

# **HUTCHESONS' HOSPITAL TRANSFER AND DISSOLUTION (SCOTLAND) BILL**

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## **PROMOTER'S MEMORANDUM**

### **INTRODUCTION**

1. This document relates to the Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill introduced in the Scottish Parliament on 25 June 2018. It has been prepared by Brodies LLP on behalf of the promoter, the Patrons of The Royal Incorporation of Hutchesons' Hospital in the City of Glasgow, to satisfy Rule 9A.2.3(b) of the Parliament's Standing Orders. The contents are entirely the responsibility of the promoter and have not been endorsed by the Parliament.

2. The following other accompanying documents are published separately by the Parliament:

- statements on legislative competence by the Presiding Officer and the promoter (SP Bill 36–LC);
- Explanatory Notes (SP Bill 36–EN);
- a Promoter's Statement (SP Bill 36–PS).

3. The Promoter's Statement includes information about where these documents and other documents that are relevant to the Bill (but are not accompanying documents) can be inspected or purchased.

### **OBJECTIVES OF THE BILL**

#### **Summary**

4. The purposes of the Bill are to transfer the property, rights, interests and liabilities of The Royal Incorporation of Hutchesons' Hospital in the City of Glasgow, a registered Scottish Charity with the charity number SC001470 (the "Incorporation"), to a new Scottish Charitable Incorporated Organisation ("SCIO"), and to dissolve the Incorporation. The SCIO has been established by the current Patrons (i.e. trustees) of the Incorporation and is called The Royal Incorporation of Hutchesons' Hospital in the City of Glasgow SCIO ("the SCIO"). The SCIO was registered with the Office of the Scottish Charity Regulator ("OSCR") on 29 December 2017 and has the charity number SC048030.

5. In addition to transferring the property, rights, interests and liabilities of the Incorporation to the SCIO, and dissolving the Incorporation thereafter, the Bill will also repeal the Hutchesons' Hospital Act 1872, which regulates the management of the Incorporation and its revenues.

## **Background**

6. Mr George Hutcheson of Lambhill was born around 1558 and died in 1639. Under his Deed of Mortification dated 16 December 1639, he bequeathed land on which a hospital was to be built in Glasgow for the relief of poor and aged men, funds with which to construct that hospital, and funds to provide clothing, sustenance and lodging to those within the hospital. George Hutcheson's brother, Thomas Hutcheson, made further bequests to the charity in respect of indigent orphans who were sons of burgesses of Glasgow. Thomas also established the school, which became Hutchesons' Grammar School, to which boys could be sent if they were deemed by the Patrons to "show more than ordinary talent", though it is not clear precisely when that was done. Thomas also entered into a contract with the original Patrons (the Provost, three Baillies, Dean of Guild, Convener and ordinary Ministers of Glasgow, and their successors in office) to fulfil the terms of George's Deed of Mortification and administer the charity assets and funds.

7. George Hutcheson's Deed of Mortification envisaged the bequeathed funds providing pensions (meaning grants) for the sustenance and lodging of eleven "aged and decrepit men" above fifty years of age; formerly merchants, craftsmen or any other trade and known to be destitute of all help and support at the time of their entry to the hospital. The first pensions paid out of the charity funds were to two male beneficiaries in 1643.

8. The Hutchesons' Hospital building was completed in 1650 and was situated at the Trongate in Glasgow. The building was demolished in 1795 and the land sold to make way for Hutcheson Street, adjacent to which a new Hutchesons' Hospital was to be constructed out of a sinking fund for which the Patrons made provision out of the charity's revenues in 1800. The new Hutchesons' Hospital building, which included Hutchesons' School, was completed in 1805 on Ingram Street in Glasgow, facing Hutcheson Street and adjacent to John Street. However, the School moved to its own premises nearby in 1810 to accommodate larger numbers of scholars, and then to a purpose-built school building in the Gorbals area of Glasgow in 1841.

9. From 1639, with further bequests from Thomas Hutcheson and others, both the funds and the numbers and categories of people eligible for Hutchesons' Hospital pensions gradually expanded. In 1734 the number of adult male pensioners (originally provided for by George Hutcheson's bequests) was increased to fourteen, after the number of boy pensioners (originally provided for by Thomas Hutcheson's bequests) had been increased to fifteen in 1728. The Patrons decided to make certain widowed women over the age of fifty eligible for pensions from 1737 onwards. After 1758 there appeared to be no fixed rule on the number of men and women benefiting from the Hutchesons' Hospital funds, nor the amounts paid out to them. From 1781 onwards poor women of any age, and whether or not widowed, were made eligible for pensions from the charity funds, provided that they were resident in Glasgow and their husbands or fathers were burgesses of Glasgow. The current number of pensioners (i.e. recipients of discretionary grants) is 24, being 21 female and three male.

