



Law Society
of Scotland

Written evidence

Charities (Regulation and Administration)(Scotland) Bill- detailed consultation

February 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.

Our Charity Law sub-committee welcomes the opportunity to consider and respond to the Social Justice and Social Security Committee of ten Scottish Parliament's detailed consultation on the Charities (Regulation and Administration) (Scotland) Bill.¹ The sub-committee has the following comments to put forward for consideration.

¹ [Charities Bill - Detailed consultation - Scottish Parliament - Citizen Space](#)

Consultation Questions

Questions 1-7 are respondent information provided via the online submission process.

8. What are your views on the Scottish Government's consultation and engagement process leading to the Bill?

We have long advocated for reform of Scottish charity legislation. We responded² to the 2019 Scottish Government consultation on charity law, highlighting over 20 areas of the Charities and Trustee Investment (Scotland) Act 2005 where wider reform would be beneficial. We responded³ 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.⁴

We have welcomed opportunities to engage constructively with Scottish Government, the Office of the Scottish Charity Regulator (OSCR) and other stakeholders.

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 look forward to engaging further with Parliamentary scrutiny of the Bill and the proposed wider review of charity law (see our answer to Question 10, below).

9. How has the charity sector changed since 2005, and why is an update or strengthening of legislation needed?

Other organisations will be better placed to respond to this question, particularly OSCR and SCVO and other relevant umbrella bodies.

² [01-04-19-cha-scottish-charity-law-consultation-response-final.pdf \(lawscot.org.uk\)](#)

³ [21-02-19-char-strengthening-scottish-charity-law-survey.pdf \(lawscot.org.uk\)](#)

⁴ [2021 election priorities | Law Society of Scotland \(lawscot.org.uk\)](#)

We have outlined why we believe updating and strengthening of legislation is required in our response to Question 8, above.

10. The Government is committed to carrying out a wider review of charity law after the passage of this legislation. What are your views on a review?

Whilst we welcome the introduction of the Bill, we continue to believe that a more comprehensive overhaul is needed to place the sector on the strongest possible footing for the future. We therefore welcome the Scottish Government's commitment to a wider review of charity law after the passage of this legislation. We would welcome 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.

We have highlighted above at Question 8 a number of areas for reform which, if not addressed by the Bill, should be addressed in the context of the wider review.

11. What are your views on the Bill's Financial Memorandum and the various impact assessments published by the Scottish Government?

We have no specific comments on the Financial Memorandum or the various impact assessments.

12. Will the Bill lead to the Scottish public being better protected, and will charity regulation become more transparent?

We believe that the changes proposed are sensible and proportionate. Some of the proposed reforms, including those relating to publishing accounts via the Register and the publication of the names of trustees, will directly increase transparency. However, we would note that it is possible that in some situations this increased transparency may have a deterrent effect on trustees or potential trustees.

13. What are your views on the extent to which the Bill matches OSCR's original proposals, as set out in 2018?

The Bill is largely consistent with the proposals consulted on in 2019. We responded to the 2019 Scottish Government consultation on charity law, largely welcoming the proposals but highlighting over 20 areas of the Charities and Trustee Investment (Scotland) Act 2005 where wider reform would be beneficial.

We welcome the inclusion in the Bill of proposals for the creation of a record of charity mergers providing for the transfer of legacies (section 12). 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 note that a small number of other changes proposed by the Bill did not form part of the 2019 consultation. We do not have any specific comments on the inclusion of these additional reforms.

14. Do you think the Bill makes it easier or more difficult to start and run a charity?

We believe that the changes proposed are sensible and proportionate. In general terms we do not anticipate that they will make it more difficult to start and run a charity, and they may go some way to clarifying regulatory requirements. However, as above we believe that there is significant scope for further changes to support the sector and in particular to help remove potential barriers to modernised and improved governance structures for charities.

The provisions set out in section 16 requiring all charities in the Scottish Charity Register to have and retain a connection to Scotland may present some practical challenges for new charities, however, 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 have commented further on section 16 at Question 17 below.

As per our answer to Question 12, above, it is possible that the provisions relating to publication of the names of trustees may have a deterrent effect on some individuals.

15. Will additional administrative burden be placed on charities? Would this be disproportionate for smaller charities?

Whilst it is possible that some of the changes proposed by the Bill, for example updating information about trustees, may create an additional administrative burden for charities, 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.

16. Does the Bill bring the Scottish regulatory system into line with other parts of the UK? Why is this important?

The answer to the first question here is 'Yes and No' – or, rather, 'No and Yes'. To take the system for England and Wales (E&W) first, that system is very different from the Scottish system, as much longer established, more complex, and designed to regulate a much larger charities sector both in numbers and average size in asset value of charities registered. Its definition of charity and its rules on registration are significantly different, with, in particular, exemption from registration for 'small' charities with an income of less than £5,000. The system has many features which have no equivalent in Scotland, such as the Official Custodian and controls on dispositions of charity land. To bring the Scottish system fully 'into line' with the E&W system, therefore, would be a major upheaval and is not what the Bill does, or ought to do.

