

Charities (Regulation and Administration) (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Charities (Regulation and Administration) (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers.

2. The following other accompanying documents are published separately:

- Explanatory Notes (SP Bill 20–EN);
- a Financial Memorandum (SP Bill 20–FM);
- a Policy Memorandum (SP Bill 20–PM);
- statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 20—LC).

3. This Memorandum has been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Parliament.

Outline of Bill Provisions

4. The Bill aims to strengthen and update the current legislative framework provided by the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). The Bill is intended to increase transparency and accountability and maintain public trust and confidence in Scotland's vital charity sector.

5. This Bill is not designed to take forward a complete review or reform of charity law but rather to enhance what already exists, focusing on three primary aims:

- Increasing transparency and accountability in charities;
- Improvements to the Office of the Scottish Charity Regulator's (OSCR's) enforcement powers; and
- Bringing Scottish charity legislation up to date with key aspects of charity regulation in England, Wales and Northern Ireland.

Rationale for Subordinate Legislation

6. The Scottish Government has, in deciding whether provisions should be in the Bill or in subordinate legislation, and in deciding on the appropriate level of scrutiny of subordinate legislation, given due regard to:

- the need to strike the right balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make appropriate use of valuable parliamentary time;
- the need to allow detailed administrative arrangements to be kept up to date within the basic structures and principles set out in the primary legislation; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of provisions in primary legislation approved by the Parliament.

7. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

Delegated Powers

Section 4 – Power to modify new section 69A so as to add or remove an offence

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

8. Section 4(3) inserts a new section 69A into the 2005 Act. Section 69A lists criminal offences, conviction for any of which results in a person being automatically disqualified from being a charity trustee of a Scottish charity. Subsection (4) of new section 69A provides a power for the Scottish Ministers to amend section 69A so as to add or remove an offence.

Reason for taking power

9. The criteria for automatic disqualification of charity trustees in Scotland have not been updated since the 2005 Act was enacted. At that time, the criteria mirrored the corresponding disqualification criteria in the equivalent legislation in England and Wales. This was for consistency, and to ensure that individuals disqualified from the office of charity trustee in England and Wales could not subsequently hold a similar office in Scotland.

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10. Subsequent changes to charity legislation for England and Wales have extended the criteria for automatic disqualification, broadening it to include individuals with, for example, unspent convictions for perjury, misconduct in public office and specified bribery, terrorism and money laundering offences. As a result, a divergence has emerged which the Bill seeks to address by expanding the disqualification criteria for charity trustees in Scotland through the addition of a new section 69A. The inclusion of a power at subsection (4) of that new section will allow the Scottish Ministers to amend section 69A so as to add or remove an offence. This will allow the list of specified offences in section 69A to be amended in future through regulations, rather than further primary legislation. This will bring flexibility to the disqualification regime, allowing it to be adjusted if, for example, amendments to the offences specified are made in other legislation or further offences are added in one of the other jurisdictions of the UK.

Choice of procedure

11. The power to amend the list of specified offences is subject to the affirmative procedure, as regulations made in exercise of the power would amend primary legislation and it is generally considered that any changes to primary legislation should usually be subject to the affirmative procedure. In addition, the specification of further offences in section 69A would broaden the scope of the disqualification criterion in section 69(2)(a)(ai) of the 2005 Act regarding criminal offences. Given the impact this may have on individuals affected by the change, it is considered that the affirmative procedure would provide the appropriate level of scrutiny over changes of that nature.

Section 5 – Power to add or remove persons or descriptions of persons to the list of individuals disqualified from holding office as charity trustee

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

12. Section 5(3) inserts a new section 69(7) into the 2005 Act to provide a power to amend section 69 by adding or removing persons or descriptions of persons to or from the list of persons disqualified from being a charity trustee and to modify the definitional material in section 70 (either as a consequence of any modification to section 69 or otherwise). Section 69(2) sets out the individuals who are automatically disqualified from being a charity trustee of a Scottish charity. These include persons with certain unspent criminal convictions, individuals who are bankrupt and persons removed from the control or management of a body by the Court of Session or under equivalent processes in England and Wales. Section 70 sets out various definitions for the purposes of section 69 including, for example, what is meant by “undischarged bankrupt”.

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Reason for taking power

13. The criteria for automatic disqualification of charity trustees in Scotland have not been updated since the 2005 Act was enacted. At that time, it mirrored the corresponding disqualification criteria in the equivalent legislation in England and Wales. This was for consistency, and to ensure that individuals disqualified from the office of charity trustee in England and Wales could not subsequently hold a similar office in Scotland.

