

# Edinburgh Bakers' Widows' Fund Bill

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## Promoter's memorandum

### Introduction

1. This document relates to the Edinburgh Bakers' Widows' Fund Bill introduced in the Scottish Parliament on 20 March 2017. It has been prepared by Shepherd and Wedderburn LLP (Solicitors) on behalf of the promoters, the Trustees of the Widows' Scheme of the Incorporation of Bakers of the City of Edinburgh, 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 10–LC);
- Explanatory Notes (SP Bill 10–EN);
- a Promoter's Statement (SP Bill 10–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

#### Background

4. The Incorporation of Bakers, or Baxters, of the City of Edinburgh ("the Incorporation") is one of the ancient trade incorporations or guilds set up in medieval times to regulate trade in many of the cities of northern Europe. It was granted a Seal of Cause on 20 March 1522, to replace an earlier Seal

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lost “in time of trouble”. Under the terms of the Seal of Cause, members of the Incorporation controlled admission to the craft of baking and the supply of bread within the City of Edinburgh, subject to penalties for poor quality, and they had the faculty and privilege to make statutes and rules for the guiding of their craft in honesty and for the common good.

5. The Incorporation prospered over the following years and acquired flour mills by the Water of Leith, but the advent of steam power rendered the water-powered mills obsolete and they had to be sold at a loss. The Burgh Trading Act of 1846 abolished the exclusive trading privileges of the Incorporations, which generally declined thereafter.

6. The Incorporation formed a scheme on 5 October 1803 for providing a fund for widows, and in certain circumstances for the children, of members of the Incorporation. Monies for the scheme were raised from the Incorporation of Bakers and members of the Incorporation also made personal contributions to the scheme. By 1812, the sum held by the scheme amounted to approximately £3,278. However, the scheme could not become operational without the authority of Parliament. Accordingly, an 1813 Act entitled “An Act for providing a fund for annuities for widows of members of the Incorporation of Bakers of the City of Edinburgh 1813” was passed authorising the scheme and naming it the “Widows Fund for the Incorporation of Bakers within the City of Edinburgh” (“the Fund”).

7. After payment of certain expenses, the monies raised were used to pay annuities to widows of contributors to the Fund. In certain circumstances, provision could also be made for elderly members or orphans of members who were considered to be in need.

8. The last annuity paid under the scheme was in 1997. At that time, the rate of payment was £5,000 per annum. Since then, there have been no qualifying beneficiaries under the Fund. However, there are currently two wives of contributing members to the Fund who could qualify in future for annuities if they are widowed. As such, they have a contingent interest in the Fund.

9. The last contributions to the Fund were made in 1981 by the last eligible member in terms of the scheme. He had been admitted to the scheme in 1968 and had, by 1981, paid the 13 years of contributions required by the 1813 Act to allow his wife to be entitled to future annuities on his death.

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10. Since then, the only new members admitted to the Incorporation have been either men over the age of 45 years or women. Neither category of members is eligible to contribute to the Fund under the terms of the 1813 Act. Given the restrictions on contributing members imposed by the 1813 Act, the Incorporation has found it difficult to attract new members. At a meeting on 20 June 2013, the Trustees took the decision that the scheme should not continue to operate in its current form. They agreed that the scheme should not be open to new contributions and that this should be made clear to prospective new members of the Incorporation.

### The need for change

11. The promoters consider that there is a need for change given the restrictions on the ability of the Trustees to apply the assets of the Fund (“the Fund assets”) as imposed by the provisions of the 1813 Act. The Fund is not a modern financial vehicle and does not provide any defined benefits for widows of contributing members, depending instead of the discretion of the Trustees. With a finite number of potential beneficiaries, the Trustees find themselves unable to apply the Fund assets in accordance with the spirit of the Fund.

12. Furthermore, the Trustees do not consider that the Fund assets can be used to their best effect by having the Fund authorised and regulated by an Act of Parliament.

13. There exists among the current Trustees a desire for change and a willingness to undertake the work required in order to achieve change. If nothing is done, the Fund assets may become frozen and the Trustees will be powerless to make any changes.

14. Having considered the case of *Smith v Lord Advocate* (1899) 1 F 741, the Trustees fear that the Fund assets may, as *bona vacantia*, fall to the Crown as *ultimus haeres*. The Fund would not then be used in the general spirit of either the scheme, or the Incorporation.

15. The Trustees feel that the Fund has become defunct and they wish to use the monies it contains in a responsible manner for charitable purposes which will tie in with the Laws and Regulations of the Incorporation. The Trustees have created a new charitable trust as a new repository for the Fund assets. The purposes of the new charitable trust are broadly as follows: the encouragement and support of training and education in baking

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trade-related careers, the provision of training opportunities in baking, encouraging discussions on baking and baking standards and the promotion of an appreciation of local baking and the history of baking.