10. In 1821, in order to give more legal certainty to the administration and management of the charity's funds and affairs, the Patrons sought and were granted a Royal Charter, with the charity becoming The Royal Incorporation of Hutchesons' Hospital in the City of Glasgow. The charity in its current form was incorporated by the Hutchesons' Hospital Act 1872 (the "1872 Act"). The 1872 Act regulates the management of the Incorporation and the endowments connected with it. It was passed partly in light of changes which had taken place since the time when the original bequests had been made to the charity and which, as stated in the preamble to the 1872 Act, rendered "the exact observance" of many of the bequests "disconsonant with the intention of the donors". The 1872 Act was also required because certain changes to the Incorporation could not be effected without the authority of an Act of Parliament.

11. The 1872 Act provided for an increased number of Patrons and made provision for the better administration and governance of the Incorporation, including the application of the property and revenues of the Incorporation. It also provided for the Patrons to have the power to apply certain proportions of specified revenues towards the payment of pensions to Glasgow residents meeting certain criteria.

12. The majority of the 1872 Act concerned the powers of the Patrons in relation to the Incorporation's revenue distributions in the furthering of education, including giving the Patrons the power to apply certain proportions of specified revenues and endowments held by the Incorporation towards the cause of education in Glasgow, subject to the conditions set out in the 1872 Act.

13. The Incorporation's educational aspects subsequently came within the scope of the Educational Endowments (Scotland) Act 1882, under which the Hutchesons' Educational Trust Scheme (the "Hutchesons' Scheme") was made. The Hutchesons' Scheme provided that from 5 March 1885 the Incorporation's distributions for educational purposes would be paid to and administered separately by The Governors of Hutchesons' Educational Trust. That body continues to administer Hutchesons' Grammar School today, subject to it having been reconstituted several times under other legislation relating to educational endowments. The Hutchesons' Scheme obliged the Incorporation to pay to the Hutchesons' Educational Trust (the "Trust") no less than a specified proportion of the annual net revenue of certain funds controlled by the Incorporation.

14. A number of other smaller funds or Mortifications have been absorbed into and are administered by the Incorporation. No heritable property is held by the Incorporation. The latest accounts of the Incorporation for the year ended 31 December 2016 show that the Incorporation had assets (investments) of £2,831,629, with total funds available for charitable purposes (the income of the Incorporation, after deducting expenses of administration) being £61,379. After payments to beneficiaries of £33,380 and accruing £23,813 due to the Trust, there was a surplus for the year of £4,186 before taking into account the gain of £281,131 on investments. The amount due to be paid over to the Trust was £47,575, being its share of the Net Income for the two years ended 31 December 2016.

## **The need for change**

15. Under the 1872 Act, the governing body of the Incorporation is comprised of the following trustees (known as Patrons): specified *ex officio* Patrons, being the Lord Provost and every councillor of the City of Glasgow (now Glasgow City Council), the Magistrates of the City of Glasgow, the Lord Dean of Guild (Chair of the Board of Directors of the Merchants' House of Glasgow, a registered charity (SC008900) originally constituted in 1605), the Deacon Convener (Leader of the Trades House of Glasgow, a registered charity (SC040548) also established in 1605), and the Ministers of specified parishes in Glasgow; three annually elected representatives from the Merchants' House of Glasgow; three annually elected representatives from the Trades House of Glasgow; and six Ministers to be elected by the Patrons "from among the Ministers of religion officiating in Glasgow, not being Ministers of the Established Church of Scotland". A Preceptor (i.e. chairperson) is elected annually from among the Patrons. For the year ended 31 December 2017 the governing body of the Incorporation comprised 95 Patrons, including the Preceptor.

16. The conduct of the day to day business of the Incorporation, including the discharge of the Patrons' various trustee responsibilities, is carried out by an Executive Committee. The Executive Committee meets quarterly and at such other times as required, and has the general remit to deal with all business, reporting to the Annual Meeting of Patrons. The Preceptor, who although elected annually normally serves for three years, is an *ex officio* Convenor of the Executive Committee. The Executive Committee typically comprises individuals with substantial experience of trustee responsibilities. The Chamberlains, being a firm of solicitors, keep the Patrons advised as to changes in the law relative to the responsibilities of trustees.