14. Subsequent changes to charity legislation for England and Wales have extended automatic disqualification rules beyond the changes in relation to criminal offences discussed above in relation to section 4 (for example by extending those rules to those who have been found to have disobeyed an order of the Charity Commission for England and Wales or Northern Ireland, or to those who are designated individuals under counter-terrorism legislation). As a result, a divergence has emerged and the Bill seeks to address this and to bring the Scottish provisions up to date. The addition of new section 69(7) will provide a power to add or remove persons or descriptions of persons to or from the list of individuals disqualified from holding office as charity trustee, thereby allowing future changes to the disqualification regime to be taken forward in regulations, as opposed to primary legislation. Section 70 could need to be adjusted either in consequence of those changes or as the only means of implementing those changes (for example, if the definition of “undischarged bankrupt” were to need updating, that would be effected by means of a change to section 70 only).

Choice of procedure

15. As with the power to amend section 69A discussed above, the power at section 69(7) would be exercised by amending primary legislation and it is therefore generally considered appropriate for the affirmative procedure to apply. In addition, amending section 69 so as to add or remove descriptions of persons would also have the effect of amending the scope of the regime for disqualification of charity trustees as a whole. As with section 69A, it is considered that the enhanced level of scrutiny afforded by the affirmative procedure is appropriate for changes of that nature.

Section 16(3) – Power to modify section 5 to make provision about the factors which are or are not relevant for the purpose of section 5(2)(aa)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

16. Section 16 makes provision about charities which it is not appropriate for OSCR to regulate. Section 16(3) inserts a new section 5(2)(aa) into the 2005 Act so that OSCR may not enter an applicant onto the Scottish Charity Register if it considers it would not

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be appropriate for OSCR to regulate the applicant because the applicant has or will have no or negligible connection to Scotland. In considering, in all circumstances, what connection the applicant has or will have to Scotland, OSCR must have regard to the factors listed in new section 5(4).

17. Section 16 also inserts a new section 5(5) into the 2005 Act to include a power for Scottish Ministers to modify section 5 to make provision about the factors which are or are not relevant for the purpose of subsection (2)(aa).

Reason for taking power

18. This power is taken to provide flexibility for changes to be made in the future for items that are necessary to be added to or removed from section 5, ensuring the integrity of the Scottish Charity Register. The question of what constitutes a connection to Scotland may develop in light of both experience and changing circumstances – for example, the location of trustee meetings might have been more of a tangible consideration prior to the coronavirus pandemic but now many trustee meetings will take place online so other factors are likely to be of greater relevance.

Choice of procedure

19. As this power permits the modification of primary legislation, the affirmative procedure is generally considered appropriate. Further, in terms of the substance of the power, regulations made in exercise of this power would adjust the factors which are or are not relevant for the purpose of OSCR considering an application for entry to the Register. In view of the centrality of the Register to the scheme of regulation set up by the 2005 Act, it is also considered that the affirmative procedure confers the appropriate level of scrutiny over the power's exercise.

Section 16(4) – Power to modify new section 30A to make provision about the factors which are or are not relevant for the purpose of section 30A(1)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

Provision

20. Section 16(4) of the Bill inserts new section 30A into the 2005 Act. Section 30A makes provision for the removal of a charity from the Scottish Charity Register where it has no or only negligible connection to Scotland (if it does not comply with a direction under section 30A(2), to take steps OSCR considers necessary for the purposes of establishing a connection to Scotland which is more than negligible). Section 30A(5) sets out factors which OSCR is required to have regard to when considering what connection (if any) a charity has to Scotland. New section 30A(6) confers a power on

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the Scottish Ministers to modify new section 30A to make provision about the factors which are or are not relevant in considering whether a charity has a connection to Scotland.

Reason for taking power

21. Further to changes made to section 5 of the 2005 Act relating to entry onto the Register, this power relates to the removal from the Register of a charity where it has no or negligible connection with Scotland and has not complied with a direction to rectify that. The provisions will allow OSCR to ensure charities already on the Register, presently and in future, meet the same requirements as organisations applying to be a charity. The same flexibility as is required in relation to the power taken under section 16(3) of the Bill is therefore also required here. Whilst the powers established under section 16(3) and (4) are separate, it is likely that they would be exercised simultaneously so that the lists broadly mirror each other. Noting that there could be cases where the context for an applicant is different to that for an existing charity, however, it is considered useful to have 2 separate powers in order to provide flexibility should any divergence between the lists later be considered desirable.

Choice of procedure

22. As this power permits the modification of primary legislation, the affirmative procedure is generally considered appropriate. Further, in terms of the substance of the power, regulations made in exercise of this power would adjust the factors which are or are not relevant in OSCR considering whether to take action to remove a charity from the Register (by first issuing a direction) on the basis that it is not connected to Scotland. In view of the centrality of the Register to the scheme of regulation set up by the 2005 Act, it is also considered that the affirmative procedure confers the appropriate level of scrutiny over the power's exercise.

