

# **CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **INTRODUCTION**

1. As required under Rule 9.3.3 of the Parliament’s Standing Orders, this Policy Memorandum is published to accompany the Charities (Regulation and Administration) (Scotland) Bill introduced in the Scottish Parliament on 15 November 2022.
2. The following other accompanying documents are published separately:
  - Explanatory Notes (SP Bill 20-EN);
  - a Financial Memorandum (SP Bill 20-FM);
  - a Delegated Powers Memorandum (SP Bill 20-DPM);
  - statements on legislative competence by the Presiding Officer and the Scottish Government (SP 20-LC).
3. If passed, the Bill would amend relevant sections of the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”)<sup>1</sup>, and provide improved powers for the Office of the Scottish Charity Regulator (“OSCR”). This Policy Memorandum has been prepared by the Scottish Government to set out the Government’s policy behind the Bill. It does not form part of the Bill and has not been endorsed by the Parliament.

### **BACKGROUND**

4. The 2005 Act reformed the regulatory regime for charities in order to support the charity sector and to safeguard the public interest in relation to charities. Corresponding legislation in England and Wales, and Northern Ireland, has been updated several times since the 2005 Act was passed, and it is recognised that Scottish legislation is overdue for review.
5. The overall aim of the Bill is to strengthen and update the current legislative framework for charities registered in Scotland. The Bill does not seek to revisit the fundamental principles of the 2005 Act.
6. One of OSCR’s statutory functions is to give advice to the Scottish Ministers, as and when appropriate, on matters relating to OSCR’s functions. The Bill is based on practical proposals put

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<sup>1</sup> <https://www.legislation.gov.uk/asp/2005/10/contents>

forward by OSCR to strengthen and update the current legislative framework for charities, as set out in the 2005 Act, by:

- Increasing transparency and accountability in charities;
- Making improvements to OSCR's powers; and
- Bringing Scottish charity legislation up to date with certain key aspects of charity regulation in England, Wales and Northern Ireland.

7. Consultations on the proposals took place in 2019 and 2021 and the responses showed strong support from the sector and stakeholders for these practical improvements to charity regulation, including from those organisations which also called for wider reforms. Stakeholders are keen to see changes brought forward given it has been 17 years since the 2005 Act was passed.

8. The Scottish Government is aware that some in the sector wish to see a broader review of charity regulation. However, this requires further consideration and comprehensive consultation. Following the passage of this Bill, the Scottish Government will engage with the charity sector on the wider questions for review.

## **CONSULTATION**

9. In 2018, OSCR submitted a paper<sup>2</sup> to the Scottish Ministers with practical proposals to 'modernise' the 2005 Act, focused on improving trust and confidence in the charity sector and updating the existing law. A 12-week consultation<sup>3</sup> on the proposals closed on 1 April 2019, with 307 responses indicating broad support for all proposals. However, some respondents felt that certain proposals needed further development before they could be considered and that almost all of the proposals required refinement and/or further policy development. The responses from OSCR and the Law Society of Scotland Charity Law sub-committee also suggested a longer list of more technical changes that would require to be taken forward by primary legislation. Further proposals were identified following analysis of the consultation responses and discussions with stakeholders.

10. Progress on further engagement with the sector to help define and refine the proposals was delayed due to COVID-19. The engagement with the charity sector re-started in December 2020. Targeted stakeholder events with partners took place in December 2020 and January 2021 with a mix of charity professionals, trustees, charity staff, volunteers and practitioners, including:

- The Law Society of Scotland Charity Law sub-committee, made up of practising legal professionals and academics;
- OSCR charities reference group, representatives from approximately 35 charities reflecting the range and breadth of the sector;
- The Scottish Council for Voluntary Organisations (SCVO) and the Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO) jointly hosted two events with 33 attendees; and

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<sup>2</sup> [2018-03-09-modernisation-of-the-2005-act-proposal-paper.pdf \(oscr.org.uk\)](https://www.oscr.org.uk/publications/2018-03-09-modernisation-of-the-2005-act-proposal-paper.pdf)

<sup>3</sup> [Scottish charity law: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/2018-03-09-modernisation-of-the-2005-act-proposal-paper.pdf)

- Local charities took part in events held by 12 Third Sector Interfaces (TSIs).

