



Law Society
of Scotland

Stage 1 Briefing

Charities (Regulation and Administration) (Scotland) Bill

9 May 2023



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

The Charities (Regulation and Administration) (Scotland) Bill¹ (the Bill) was introduced by the then Cabinet Secretary for Social Justice, Housing and Local Government, Shona Robison MSP, on 15 November 2022. The Bill's introduction followed previous consultation on charity law reform by the Scottish Government in 2019² and in 2021.³ We previously submitted written evidence on the Bill to the Social Justice and Social Security Committee of the Scottish Parliament⁴ and provided oral evidence as part of the Committee's stage 1 consideration of the Bill on 9 March 2023.⁵ The Social Justice and Social Security Committee's Stage 1 Report on the Charities (Regulation and Administration) (Scotland) Bill (the Stage 1 Report) was published on 28 April 2023.⁶

We welcome the opportunity to consider and provide comment on the Bill ahead of the Stage 1 debate scheduled for 11 May 2023.

General remarks

We welcome the introduction of the Bill and consider that the changes proposed are generally sensible and proportionate. We have commented in detail on certain provisions below.

Whilst we welcome the introduction of the Bill, we believe that a more comprehensive overhaul is needed to place the sector on the strongest possible footing for the future.

We have long advocated for reform of Scottish charity legislation. We responded⁷ to the 2019 Scottish Government consultation on charity law, highlighting over 20 areas of the Charities and Trustee Investment

¹ [Charities \(Regulation and Administration\) \(Scotland\) Bill \(parliament.scot\)](#)

² [Consultation on Scottish Charity Law - Scottish Government - Citizen Space](#)

³ [Strengthening Scottish Charity Law Survey - Scottish Government - Citizen Space \(consult.gov.scot\)](#)

⁴ [23-02-03-char-charities-bill-written-evidence.pdf \(lawscot.org.uk\)](#)

⁵ [Social Justice and Social Security Committee | Scottish Parliament TV](#)

⁶ [Stage 1 Report on the Charities \(Regulation and Administration\) \(Scotland\) Bill | Scottish Parliament](#)

⁷ [01-04-19-cha-scottish-charity-law-consultation-response-final.pdf \(lawscot.org.uk\)](#)

(Scotland) Act 2005 (the 2005 Act) where wider reform would be beneficial. We responded⁸ to the 2021 Strengthening Scottish Charity Law Survey, welcoming further consultation and seeking reassurance that the remaining proposals consulted on in 2019 would also be taken forward and that other issues of concern raised by respondents would be fully considered. Also, we identified reviewing charity law as one of our priorities for the 2021 Scottish Parliament elections.⁹

The Scottish Government's consultation and engagement process to date has focused largely on proposed reforms derived from those suggested by OSCR in 2019. Throughout our engagement, we have highlighted that we believe more comprehensive reform of charity law is needed, including:

- Reforms to Scottish Charitable Incorporated Organisations (SCIOs), in particularly to assist smaller unincorporated organisations converting to this legal form.
- Statutory clarification of obligations regarding notifiable events.
- Clarification of provisions relating to winding up and dissolution.
- Amendments to address technical obstacles to reorganisation.
- Reforms relating to the treatment of royal charter/warrant and enactment charities. We are disappointed to note that the Bill does not contain reforms relating to the treatment of royal charter/warrant and enactment charities. In particular, clarification is badly needed on the extent and force of the exception in favour of endowments of which the governing body is a charity.¹⁰

In particular, we have previously suggested¹¹ small technical amendments in respect of sections 3(6), 7(4)(a), 16(2), 49, 54, 56(6)(b), 59 to 61, 63 and 66 of the 2005 Act which we would not anticipate being contentious.

We are disappointed that the Bill as introduced does not address the above areas, where we believe that reform is now overdue.

We welcome the Scottish Government's commitment to a wider review of charity law after the passage of this legislation. We note that the Stage 1 Report contains an Annex of evidence gathered on a wider review to help inform the Scottish Government's next steps. We call for further clarification on the scope and timescale for the wider review, to ensure that momentum is not lost. It is essential that this is not a missed opportunity for wider changes to the law to help support charities in Scotland to thrive.

Whilst the Bill does not introduce the comprehensive reform which we have called for, if passed it will lead to new requirements on the sector. We would support a public awareness-raising and engagement campaign prior to commencement, to ensure that charities and charity trustees are fully aware of their obligations and able to manage their affairs accordingly.