Section 18 – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation;
otherwise negative

Provision

23. This section provides that the Scottish Ministers may make regulations to make any incidental, supplementary, consequential, transitional, transitory or saving provision that they consider appropriate for the purpose of, in connection with or for giving full effect to the Bill. Such regulations may modify primary legislation (including the Act for this Bill), and they may make different provision for different purposes.

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Reason for taking power

24. This enabling power is sought to provide flexibility to quickly and effectively make any necessary adjustments that might be needed for the purposes of, in connection with, or for giving full effect to the Bill. The Bill's provisions are inserted into or interact with the 2005 Act. While the Scottish Government has given careful consideration to such interactions, the Bill may give rise to a need for ancillary provision. The power to make such provision is common in Bills to provide flexibility to make any adjustments in light of experience in relation to the operation of the Act as timeously as possible.

Choice of procedure

25. Section 18(3) provides that regulations made in exercise of this power are subject to the affirmative procedure if those regulations add to, replace or omit any part of the text of an Act. Otherwise, such regulations will be subject to the negative procedure. This formulation is standard in connection with ancillary powers, and is considered to provide an appropriate level of Parliamentary scrutiny, recognising the particular interest Parliament has in provisions which modify primary legislation.

Section 19 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

Provision

26. This section provides that the Scottish Ministers may make regulations to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Commencement regulations may include transitional, transitory or saving provision, and they may make different provision for different purposes.

Reason for taking power

27. It is standard for Ministers to have powers over the commencement of Acts. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable. It is also necessary to ensure that commencement regulations can make provision for effective transitional arrangements when provisions of the Bill are brought into force and to ensure that provisions of the Bill can be commenced for different purposes if necessary.

Choice of procedure

28. As is standard practice for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies to the power in section 18. Commencement regulations bring into force provisions the substance of which have already been considered by Parliament during

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the course of the Bill's passage. Any regulations made under this section will be laid before Parliament as soon as practicable after they are made.

Paragraph 13 of schedule – Amendment to power in section 52(1) in respect of SCIO documents

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

Provision

29. Paragraph 13 of the schedule adds new subsections (3A) and (3B) to section 52 of the 2005 Act. Section 52 deals with the name and status of Scottish Charitable Incorporated Organisations (“SCIOs”) and provides, at subsection (1), that the name of a SCIO must appear in legible characters on such documents issued or signed by or on behalf of that SCIO as the Scottish Ministers may specify in regulations.

30. New subsection (3A) would permit regulations made in exercise of the power in section 52(1) to specify other information – beyond the name and status of a SCIO – that must also be stated in legible characters in the relevant documents. New subsection (3B) would permit regulations to exempt all SCIOs, or SCIOs of a particular type, from any of the requirements imposed by virtue of the new subsection (3A). It would also permit regulations to provide that any statement required (in relation to the SCIO's name/status or anything else that is required by virtue of these new additions) may, in the case of documents which are otherwise wholly or mainly in a language other than English, be made in that other language. While the provision is made by extending the scope of the existing power to specify documents in which a SCIO's name and status must be set out, the substance of the change is the conferral of a power (albeit one that is not free-standing).

Reason for taking power

31. The policy intention is to require SCIO numbers to be specified as additional information in the relevant documents, but other information may be required in future. The addition of new subsections (3A) and (3B) will result in consistency between this power, which applies only in relation to SCIOs, and the power in section 15 of the 2005 Act which applies in respect of other charities which are not SCIOs, and will allow regulations applying to SCIOs to keep pace with changes made to the information required of other charities.

Choice of procedure

32. The power in section 52(1) of the 2005 Act is subject to the negative procedure, and the addition of new subsections (3A) and (3B) of section 52 does not alter that position. Continued application of the negative procedure is considered to be appropriate given the administrative nature of the matters the power deals with. In addition, the level of

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procedure to which the slightly expanded power is subject remains the same as the level of procedure which applies to the power in section 15 of the 2005 Act (which makes equivalent provision in relation to charities other than SCIOs).

Paragraph 14 of schedule – Amendment to existing powers to make secondary legislation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative if modifying primary legislation

Provision

33. Paragraph 14 of the schedule makes minor changes to the existing powers in the 2005 Act.

34. Sub-paragraph (2) provides that the power to make regulations about SCIOs includes the power to modify the text of primary legislation (including the 2005 Act itself). Sub-paragraph (4)(c) adjusts the level of procedure which applies to ensure that, in cases where primary legislation is modified, the affirmative procedure would apply.

35. Sub-paragraphs (3) and (4)(a) extend the 2005 Act's existing power to make ancillary orders by providing, first, that such orders can be made not just for the purposes of or in consequence of the 2005 Act but also any provision made under it and, second, clarifying that the existing ability to modify any enactment when doing so includes the 2005 Act itself.