11. A Citizen Space survey<sup>4</sup> (‘Strengthening Scottish Charity Law’) asked detailed questions about six of the proposals and ran between December 2020 and February 2021 with 100 responses received. The remaining proposals were not considered appropriate for this strand of engagement due to their technical nature and/or limited application to the wider sector. The proposals have been taken forward as part of the Bill and analysis of the engagement events and the Citizen Space survey suggests a high level of support for the proposed changes.

12. The Bill aims to strengthen and update the current legislative framework for charities. The Bill derives from the original proposals put forward by OSCR which the Scottish Government consulted on in 2019. As such, the proposals are generally regulatory in nature as opposed to anything more fundamental about charities. While consultation has shown that there is broad support for the proposals, there were also calls for a wider review and reform of charity law. The focus of these calls for review are around a refinement of the definition of ‘public benefit’<sup>5</sup>, to enhance public understanding and protect the reputation of the ‘charity brand’. Any review of the charity test or any other fundamental changes would need a comprehensive review akin to the review undertaken before the 2005 Act came about, and further and wider consultation ahead of any further changes. The Scottish Government is committed to carrying out a wider review after the passage of this legislation.

## **POLICY OBJECTIVES OF THE BILL**

13. This Policy Memorandum examines the policy proposals provided for in the Bill most of which were included in the Scottish Government’s 2019 consultation on strengthening Scottish charity law.

	Paragraphs
A requirement on OSCR to publish the statements of account for all charities in the Scottish Charity Register (section 9)	14 – 22
Requirements on OSCR to include charity trustee names in the Scottish Charity Register, to keep an internal schedule of charity trustees’ details and to create a publicly searchable record of removed charity trustees (sections 2, 3 and 7)	23 – 34
Updating the criteria for the automatic disqualification of charity trustees and extending it to individuals with senior management positions in charities (sections 4 to 6)	35 – 43
Providing OSCR with a new power to issue positive directions to charities (section 15)	44 – 54
Removal from the Scottish Charity Register of unresponsive charities that fail to submit statements of account (section 11)	55 – 62

<sup>4</sup> [Strengthening Scottish charity law: analysis of engagement responses - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/analysis-of-engagement-responses-2020-2021/pages/11.aspx)

<sup>5</sup> An organisation can only become a charity if it meets the ‘charity test’, meaning that it must show it has only charitable purposes and provides public benefit.

A requirement for all charities in the Scottish Charity Register to have and retain a connection to Scotland (section 16)	63 – 68
A power for OSCR to conduct inquiries into former charities and their charity trustees etc. (section 13)	69 – 76
A requirement for de-registered charities’ assets to continue to be used to provide public benefit (schedule, paragraph 7)	77 – 81
Clarification of existing provision, to improve speed and efficiency regarding OSCR’s powers to gather information for inquiries (section 14)	82 – 86
The creation of a record of charity mergers and provision for the transfer of legacies (section 12)	87 – 97
Providing OSCR with a power to appoint interim trustees (section 8)	98 – 102
List of minor or technical amendments to the 2005 Act (schedule)	103 –121

**A requirement on OSCR to publish the statements of account for all charities in the Scottish Charity Register (section 9)**

14. The overall policy intention is to increase transparency and accountability in the sector by imposing a duty on OSCR to publish statements of account for all charities. Charities and charity trustees will have an option to apply to OSCR for a dispensation from certain information (e.g. the names of any of the charity trustees) being included on the Scottish Charity Register (“the Register”) where the publication of that information is likely to jeopardise the safety or security of a person or property. Any decision OSCR makes in relation to dispensation will be subject to the review mechanism available under the 2005 Act. This dispensation will carry over to statements of account with charities not being required to include in the statements of account any information which they have a dispensation for in relation to the Register.

15. There is currently no legal requirement for statements of account to be published on the Register, although charities are required to supply a copy to anyone who reasonably requests it. All charities in Scotland are already under a legal duty to prepare annual statements of account, and to have these independently examined or audited, before submitting the statements to OSCR.