16. The Trustees are also mindful of their duties towards the wives of contributing members and they want to ensure that their interests in the Fund are recognised and dealt with in a fair manner.

## Summary

17. The overall objective of the Bill is to transfer the Fund (which was established under Georgian legislation) to a modern non-statutory charitable trust. More particularly the objectives are threefold:

- The first objective is to allow the Trustees to make capital payments to the wives of current contributing members in lieu of future annuity payments that would have been due to them if they were later widowed.
- The second objective is to transfer the remaining property, rights, interests and liabilities of the Fund to The Incorporation of Bakers of Edinburgh Charitable Trust (Registered Scottish Charity Number SC047164) (“the Charitable Trust”).
- The third and final objective of the Bill is to dissolve the Fund and repeal the 1813 Act which authorised it.

## Alternative approaches

18. The promoters consider that it is no longer necessary or appropriate to have the terms of the Charitable Trust set out in and governed by statute. This is on the basis that:

- the Charitable Trust will be regulated by the Office of the Scottish Charity Regulator (“OSCR”) which removes any benefit obtained by parliamentary scrutiny;
- it is not a good use of parliamentary time to deal with any future changes which might be required to the provisions of the Charitable Trust;
- there would be significant cost and time implications for the new Charitable Trust in obtaining legislative alteration to its terms that would erode the funds available to distribute for charitable purposes.

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19. Remaining a body constituted by Act of Parliament was therefore not considered to be a viable option.

20. In order to achieve the objectives set out in the preceding paragraphs, the Trustees concluded that the assets and liabilities of the Fund should be transferred to a non-statutory charitable legal vehicle. The Trustees examined alternative legal structures and have determined that a charity constituted by a Deed of Trust would best serve their objectives. The alternative legal structures considered by the Trustees were becoming a company limited by guarantee and a Scottish Charitable Incorporated Organisation (a "SCIO").

21. The Trustees concluded that a Deed of Trust would provide an effective legal structure to further the objectives of the new charitable trust. The Trustees also considered that a charitable trust would provide an efficient method of holding and paying out charitable assets. A charity constituted by Deed of Trust will be regulated by OSCR and must adhere to the terms of The Charities and Trustee Investments (Scotland) Act 2005 ("the 2005 Act"). A Deed of Trust can be amended more simply than an Act of Parliament, company limited by guarantee or SCIO, adding to the effectiveness and efficiency of the selected legal vehicle.

22. In considering the suitability of a company limited by guarantee, the Trustees concluded that, in light of the fact that the charity would not be employing any individuals and that it would, at least initially, be a grant-giving charity, there would be no advantage in constituting the charity by way of a company limited by guarantee. Indeed, the Trustees considered that the obligation to report to Companies House, in addition to reporting to OSCR, would constitute an unnecessary administrative burden on the charity and would lead to increased administration costs.

23. In order to avoid duplication of regulation, the Trustees considered whether a SCIO would be a suitable charitable structure. Whilst the benefit of being a SCIO is that there is no duty to report to Companies House, the Trustees did not consider that there would be any advantage to adopting the SCIO structure as compared to a trust. The Trustees had concerns about what would happen if the SCIO was to be wound up by OSCR. The Trustees also felt that, due to the lack of familiarity with SCIOs among the general public, adopting this structure might deter future Trustees from becoming involved with the charity.

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24. For these reasons, the Trustees consider that a charitable trust will provide a suitable and effective framework for the future.

25. Having identified a charitable trust as being the most appropriate recipient legal vehicle, the Trustees then had to consider the appropriate mechanism to transfer the assets and liabilities of the Fund to the Charitable Trust. Given that the Fund constitutes a public trust, the Trustees considered the following options:

### Cy pres

26. Under common law, the doctrine of *cy pres* allows trustees to make an application to the Court of Session to have the terms of a public trust varied where the purposes of the trust are or have become impossible to fulfil or have become particularly inappropriate. Whilst the Trustees consider that the purposes of the Fund have become inappropriate and will soon become impossible of fulfilment, they do not consider the *cy pres* route to be a suitable option. The court will only approve a *cy pres* scheme where the terms of the scheme are sufficiently close in character to the existing terms that they can be regarded as being within the ambit of the truster's original intent. The Trustees wish to substantially change the provisions of the Fund and, accordingly, a *cy pres* scheme is unlikely to be approved by the Court.

### Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

27. Section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 gives the Sheriff Court and the Court of Session powers to approve a scheme for the variation or reorganisation of the trust purposes in any public trust. As with the *cy pres* scheme, the Trustees consider that an application under section 9 would not be possible due to the substantial changes that they wish to make to the terms of the Fund. Section 9(2) provides that:

“The court shall not approve a scheme ... unless it is satisfied that the trust purposes proposed in the scheme will enable the resources of the trust to be applied to better effect *consistently with the spirit of the trust deed or other document constituting the trust*, having regard to changes in social and economic conditions since the time when the trust was constituted.” [emphasis added]

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## Sections 39 and 40 of the Charities and Trustee Investments (Scotland) Act 2005

28. Sections 39 and 40 of the 2005 Act provide a regime for charitable trusts to seek the approval of OSCR for a reorganisation of the trust purposes. The Trustees considered whether it might be possible for the Fund to become a charity and thereafter make use of sections 39 and 40 of the 2005 Act. However, section 42(5) of the 2005 Act provides that, in general, this route is not open to a charity constituted under any enactment, unless the charity is an endowment. "Endowment" means:

"any property, heritable or moveable, dedicated to charitable purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society contributed or paid by the members of such incorporation or society by way of entry moneys or other fixed or stated payments, nor burgess or guildry fines paid to any such incorporation or society, nor funds bequeathed or given to any such incorporation or society for the benefit solely of members or widows or families of members of such incorporation or society".

29. Whilst it might be possible for the Trustees of the Fund to consent to it being treated as an endowment, the use of the Fund is not currently dedicated to charitable purposes so it would not qualify.

30. The Trustees are therefore not permitted to make use of sections 39 and 40 of the 2005 Act as a means of varying the Fund.

31. The Trustees have concluded that the only appropriate method of amending the objectives of the Fund and the powers of the Trustees is to promote a Private Bill in the Scottish Parliament.

## The Charitable Trust

32. The Charitable Trust is registered with OSCR. The purposes of the Charitable Trust as set out in the Deed of Trust are:

"The advancement of education through:

- encouraging the training of bakers by supporting a wide range of education and training opportunities in baking through ourselves and other organisations who share similar aims and values and encouraging baking and the teaching of baking;

"The advancement of the arts, heritage, culture or science through:

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- supporting the dissemination to the public of information and discussion on baking and baking standards within the context of local food culture; and
- promoting an understanding and appreciation of locally produced bread and of the history of the baking trade particularly in Edinburgh and beyond.”

33. The terms of the Deed of Trust have been approved by OSCR and the above purposes meet OSCR’s Charity Test in that they are charitable purposes providing a public benefit in Scotland. The promoters believe that the establishment of the Charitable Trust provides the most appropriate means by which the proceeds currently contained in the Fund can be used to further the purposes of the Incorporation to the benefit of the public.

34. In addition to the charitable purposes, the Charitable Trust provides the Trustees with powers and responsibilities consistent with modern practice, as well as enabling the Trustees to meet the requirements of the 2005 Act and other legislative changes. The terms of the Charitable Trust reflect modern charity trust management practice, taking account of the type of assets held (i.e. cash and investments) and the value of the assets.

## Consultation

35. The Trustees of the Charitable Trust are the current four Trustees of the Fund, together with two new Trustees. All six Trustees are also members of the Incorporation. Consultation has been carried out with the members of the Incorporation, with the wives of contributing members of the Fund, and with OSCR.

36. The Trustees have considered how the interests of the wives are to be dealt with as well as the best vehicle for the Charitable Trust.

37. Prior to transferring the Fund assets into the Charitable Trust, the Trustees will make a single capital payment to each of the two wives of contributing members. The agreed capital payments have been ring-fenced from the Fund assets. The Bill will give authority to the Trustees to make a single payment to each of the wives who are not yet (and may never become) widows. The Trustees do not otherwise have authority to make such payments to wives (rather than widows) in terms of the 1813 Act. It is intended that the payments will be made to the wives prior to the dissolution of the Fund.



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38. The Trustees have consulted an actuary and the capital payments have been calculated by the actuary to ensure that the wives receive equitable payments. The wives have been consulted on the actuarial calculation. The outcome of the consultation with the wives was that they have agreed to accept the capital payments from the Fund assets in lieu of potential future annuities to which they might have been entitled as widows in terms of the 1813 Act.

39. Net of the ring-fenced funds, the Fund assets are mainly invested in Government Bonds and have an investment value as at 5 January 2017 of around £355,000 producing around £6,300 gross annual income.

40. The Trustees, as members of the Incorporation, have considered the interests of the Incorporation and how these can be furthered by the establishment of a charitable trust for the remaining Fund assets. The purposes of the Charitable Trust will respect the spirit and aims of the Incorporation.

41. The Trustees have also consulted OSCR as part of their application for charitable status for the Charitable Trust. The outcome of the consultation was that OSCR has granted its approval to the setting up of the Charitable Trust.

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