17. In recent years the attendance at meetings of the Incorporation and contribution to the running of the Incorporation by the majority (but by no means all) of the *ex officio* trustees has been limited.

18. The promoter considers that there is a need for change given the outdated and unwieldy governance arrangements and the inability to amend the constitution of the Incorporation without primary legislation, as well as the restrictions the 1872 Act places on the ability of the promoter to apply the assets of the Incorporation. These restrictions are outdated and affect the ability of the promoter to provide genuine charitable benefit.

19. In relation to the restrictions on the promoter to make revenue distributions, the overarching purposes of the Incorporation are still appropriate but times have changed since the Incorporation's reconstitution under the 1872 Act, and the promoter considers that the restrictions are out of date, impracticable and unsuitable for the best application of the Incorporation's charitable assets.

20. The Incorporation is not a modern financial vehicle, and the promoter does not consider that the Incorporation's assets can be used to their best effect by having the Incorporation continue to be constituted and regulated under an Act of Parliament. The promoter considers that it is no longer necessary or appropriate to have the terms of the Incorporation set out in and governed by statute. This is on the basis that:

- it should not be necessary to require legislation to update or otherwise change the governance or administration of the Incorporation, and requiring the promotion of a Private Bill to effect change places the promoter at a disadvantage compared to the trustees of comparable charities that can effect changes through the internal decision making processes of their own constitution (with the consent as appropriate of the Office of the Scottish Charity Regulator (“OSCR”) and without the additional requirement of seeking the Parliament’s approval);
- it would not be a good use of the Parliament’s time or the charity’s assets to have to deal with any future changes that might be required to the Incorporation by way of legislation; and
- the SCIO, as the proposed new vehicle for the Incorporation, will be regulated by OSCR which will compensate for any perceived disadvantage resulting from the removal of parliamentary scrutiny.

21. The promoter does not consider that the charitable funds are used to their best effect by having the Incorporation constituted under an Act of Parliament, particularly given that Scottish charity law, regulation and practice has changed significantly since 1872. The most important and fundamental recent change has been the establishment of OSCR and the passing of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). The role of OSCR and the effect of the 2005 Act mean that there is a public register of Scottish charities and independent and proactive scrutiny of charities. The need to have a charity established by an Act of Parliament to ensure, for example, public accountability of trustees has fallen away. The practice connected with the establishment of charities has also developed significantly since 1872, and it would now be very unusual for a charity to be constituted by Act of Parliament.

22. The promoter therefore does not consider that remaining constituted under an Act of Parliament is a viable option.

23. The promoter believes that the assets and liabilities of the Incorporation should be transferred to a non-statutory charitable legal vehicle. A SCIO is a corporate charitable vehicle designed solely for and available only to Scottish charities. A SCIO is now the most popular choice of legal vehicle for new charities in Scotland and would provide an effective legal structure to further the objectives of the Incorporation, being an efficient method of holding, investing and paying out charitable assets as well as generally governing the administration of the charity. A charity constituted as a SCIO will be regulated by OSCR and must adhere to the terms of the 2005 Act. The governance of a SCIO can (with OSCR’s consent where necessary) be amended much more simply than via primary legislation, adding to the effectiveness and efficiency of the selected legal vehicle.

## **The SCIO**

24. Broadly speaking, the charitable purposes for which the Incorporation may currently apply the charitable assets are:

- To provide assistance to residents of Glasgow and such others who are considered by the Patrons to be needful and deserving of aid. This assistance consists of grants (or

“pensions”) made on an annual basis and paid quarterly, and such *ad hoc* distributions as are approved by the Executive Committee; and

- To make provision for the education of children. This purpose is met by paying to the Trust not less than 40% of the annual net revenue of the funds held by the Incorporation for the purposes of providing bursaries to those in need.

25. The charitable purposes of the SCIO seek to respect the spirit and underlying intention of the Incorporation’s purposes, but in a manner that more satisfactorily and effectively allows the charitable funds held by the Incorporation to be applied in the 21<sup>st</sup> century. The SCIO’s purposes are as follows:

- the relief of those in need by reason of age, financial hardship or other disadvantage; and
- the advancement of education.