⁸ [21-02-19-char-strengthening-scottish-charity-law-survey.pdf \(lawscot.org.uk\)](#)

⁹ [2021 election priorities | Law Society of Scotland \(lawscot.org.uk\)](#)

¹⁰ See section 42(6) of the 2005 Act.

¹¹ See 01-04-19-cha-scottish-charity-law-consultation-response-final.pdf (lawscot.org.uk), Annex at page 15 onwards.

Comments on the Bill

References to the 2005 Act (Section 1)

The Bill proposes amendments to the Charities and Trustee Investment (Scotland) Act 2005. Section 1 provides that, for the purposes of the Bill, the “2005 Act” means the Charities and Trustee Investment (Scotland) Act 2005.

We have no comments on this section.

Information about charity trustees etc. (Sections 2 and 3)

Section 2 brings the Scottish system into line with England and Wales (E&W) by requiring (as the norm) inclusion of the names of a charity’s charity trustees in its entry in the Register. Section 3 makes express provision for a schedule of all charity trustees to be maintained by OSCR for its own use.

OSCR’s maintenance of such a schedule may possibly have a deterrent effect on some individuals – here is yet another state database to which charity trustees have to commit their personal details – but it could at least be made clearer on the face of the Bill that this is to be a facility strictly for the internal use of the regulator with no public access.

It is possible that some of the changes proposed by the Bill including updating information about trustees, may create an additional administrative burden for charities. However the extent of this will depend on the detail of implementation. Particular consideration should be given to ensuring that those who may not have access to the internet or be confident using online processes are not excluded.

Disqualification from being charity trustee etc. (Sections 4-7)

In our view, it is important that an individual disqualified from running a charity in one jurisdiction of the UK should not be free to participate in the running of a charity in one of the other jurisdictions, and sections 4-7 of the Bill introduce detailed new provisions on disqualification in Scotland to achieve broad parity with the already more developed provisions in E&W, in this respect aligning the two systems more closely and incorporating updated reference to Northern Ireland. In particular, it is provided that disqualification as a charity trustee will now also (in principle) disqualify a person from holding an office or employment with senior management functions. We regard these provisions as satisfactory.

Section 4 confers a power on Scottish Ministers to modify new section 69A to add or remove an offence. Regulations made under this section are subject to the affirmative procedure. We consider that this is appropriate.

Section 5 confers a power on Scottish Ministers to add or remove persons or descriptions of persons to the list of individuals disqualified from holding office as charity trustee. Regulations made under this section are subject to the affirmative procedure. We consider that this is appropriate.

The impact of these proposals on charities, and on potential trustees and senior managers, will depend on the detail of implementation. In our oral evidence, we highlighted that OSCR is a proportionate and reasonable regulator¹² and we believe that proportionate and reasonable implementation of these provisions - particularly the waiver process - should mitigate any potential adverse or deterrent effect whilst ensuring public confidence in the sector.

Appointment of interim charity trustees (Section 8)

This is a sensible provision which will allow OSCR to assist charities which need temporary support through the appointment of charity trustees on an interim basis.

We do have some practical concerns regarding how OSCR will source interim trustees, and would suggest that OSCR may wish to consult publicly on how it will proceed in this regard once the provisions are in force.

Charity accounts (Sections 9-11)

Section 9

The introduction of a statutory right of public access to charity accounts via OSCR draws on the E&W system and fills what has been an obvious gap in the Scottish provisions to date.

Section 11

The Bill gives a new power to OSCR to deregister a charity for failure to submit accounts. This has no equivalent in the E&W system (and might be technically difficult to introduce there because of the system's different rules on registration), but in our view a sound case has been made for the new power by OSCR.

Charity mergers (Section 12)

We welcome the inclusion in the Bill of proposals for the creation of a record of charity mergers providing for the transfer of legacies. Whilst this proposal did not form part of OSCR's 2018 proposals, we identified this as an area for reform in our response to the 2021 Strengthening Scottish Charity Law Survey. We would agree with the comment in the Stage 1 Report that consideration should be given to extending these provisions to lifetime gifts as well as legacies under wills.

Inquiries (Sections 13-15)

Section 15

The Bill confers a new power on OSCR to issue positive directions adapted from a similar power held by the Charity Commission. Again, in our view, OSCR has made a sound case for this new power. It may be

¹² Stage 1 Report, para 67

noted, however, that, overall, the options for intervention by OSCR will still fall far short of the array of powers available to the Charity Commission (see Charities Act 2011, sections 75A-85).