16. It is recognised that transparency is an important factor in maintaining public trust and confidence in charities. In publishing annual statements of account, charities have an opportunity to demonstrate the public benefit they provide and to showcase their activities. This assists in reassuring members of the public that the money that they may donate is being applied for the charity’s charitable purposes and for public benefit.

17. In an effort to increase public trust and confidence in the sector, OSCR currently publishes copies of statements of account for charities that have an annual income of more than £25,000, and for all Scottish Charitable Incorporated Organisations (SCIOs) regardless of their income. OSCR also includes links to statements of accounts published directly by the charities, or to other regulators that already publish the information such as Companies House, the Scottish Housing Regulator or the Charity Commission for England and Wales (CCEW). This covers just over half of all of the charities on the Register.

### **Consultation**

18. The vast majority of respondents to the 2019 consultation supported the proposal (82%), with the general consensus being that it was in the best interests of strengthening the transparency of, and building public confidence in, the charity sector in Scotland. The majority of feedback in support of this proposal suggested it would lead to increased scrutiny, transparency, accountability and openness of charities to the public and other interested parties (e.g. funders, beneficiaries, potential donors).

19. Many responses highlighted the fact that statements of account were already in the public domain, by either being available from charities directly or from other regulators such as Companies House, and that these are usually unredacted. Some referenced the different challenges they encountered with the current system of accessing such documents which included: difficulties in finding statements of account on individual charity websites; the fact that many small charities relied more heavily on social media channels and did not necessarily have websites; the length of time taken to receive such documents following a direct request; and experience of requests for accounts either being questioned or not answered.

20. Many of the comments by those who disagreed with the proposal supported publishing statements of account, just not in full. Feedback included concerns around redacting sensitive personal (or commercial) information, and that the proposal could create an additional burden for smaller charities.

21. The 2021 consultation focused on dispensation from certain information being included in statements of account with just over half of respondents considering that no dispensations were necessary, and just under half considering it important to have provision for dispensation in exceptional circumstances, e.g. to safeguard individuals and vulnerable groups. The majority of respondents (72%) agreed that, where dispensations were made, some form of statement of account should still be published, for example either redacted or abbreviated.

22. The approach taken in the Bill will ensure the statements of account sent to OSCR are easily accessible in one location (the Register) by anyone wishing to access them. The ability to apply for a dispensation from including the names of charity trustees in the accounts balances the need to safeguard individuals with the overarching public interest in accessing charity accounts in full. The rules about what must be contained in accounts are set out in secondary legislation and so it would be possible for further allowances to be made there if appropriate. However, a guarantee is built into the Bill which ensures that it will never be necessary to include information which is exempted from having to be included in the Register on safety and security grounds.

### **Requirements on OSCR to include charity trustee names in the Scottish Charity Register, to keep an internal schedule of charity trustees' details and to create a publicly searchable record of removed charity trustees (sections 2, 3 and 7)**

23. The overall policy intention is twofold. The first intention is to increase transparency and accountability for charities by imposing duties on OSCR to publish the names of trustees on the Register and to maintain a separate, publicly searchable record of individuals that have been removed from being concerned in the management or control of any body by the Court of Session (and are therefore permanently disqualified from acting as a charity trustee, unless OSCR grants

them a waiver). The second intention is to introduce efficiencies to OSCR's operations in relation to compliance, inquiries and engagement work to better support its regulation of charities and their trustees, by imposing a duty on OSCR to create and maintain an internal database of trustees containing their personal information and contact details and providing OSCR with a power to gather information for that purpose.

24. In relation to the first intention, at present the law only requires the Register to set out the principal office of the charity or (where the charity does not have such an office) the name and address of one of its trustees. The Bill provides that each charity's entry in the Register must include the names of each of its charity trustees, and the Bill also establishes a record of persons removed from office which is to be publicly searchable by name. Having this information publicly available will increase transparency and accountability, both key drivers of public trust in the charity sector. It will also bring information about Scottish charities up to the same standard as is available in other parts of the UK.