What is important is not that the two systems should be fully aligned in the sense of one being a version of the other, but that each jurisdiction should regulate its charities appropriately for the size and make-up of its own charities sector. That is the main concern of the Bill, building on the 2005 Act. It is also important that a charity established in one jurisdiction should be adequately regulated if it operates territorially in the other, and in the Scottish system that is achieved by the registration of 'cross-border charities' under the 2005 Act and by the reference procedures under the Memorandum of Understanding between OSCR and the Charity Commission. Nothing in the review of the 2005 Act has suggested that those arrangements are

not working well, and the Bill proposes no changes. On the other hand, it is equally important that an individual disqualified from running a charity in one jurisdiction should not be free to participate in the running of a charity in the other, and sections 4-7 of the Bill introduce detailed new provisions on disqualification in Scotland to achieve parity with the already more developed provisions in E&W, in this respect aligning the two systems more closely.

In other respects, too, comparison with the system in E&W has exposed weaknesses in the Scottish system which the Bill now addresses. The introduction of a statutory right of public access to charity accounts via OSCR (section 9), the requirement for a connection with Scotland for bodies in the register (section 16), the express duty for charities to submit an annual return (Schedule, para 12), the new provisions for the recording of mergers and treatment of legacies (section 12), and the release of OSCR from its resource-intensive obligation to review each entry in the register from time to time (Schedule, para 1), all draw on the E&W system and bring the Scottish system more closely into line with it. So also, the Bill's provisions on charity names (Schedule, paras 4 and 5), while they address difficulties with the 2005 Act's treatment of changes of name identified during the review of the Act, introduce 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.

There are other areas, however, in which the Bill either introduces or maintains an approach distinctive to Scotland. In the area of enforcement, while the Bill (section 15) confers a new power on OSCR to issue positive directions adapted from a similar power held by the Charity Commission, it gives a further power to OSCR to deregister a charity for failure to submit accounts (section 11). 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). Otherwise, however, the options for intervention by OSCR will remain far short of the array of powers available to the Charity Commission (see Charities Act 2011, sections 75A-85).

In its treatment of charity trustees, the Bill (section 2) brings the Scottish system into line with E&W by requiring (as the norm) inclusion of the names of a charity's charity trustees in its entry in the register, but the express provision (section 3) for a schedule of all charity trustees to be maintained by OSCR appears to be an innovation peculiar to Scotland. As in the case of inclusion of charity trustee names in the main register (see our answer to Question 12), 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. Otherwise, the Bill leaves intact a major difference of principle between Scotland and E&W on charity trustee remuneration. The Bill (Schedule, para 15) makes minor technical amendments to tighten up the existing provisions in the 2005 Act but makes no change to the principle that a charity trustee may, where the requisite conditions are met, receive remuneration for services provided as a charity trustee or under a contract of employment. In E&W, the parallel provisions exclude remuneration for such services, allowing only for remuneration for the provision of goods and services provided otherwise than as a charity trustee or employee. This is a policy

area, therefore, in which the two systems remain out of alignment, but the distinctive Scottish approach appears to have attracted no criticism during the course of the review.

The legal system in Northern Ireland (NI) is in essence a version of the legal system in E&W and the system for the regulation of charities set up under the Charities Act (Northern Ireland) 2008 is closely modelled on the charities system for E&W as it stood at that time. It should be added, however, that the charities sector in NI is closer in size and make-up to the Scottish sector than to the much larger sector in E&W (see generally *Independent Review of Charity Regulation NI (2022)*), and that in the NI system there is currently no exemption from registration for ‘small charities’. In principle, none the less, to the extent that the Bill brings the Scottish charities system into line with the system for E&W it brings it into line with the system for NI. So also, a charity established in NI active territorially in Scotland under the banner of ‘charity’ is subject to the same requirement of registration with OSCR as a charity established in E&W, and a Memorandum of Understanding is in place between OSCR and the Charity Commission for Northern Ireland. The criteria for disqualification in the Scottish provisions as updated by the Bill include orders issued and offences committed in NI.

Regrettably, the NI system has been dogged by teething troubles since its inception, with drafting flaws in the 2008 Act requiring correction first in the Charities Act (Northern Ireland) 2013 and then in the Charities Act (Northern Ireland) 2022, with the result that it is not yet fully functional (see the extensive recommendations of the *Independent Review*). The amending legislation has been primarily concerned with repairing the original flaws and has not kept full pace with developments in the E&W system. If Scotland is looking for a comparator as a source for future improvements for its own system, therefore, it would be best to go to E&W rather than NI. This is likely to be relevant for the wider review of charity regulation in Scotland due to take place following the passage of the Bill.

Overall, therefore, whilst the Bill does not fully bring the Scottish regulatory system into line with other parts of the UK, it creates alignment in many important respects.

17. Do you have any other comments or concerns about specific sections of the Bill, or about the Bill more generally?

Information about charity trustees for OSCR’s use- Section 3

It should be made crystal clear in the substantive provisions of the inserted s 66A of the 2005 Act that the new Schedule of charity trustees is to be strictly for the regulator’s internal use and not accessible to the public.

Connection to Scotland- Section 16

The provisions on a ‘connection with Scotland’ would 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, s 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? See *Guadiya Mission v Brahmachary* [1997] EWCA Civ 2239, [1998] Ch 341 on the position in E&W.

Removal from Register: protection of assets- schedule 1, para 7

What appears to have been a drafting oversight in the original s 19 of the 2005 Act is put right, but the repair highlights the need for the Scottish Ministers to issue regulations under s 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.

Reorganisation for certain charities established by Royal warrant, Royal charter or enactment

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: see section 42(6) of the 2005 Act.



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