated instances of a failure to notify OSCR of changes under section 17, the cumulative effect of this will be considered in deciding whether or not to take action.

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Appendix

Charities and Trustee Investment (Scotland) Act 2005 Sections 10, 11, 16 and 17

10 Objectionable names

- (1) A body's name falls within this section if it is-
 - (a) the same as, or too like, the name of a charity,
 - (b) likely to mislead the public as to the true nature of the purposes of the body or of the activities which it carries on, or intends to carry on, in pursuit of those purposes,
 - (c) likely to give the impression that the body is connected in some way to the Scottish Administration, Her Majesty's Government in the United Kingdom or any local authority, or with any other person, when it is not so connected, or
 - (d) offensive.

- (2) The reference in subsection (1)(b) to a body's purposes are-
 - (a) in the case of an applicant, the purposes set out in the statement accompanying its application,
 - (b) in the case of a charity, the purposes set out in its entry in the Register, and
 - (c) in the case of an SCIO proposed in an application under section 54(1), 56(1) or 59(1), the purposes set out in the SCIO's proposed constitution accompanying the application.

11 Change of name

- (1) A charity may change its name only with OSCR's consent.

- (2) A charity which proposes to change its name must, not less than 42 days before doing so, give notice to OSCR specifying its proposed new name.

- (3) Unless OSCR, within 28 days of the date on which a notice is given under subsection (2), directs the charity not to change its name, OSCR is to be taken as having given its consent.

- (4) OSCR may refuse to consent to a charity changing its name only where it considers that the proposed new name falls within section 10.

16 Changes which require OSCR's consent

- (1) A charity may take any action set out in subsection (2) only with OSCR's consent and in accordance with any conditions attached to any such consent.
- (2) Those actions are-
 - (a) amending its constitution so far as it relates to its purposes,
 - (b) amalgamating with another body,
 - (c) winding itself up or dissolving itself,
 - (d) applying to the court in relation to any action set out in paragraphs (a) to (c).
- (3) Subsection (1) does not apply in relation to any action-
 - (a) in pursuance of an approved reorganisation scheme, or
 - (b) for which OSCR's consent is required by virtue of any other enactment.
- (4) Where a charity proposes to take any action set out in subsection (2) it must, not less than 42 days before the date on which the action is to be taken, give notice to OSCR of the proposal specifying that date.
- (5) In the case of an action set out in subsection (2)(a), the charity must not proceed unless and until OSCR has given its consent.
- (6) In any other case, unless OSCR, within 28 days of the date on which notice is given under subsection (4)-
 - (a) refuses its consent, or
 - (b) directs the charity not to take action for a period of not more than 6 months specified in the direction,OSCR is to be taken as having consented to it.
- (7) A direction under subsection (6)(b)-
 - (a) may be revoked at any time,
 - (b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.
- (8) Where OSCR gives such a direction it must, after making such inquiries as it thinks fit-
 - (a) give its consent, whether or not subject to conditions, or
 - (b) refuse its consent.

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17 Notification of other changes

- (1) A charity must give OSCR notice of-
 - (a) any change in-
 - (i) the principal office of the charity, or
 - (ii) where it does not have such an office, the name or address of the charity trustee specified in the Register (or which would, but for section 3(4), be so specified),
 - (b) any change in any other details set out in its entry in the Register,
 - (c) any change to its constitution,
 - (d) any action set out in section 16(2)(b) to (d) which the charity has taken,
 - (e) any administration order or an order for winding up made by the court in respect of the charity,
 - (f) the appointment of a receiver in respect of any of the charity's property, setting out the date on which the change, action, order or appointment took effect.
- (2) Subsection (1) does not apply in relation to any action which requires OSCR's consent under section 16.
- (3) A notice under any of the paragraphs (a) to (d) of subsection (1) must be given within 3 months of the date of the change or action to which it relates.
- (4) A notice under paragraph (e) or (f) of subsection (1) must be given within 1 month of the date of the order or appointment to which it relates.