25. A charity or any of its trustees will be able to apply to OSCR for a dispensation from the name or names of charity trustees being published on the Register where the publication of that information is likely to jeopardise the safety or security of a person or property. Should OSCR refuse the dispensation, the applicant will have the opportunity to ask for a review of that decision. OSCR will also be able to grant dispensations, of its own accord, on safety or security grounds either to a particular charity or a class of charities. This is intended to cover cases where an exemption is warranted for a type of charity such as all women's refuge charities. Further, persons that have been removed as trustees by the Court of Session will be able to apply to OSCR to have their entry redacted if disclosing it is likely to jeopardise the safety or security of a person or property.

26. Charity trustees are responsible for governing a charity and directing how it is managed and run. As the persons in charge, it is charity trustees who are ultimately held accountable for the charity's actions. Accordingly, in relation to the second intention, it is essential that OSCR, as the regulator, has up-to-date information on who the charity trustees are so that it can contact trustees quickly where there are concerns in relation to how the charity is being run.

27. At present, OSCR only gathers information on trustees at the start of the life of a charity through trustee declarations and afterwards through statements of account submitted annually. However, the contact details provided in trustee declarations are not subsequently updated, and the statements of account only provide trustee names but not contact details (charities only have to detail an initial and surname). Furthermore, trustee details can be out of date by the time OSCR receives the statement of account, given that charities have up to nine months from the financial year end date to submit their statement of account to OSCR.

28. Currently, OSCR obtains contact details of a "principal contact" (the person OSCR communicates with when it needs to get in touch with the charity) through annual returns. The annual return is the online form charities complete each year to provide OSCR with information about the charity (in particular, providing information for the Register, and also including information about the charity's finances). The principal contact does not have to be one of the trustees - it can also be an employee, accountant or legal adviser. In addition, information can go

out-of-date in between annual return submissions. As such, OSCR currently holds limited information on the over 180,000 charity trustees involved in over 25,000 charities in Scotland.

29. Through OSCR's practical experience of regulation, having limited trustee information results in difficulties and delays when carrying out compliance, investigative or engagement work. For example, at the beginning of an inquiry OSCR has to ask for home addresses of all trustees in order to serve relevant notices on them which can result in delays. Further, if the concern OSCR is investigating is against the principal contact there is a risk that person may not pass on the information.

30. The internal database will consist of personal information and contact details for charity trustees. This will provide valuable and relevant information to better support effective regulation of charities and their trustees.

### ***Consultation***

31. The 2019 consultation saw majority support for all aspects of this proposal: 79% supported OSCR collecting trustee information for use in an internal database; 71% supported publishing the names of trustees on the external public register; and 79% supported publishing the names of trustees who have been removed by the Court of Session following an inquiry by OSCR (or removed under predecessor legislation). Among those who expressed their general support for the proposals, it was felt that these proposals would help to "increase public confidence in the governance of charities". Other comments made were that the proposals would bring Scotland into line with the rest of the UK, and that some of this information was already in the public domain. It should be noted that trustee names are already included in accounts and charities are already required to provide a copy of their accounts to anyone who reasonably requests it.

32. While there was overall support for these proposals, some process-related issues were raised including ensuring systems were robust enough to meet data protection requirements, and that the privacy of data was respected, with only the charity trustee names and no other personal details being published on the external register. Wider feedback noted the challenges of keeping the registers up-to-date, and that the reason for keeping an internal register would need to be made clear. That reason has been set out in the Bill's accompanying documents and will continue to be communicated clearly by OSCR in its dealings with charities. The Bill provides only for charity trustees' names to be included – dates of birth and addresses etc. will not be included on the Register.

33. With regards to dispensation, 58% thought trustees should be allowed to apply, whereas 31% did not. For those who supported dispensation, it was noted that the default position should be publishing trustee names, with dispensation being the exception and considered by OSCR on a case-by-case basis. However, they acknowledged there would be legitimate circumstances where dispensation should be granted, such as where publishing information could cause safety or security issues, and for vulnerable individuals. For those who did not support dispensation, they considered individuals involved in the governance of charities should be "visible", and that not being able to apply would strengthen accountability, transparency, and build public trust in the sector.