26. The SCIO’s constitution also provides that it will operate as a grant-giving charity based in Glasgow supporting those with sufficiently close connections to Greater Glasgow (with both the necessary connection and the scope of “Greater Glasgow” to be determined by the Charity Trustees). In particular it will:

- make provision (financial or otherwise) for those in need by reason of financial hardship or other disadvantage (including but not limited to older age, significant changes in personal circumstances, personal or family owned business failure, and bereavement resulting in dependant(s) being in the care of surviving family);
- make provision (financial or otherwise) for the education and learning of children, young people and adults with a view to meeting or providing for educational needs and improvements in and around the City of Glasgow; and
- make over not less than 40% of its net revenue to the Trust.

27. The SCIO’s constitution creates a “two tier” structure consisting of:

- Charity Trustees – who hold regular meetings, communicate with each other regularly and generally control the activities of the SCIO; and
- Full Members – who have the right to attend Full Members’ meetings (including annual general meetings).

28. However, the SCIO’s constitution provides that the charity is to operate as a “single tier” entity, meaning the Charity Trustees and Full Members must be the same persons.

29. The constitution provides for the SCIO to have a maximum of fifteen trustees as follows: a maximum of three trustees appointed by Glasgow City Council; a maximum of three trustees appointed by the Merchants’ House of Glasgow; a maximum of three trustees appointed by the Trades House of Glasgow; a maximum of one trustee appointed by the Church of Scotland Glasgow Presbytery; a maximum of one trustee appointed by The Archdiocese of Glasgow and a maximum of four other trustees who may be appointed by way of a resolution passed unanimously at a meeting of the trustees.

30. As well as modernising the charitable purposes, the SCIO provides the Charity Trustees with powers and responsibilities consistent with modern practice, obliging and enabling them to meet the requirements of the 2005 Act and other legislative changes. In particular, the constitution expressly requires the Charity Trustees to: adhere to the terms of the 2005 Act; resolve conflicts of interest in favour of the charity; and monitor investment performance, consider diversification and take appropriate professional advice. This latter obligation is not found in the default law applicable to trustees, but it is appropriate to include it in a well-managed modern charity. The SCIO constitution also provides the Charity Trustees with modern investment powers. The SCIO as a vehicle reflects modern charity management practice taking account of the type of assets held (i.e. cash and investments) and the value of the assets.

31. Patrons of the Incorporation were not permitted to receive remuneration under the 1872 Act. The SCIO also prohibits remuneration for Charity Trustees.

### **ALTERNATIVE APPROACHES**

32. The promoter has considered whether possible alternative mechanisms (i.e. other than an Act of the Scottish Parliament) could be used to transfer the assets and liabilities of the Incorporation to the SCIO.

33. As the Incorporation is neither a trust nor an educational endowment (to which the Education (Scotland) Act 1980 would apply), the promoter cannot utilise any court reorganisation process.

34. The promoter considered the possibility of using the “reorganisation provisions” contained in Chapter 5 (particularly sections 39 and 40) of the 2005 Act, which provide a regime for charities to seek the approval of OSCR for a reorganisation of the purposes and constitution. However, section 42(5) of the 2005 Act provides that those sections do not apply to “any charity constituted under a Royal Charter or warrant or under any enactment”. The Incorporation is such a charity, having first been (officially) constituted under the 1821 Royal Charter and then reconstituted under the 1872 Act, and its purposes being set out in those instruments.

35. Section 42(6) of the 2005 Act provides that section 39 will nevertheless apply to such a charity if it is an endowment the governing body of which is a charity (“endowment” and “governing body” having the definitions set out in Part 6 of the Education (Scotland) Act 1980). However, although the assets of the Incorporation could, at least in part, be characterised as an endowment (“any property, heritable or moveable, dedicated to charitable purposes...”) the Patrons, as the governing body of the Incorporation, are not registered as a charity. It is the Incorporation which is the registered charity.

36. The 1872 Act also does not draw the same clear distinction between an endowment and its governing body as is made in section 42(6). That distinction does reflect the language used in schemes relating to educational endowments made under Part 6 of the Education (Scotland) Act 1980 and its predecessor legislation (such as the Educational Endowments (Scotland) Act 1882, under which the Hutchesons’ Scheme was made in 1885), which expressly distinguish between endowments and the governing bodies thereof. Paragraph 57 of the explanatory notes to the 2005 Act suggests that the exception in section 42(6) is intended to be used specifically by “a

charitable endowment (either educational or non-educational) established under the Education (Scotland) Act 1980". This is at best an incomplete description of section 42(6), which is not limited to endowments established under the 1980 Act, but it is perhaps an indication that section 42(6) deliberately echoed the language of schemes made under the 1980 Act because it was principally intended to be used by such charities.