Reason for taking power

36. The reason for taking the power to modify the text of the 2005 Act when making regulations about SCIOs is that SCIOs, by their nature, often require the rules in the 2005 Act to be applied with slight modifications. This is because (unlike other charities) if a SCIO is removed from the Register, it not only ceases to be a charity but also ceases to exist as an entity. While there is therefore an existing broad power to make provision about SCIOs, there may be times where it is helpful to be able to signpost users to that further provision on the face of the 2005 Act itself.

37. The reason for taking the power to modify enactments when making an ancillary order under the 2005 Act is to bring the power in line with modern practice. It is standard nowadays, when an Act includes powers to make subordinate legislation, for the power to make ancillary provision to extend to that subordinate legislation as well. It is also standard nowadays when referring to the ability to modify enactments to clarify for the avoidance of doubt that this includes the Act itself. This power would allow, for example, appropriate minor adjustments or sign-posting to be inserted into the 2005 Act if necessary in consequence of the regulations made in relation to charity accounts.

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Choice of procedure

38. In both cases, the power is specified to be subject to the affirmative procedure if adding to, replacing or omitting any part of the text of an Act. This formulation is standard in connection with ancillary powers, and is considered to provide an appropriate level of Parliamentary scrutiny, recognising the particular interest Parliament has in provisions which modify primary legislation. The same logic applies to the expansion of the power at section 64 of the 2005 Act.

Other Provision Relating to Delegated Powers

Amendments to power in section 44(4) of the 2005 Act regarding statements of account

39. Sections 9 and 10 of the Bill both amend the existing power in section 44(4) of the 2005 Act. They do not confer powers to make subordinate legislation, but are included in this DPM in the interests of providing a comprehensive explanation of all provision made in relation to delegated powers.

40. Section 44(4) of the 2005 Act confers a power on the Scottish Ministers to make provision in regulations about the matters referred to in paragraphs (a) to (h) of that section relating to a charity's annual statement of account. Section 9(2)(b) of the Bill adjusts the power at section 44(4) by adding a constraint to the manner in which it may be exercised. Regulations made in exercise of the power must be framed in such a way that a charity is not required to include any information in its statement of account that it is entitled to have excluded from its entry in the Scottish Charity Register under section 3(4) of the 2005 Act (substituted by section 2(2) of the Bill).

41. New section 3(4) entitles a charity to apply to OSCR to have some or all of the information specified in section 3(3)(aa) or (b) of the 2005 Act excluded from its entry in the Register. The information concerned is the names of each of the charity's trustees, and the charity's principal office (or if it does not have a principal office, the address of one of its trustees). The purpose of the amendment to section 44, which introduces a constraint on the power in subsection (4), is to ensure that where a charity is entitled to have certain information excluded from the Register, that information cannot be required to be included in the charity's statement of account, which is to be made public by virtue of new section 45B of the 2005 Act (inserted by section 9(3) of the Bill).

42. The addition of this constraint upon the power in section 44(4) does not alter the position in relation to the level of scrutiny that is appropriate in relation to the regulations. Notably, it does not add to what the regulations are capable of covering.

43. Section 10(4) of the Bill also makes a minor adjustment to the existing power found in section 44(4) of the 2005 Act. It does this by clarifying that the power to make provision about the examination or audit of the statement of account includes the power to make provision about the report which is produced as a result of that examination or audit. While this would clearly have already been within the scope of the

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power, now that the requirement for an independent report on accounts is being put on the face of the 2005 Act and given a label, it is considered appropriate to also mention it in the regulation-making power in case any confusion otherwise arises in future from its omission. However, given that this does not extend the breadth of the power in practice, this does not alter the position in relation to the level of scrutiny that is appropriate for regulations made under the section.

Paragraph 14 of schedule – Amendment to existing powers to make secondary legislation

44. Sub-paragraph (4)(b) of paragraph 14 of the schedule adjusts the existing text found in section 103 of the 2005 Act about the level of procedure applicable to subordinate legislation. However, it does not make any substantive change: it does not confer any new powers, alter the extent of existing powers, or alter the procedure to which existing delegated powers are subject. It is therefore included in this DPM purely in the interests of providing a comprehensive explanation of all provision made in relation to delegated powers.

45. The change made in paragraph 14(4)(b) of the Bill's schedule simply consolidates the drafting approach in the 2005 Act to avoid the need to repeat a list of powers which are subject to the affirmative procedure when saying, by excluding those listed powers, that everything else (other than commencement orders) is subject to the negative procedure. This means that, in order to provide that new powers are subject to the affirmative procedure, it is not necessary to insert them into lists in two different places.

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