Connection to Scotland (Section 16)

While we support them in principle, the provisions on a ‘connection to Scotland’ would in our view benefit from further consideration. Much is left to the discretion of OSCR and we suggest that the provisions should strive for greater certainty. From a comparison with the equivalent E&W provision, section 1(1)(b) of the Charities Act 2011, the key issue (as also identified in para 63 of the Policy Memorandum) is jurisdictional control – would the body applying for registration be under the jurisdictional control of the Court of Session should OSCR need to enforce a regulatory order through the court?¹³ This consideration underlies the criteria to which OSCR must have regard under section 16(3) and (4) and should perhaps be referred to overtly in the provisions.

The provisions may present some practical challenges for new charities, though the likely extent of this will depend on the detail of implementation and in particular the evidence OSCR will accept to demonstrate a connection to Scotland. We therefore welcome the recommendation in the stage 1 report that OSCR monitor the operation of this section, so an informed decision can be taken on its effectiveness.¹⁴

Section 16 confers a power on Scottish Ministers to modify section 5 of the 2005 Act to make provision about the factors which are or are not relevant for the purpose of section 5(2)(aa). Regulations made under this section are subject to the affirmative procedure. We consider that this is appropriate.

Further modification of the 2005 Act (Section 17 and Schedule)

Section 17 introduces the Schedule, which further modifies the 2005 Act.

Schedule, para 4

The Bill’s provisions on changes to charity names, while they address certain of the difficulties identified during the review of the 2005 Act, fail to take full account of the representations we made at consultation. Paragraph 4 allows OSCR more than 28 days to investigate a proposed new name without having to refuse the application for change, and also allows an in-process adjustment to a proposed new name without requiring a new application. These changes are sensible, but they do not address the specific issue we identified in our response to the 2019 consultation, where we suggested that ‘The provisions [2005 Act, s 11(2)] should be adjusted so as to allow the change [of name] to be effected following receipt of OSCR’s consent, even if the 42-day period has not expired.’ The basic requirement of 42 days’ notice introduces unnecessary delay in a case where OSCR issues consent well within that 42-day period. We are disappointed that this has not been addressed in the Bill as introduced.

¹³ See *Guadiya Mission v Brahmachary* [1997] EWCA Civ 2239, [1998] Ch 341 on the position in E&W.

¹⁴ Stage 1 report, para 149.

Schedule, para 5

On the other hand, we welcome the introduction by paragraph 5 of a new power enabling OSCR to oversee the use of ‘working’ (as well as ‘official’) charity names. The provisions for the new power follow those for a similar power recently conferred on the Charity Commission (Charities Act 2022, section 25). This is sensible: the use of working names has become increasingly common in Scotland, just as in E&W.

We would suggest, however, that some clarification is required in relation to the drafting of paragraph 5 as it amends sections 71 and 73 of the 2005 Act. There is a reference in paragraph 5(7) to a paragraph “(ea)”, but we do not see such a paragraph inserted into section 71 and this does not seem to be reflected in the Keeling Schedule published with the Bill.¹⁵

Schedule, para 6

Paragraph 6 of the schedule makes adjusted provision for consent to and notification of certain changes under section 16 of the 2005 Act. Our 2019 consultation response included the following suggestion for amendment of the 2005 Act, section 16(4): ‘The provisions should be adjusted so as to allow the change [amending the charity’s constitution so far as relating to purposes, etc, per s 16(2)] to be effected following receipt of OSCR’s consent, even if the 42-day period has not expired.’ The modifications in paragraph 6 have the effect of disapplying the 42 day period for actions in pursuance of an approved reorganisation scheme, but retains the 42 day period for other changes such as changes to purposes, regardless of whether or not OSCR has in fact provided consent well within the 42 day period. The requirement to await expiry of the 42-day period causes unnecessary difficulty to charities in cases where OSCR has given consent within that period and there is a degree of urgency. We are disappointed that this has not been addressed in the Bill as introduced.

Schedule, para 7

Proposals relating to ‘Removal from Register: protection of assets’ put right what appears to have been a drafting oversight in the original section 19 of the 2005 Act. The repair highlights the need for the Scottish Ministers to issue regulations under section 19(4), to enable OSCR to apply to the Court of Session for a scheme for transfer of a removed body’s pre-removal assets to a specified charity. This is because one reason a body may be removed from the register is that it is failing to provide public benefit. After removal, it may still fail to apply its pre-removal assets for public benefit and OSCR must be able to step in with a scheme for transfer as a further protective measure.

Final provisions (Sections 18-20)

These Sections of the Bill deal with ancillary provision, commencement and short title.

We have no comments on these sections.

¹⁵ <https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/charities-regulation-and-administration-scotland-bill/introduced/keeling-schedule.pdf>



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