

Mr Kevin Stewart MSP
Convener
Local Government and Regeneration Committee
Room T3.40
The Scottish Parliament
Edinburgh
EH99 1SP

Dear Mr Stewart MSP

Codes of conduct which apply to persons sitting on arms length organisations (ALEOs)

Thank you for your letter of 22 April addressed to Bill Thomson, Commissioner for Ethical Standards in Public Life (CESPLS) in Scotland and to me.

The Scottish Charity Regulator (OSCR) is established under the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') as a Non-Ministerial Department (NMD) forming part of the Scottish Administration. OSCR is the registrar and regulator of over 23,500 charities in Scotland, a small number¹ of which we have identified as Arms Length External Organisations (ALEOs).

Your letter specifically asked us to refer to the questions raised by Clare Adamson MSP during the committee discussion and this response aims to do this as well as answering other points raised in the letter; we consider these come under two broad headings:

1. The level and nature of regulation applied to ALEOs with charitable status (the charity test, trustee duties and conflicts of interest)
2. Interaction between OSCR and CESPLS

Charitable status and charity trustee duties

ALEOs can be registered as charities if they pass the charity test set out in the 2005 Act. To do so they must have only charitable purposes and provide public benefit in furtherance of these purposes. A recent OSCR review exercise identified 64 ALEOs registered as charities in Scotland, with a combined income in 2013 of over £550

¹ OSCR Report Arms Length External Organisations identified 64 registered charities as ALEO's.



million. The majority operate leisure and culture trusts, but they are also used to undertake activities such as community safety, employability and regeneration.

All bodies which are registered as charities must comply with the 2005 Act. This sets out requirements for charities and also for charity trustees. Charity trustees are the people in overall control and management of a charity and are responsible for the charity's governance and strategy, and making sure that the charity is administered effectively. The charity trustees of a charitable ALEO will generally be the people who sit on its board; this includes both councillor and non councillor board members. Rather than a 'Code of Conduct' charity trustees are subject to statutory charity trustee duties (set out in section 66 of the 2005 Act). A charity trustee must:

- Act in the interest of the charity. In the event of a conflict of interest, charity trustees should put the interests of their charity before their own interests, or those of any other person or organisation.
- Operate in a manner consistent with the charity's purposes. Charity trustees should carry out their duties in accordance with their governing document.
- Act with due care and diligence. Charity trustees should take such care of their charity's affairs as is reasonable to expect of someone who is managing the affairs of another person.
- Ensure that the charity complies with the provisions of the 2005 Act.

In support of these duties, OSCR has published [Charity Trustee guidance](#) setting out their duties and responsibilities in more detail. As charity regulator we are required to 'encourage, facilitate and monitor compliance by charities with the provisions of the Act' and 'identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct'. Where we find misconduct or mismanagement we can take action including suspending charity trustees, directing them not to take certain actions or petitioning the Court of Session to exercise the powers given it by the 2005 Act.

Members of the public can raise directly with OSCR concerns about persons (councillor or non councillor) sitting on a charitable ALEO. OSCR will then consider these in line with [our Inquiry Policy](#). In general, we only deal with concerns that relate to charity law, for example where charity trustees have breached their duties or where there is serious or sustained misconduct by those in management and control of a charity.

OSCR has previously received concerns about charitable ALEOs and, following on from these, has conducted inquiries. Specifically we undertook inquiries into Glasgow East Regeneration Agency and Shetland Charitable Trust. In both these cases we found that the high level of control and influence exerted by local authorities in these charities had led to governance issues and we made a number of recommendations to the trustees of each charity. We are also aware that CESPLS (then the Public Standards

Commissioner) undertook inquiries into Shetland Charitable Trust. It was as a result of these inquiries the wider interest and significant combined income level of ALEOs that we undertook the detailed review referenced previously.

In January 2015 OSCR published the findings of its detailed review into the [ALEOs](#) which are also registered as charities in Scotland. The key findings from this included:

- The 64 ALEOs registered as charities in Scotland vary in size, structure and type of activity.
- In the majority of cases they had both councillor and non-councillor ('independent') trustees.
- Of the 11 ALEOs reviewed in detail, ten were assessed as being governed adequately. Issues were identified with one and we are working with this charity to address these.
- ALEOs work in partnership with the local authority to provide services. Funding agreements ensure that funds are monitored, but there is flexibility to negotiate the amount of funding and how this is used.
- Independent trustees are appointed to ALEOs based on their skills and suitability for the role. These criteria are however not consistently applied to councillor trustees and this is an area for improvement.
- Many of the ALEOs are set up as companies with the local authority as sole member of the company. Although this structure has the clear potential to allow local authorities to control the ALEOs, authorities do not routinely exercise this control – in general the charities are operating with sufficient independence to allow the charity trustees to exercise their duties.
- There are areas where improvements to governance can be made and we made a number of recommendations in this area.

Our overall conclusion was that we were satisfied that charitable ALEOs are operating well, within their unique environment. We will continue to monitor them under our usual monitoring regime and have made six recommendations for their consideration.

Conflicts of interest

I note that the Committee specifically discussed conflicts of interest in relation to councillor trustees. For charity trustees the duties state that they must act in the interest of the charity and that they should put the interest of their charity before their own or those of any other person or organisation. During our study of charitable ALEOs we looked into councillor trustees, reviewing the actions that councillors had taken at meetings and also conflict of interest policies and registers of interest.

While we found that such trustees did not generally withdraw from discussions where the general relationship or business with the local authority was discussed, this was deemed appropriate as the relationship is close and it would not be practical for councillors to remove themselves from all discussions pertaining to the local authority.

However the report does advise there are situations where councillors must withdraw in order to exercise their charity trustee duties appropriately. These would be situations where it was clearly not possible for councillors to put their duties towards the charity before those of the local authority. Our report notes an example where the trustees of a charitable ALEO were discussing whether or not to accept the local authority as a sole member, and the councillor trustees acted appropriately in removing themselves from the discussion.

Interaction between OSCR and CESPLS

There has been interaction between CESPLS and OSCR. We have shared information on specific cases and our Head of Enforcement has been interviewed in support of a CESPLS (Public Standards Commissioner) case. More generally we have undertaken joint training between both sets of Investigating Officers.

This relationship is being developed further. We have already agreed to meet to increase familiarisation between offices and establish points of contact so that, where applicable, information can be shared effectively.

Community Asset Transfers

I note that Willie Coffey MSP raised the issue of community groups taking on publicly owned assets and asked whether there are any guidance/codes of conducts for members of the public serving on these bodies. Many such community bodies are charities. Where this is the case, then the statutory charity trustee duties discussed above would also apply to their board members.

Conclusion

I hope the Committee finds this a helpful response to the queries raised during its session on 1 April 2015. Overall, for persons sitting on the governing bodies of charitable ALEOs there are specific duties that they must comply with and a route by which concerns about these can be raised. OSCR has dealt with such concerns about ALEOs and had some interaction with CESPLS on these.

Yours sincerely

David Robb
Chief Executive, OSCR

Copy to Mr Bill Thomson, Commissioner for Ethical Standards in Public Life Scotlan