37. In 2013 the Chamberlains (i.e. solicitors) of the Incorporation discussed with OSCR the prospect of converting the Incorporation into a SCIO. OSCR's view at that time was that the drafting of section 42 of the 2005 Act is ambiguous and its interpretation is difficult. The Patrons therefore decided against pursuing conversion to a SCIO at that time. In response to the promoter's consultation letter (see paragraph 45 below), OSCR referred back to those previous discussions and expressed the view that it is understandable that the promoter has chosen to promote a Private Bill. OSCR therefore confirmed that it has "no particular comment on, and certainly no objection in principle to, the proposal".

38. The promoter therefore has substantial concerns about its ability to rely on section 42(6).

39. If the promoter nevertheless asked OSCR to approve the reorganisation under section 39, and OSCR agreed to this, there may be a risk of that decision being declared *ultra vires* in the event that it was challenged. While such a challenge may be unlikely, if it were to succeed then any actions taken by the promoter or by the SCIO in respect of the charitable assets would also be unlawful. Given the scale of the assets that are to be transferred to the SCIO, this could result in the promoter incurring potentially significant liabilities. The promoter therefore considers that, in the circumstances, the risk of using the reorganisation provisions of the 2005 Act is prohibitive.

40. By contrast, the validity of an Act of the Scottish Parliament would be significantly more difficult to challenge. An Act would also have the advantage of being able to repeal the 1872 Act rather than simply rendering it redundant, and therefore keeping the statute book in good order.

41. The promoter has therefore concluded that a Private Bill is the most appropriate and best available method of achieving the desired objectives of transferring the Incorporation's property, rights, interests and liabilities to the SCIO, dissolving the Incorporation and repealing the 1872 Act.

## **CONSULTATION**

42. The Chamberlains of the Incorporation contacted Glasgow City Council, Merchants' House of Glasgow, the Trades House of Glasgow, the Presbytery of Glasgow and the Governors of Hutchesons' Educational Trust as part of the process of the Incorporation considering, developing and pursuing the restructuring option, and explained the general proposals to them including the prospect of the Incorporation promoting a Private Bill. All indicated approval in principle of the proposals.

43. As noted above, the creation of the SCIO was approved by OSCR, further to an application made by the promoter, on 29 December 2017.

44. The promoter then carried out a significant consultation exercise prior to the introduction of the Bill. The process consisted of the following.

### **Letters to consultees**

45. On 15 May 2018 the promoter sent a letter to each of the following:

- The Governors of Hutchesons' Educational Trust;
- Those currently in receipt of 'pensions' granted by the Incorporation;
- Glasgow City Council;
- The Merchants' House of Glasgow;
- The Trades' House of Glasgow;
- the Glasgow Presbytery;
- the Archdiocese of Glasgow; and
- OSCR.

46. The letters contained an explanation of the promoter's intention to promote the Bill and its reasons for doing so, an invitation to provide feedback on those proposals (to be provided by 11 June 2018) and contact details for doing so. One letter to a current recipient of a 'pension' granted by the Incorporation was returned on the basis that the recipient in question was no longer at the specified address. A new address for that recipient was identified and the letter reissued on Friday 8 June 2018, with a request for any feedback by Friday 22 June 2018.

### **Responses**

47. Three responses were received to these letters: the responses from Glasgow City Council and the Trades' House of Glasgow expressed support for the Bill proposals, and the aforementioned response from OSCR made clear that OSCR had no objection in principle to the proposals.

### **OSCR consent to dissolution**

48. Section 16 of the 2005 Act requires charities to seek OSCR's consent before making specific certain changes, including dissolution. This requirement applies whatever mechanism is used to give effect to the dissolution, including private legislation. The promoter therefore formally applied to OSCR on 19 June 2018 for consent to the dissolution of the Incorporation. OSCR has 28 days to respond to an application for dissolution, failing which consent is deemed to be granted. Given that OSCR has already approved the establishment of the SCIO (see paragraph 4 above) and the terms of OSCR's reply to the consultation letter it received (see paragraph 37 above), the promoter does not expect there to be any difficulty obtaining OSCR's consent.

*This document relates to the Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill (SP Bill 36) as introduced in the Scottish Parliament on 25 June 2018*

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