34. The 2005 Act already recognises the need for dispensation for names and addresses on the Register on the grounds of safety or security for any person and/or premises. Ensuring that the existing dispensation covers charity trustee names protects those that need it and demonstrates a consistent approach to the information contained on the Register. Although there were respondents who did not support an approach which allowed exemptions, the Scottish Government is clear that, as with the existing position in the 2005 Act, individuals' safety and security should not be put in jeopardy.

**Updating the criteria for the automatic disqualification of charity trustees and extending it to individuals with senior management positions in charities (sections 4 to 6)**

35. The policy intention is to ensure that the criteria for automatic disqualification of charity trustees in Scotland are up to date and fit for purpose. The Bill accordingly does two things. Firstly, it makes adjustments to the list of persons who are disqualified from being a charity trustee. This includes expanding the range of criminal offences for which conviction results in disqualification as well as the addition of a number of descriptions that, if met, will also result in disqualification. Secondly, it extends the disqualification rules to individuals holding office or employment in a charity with senior management functions, as well as to trustees. These changes will ensure parity with the corresponding legislation in England and Wales. Individuals can continue to apply to OSCR for a waiver from disqualification (either generally or in relation to a particular charity or type of charity) as the law currently allows.

36. In order to preserve public trust and confidence in charities, and to ensure that the benefits of charitable status are not misused, the 2005 Act provides for a person to be disqualified from being a charity trustee where that person's conduct is such that it would not be conducive to public trust in charities if they were allowed to be a charity trustee. Disqualification may be on the basis of conviction for a relevant criminal offence, bankruptcy, removal from the office of charity trustee by the Court of Session, the Charity Commission for England and Wales or the High Court of Justice in England, and disqualification as a company director.

37. When the 2005 Act was enacted, the trustee disqualification criteria mirrored the corresponding disqualification criteria in the Charities Act 1993, which was the equivalent legislation in force in England and Wales at the time. 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.

38. Subsequent changes to the charity legislation for England and Wales have extended the criteria for automatic disqualification of charity trustees. These changes broadened the disqualification criteria to include individuals with unspent convictions for perjury, perverting the course of justice, misconduct in public office, contempt of court and specified bribery, terrorism and money laundering offences. The changes also extended the rules on automatic disqualification so that they apply to senior employees in charities as well as to trustees. As a result, a divergence has emerged between the disqualification criteria in the 2005 Act and those in the corresponding English and Welsh legislation. This divergence compromises the overall policy objective of the 2005 Act that a person who is disqualified from being a charity trustee or trustee for a charity in England and Wales by virtue of the English and Welsh legislation should also be disqualified in Scotland by virtue of the 2005 Act.



39. Consequently, there is concern that the system of charity regulation in Scotland has a vulnerability by comparison with England and Wales. Under the current law, persons who would be disqualified from the office of charity trustee or from senior employment in a charity in other parts of the UK could continue to be charity trustees or senior managers in charities in Scotland. This comparative weakness in the Scottish regulatory system could undermine public trust and confidence in the charity brand in Scotland, as compared to other parts of the UK, and sections 4 to 6 of the Bill seek to address this concern.

### ***Consultation***

40. The 2019 consultation saw 84% of respondents supporting the extension of the disqualification criteria to match the criteria in England and Wales, and 79% supporting the extension to include those in senior management positions within charities. Those who supported the proposals felt the additional criteria were reasonable and comprehensive, and that the proposals were aimed at excluding those whose behaviour was unfit for leading a charity. It was generally reported that it made sense to bring Scottish legislation into line with equivalent legislation for England and Wales.

41. The main feedback from respondents who did not support the proposals related to charities working in sensitive areas (e.g. ex-offenders). Here, it was reported that such charities might want to include ex-offenders as trustees on their board. Wider feedback was around the ability of those with a criminal record to change or be rehabilitated, and that many convictions might not make an individual unsuitable to be a trustee.

42. The 2021 consultation considered the definition of “senior manager”, with the function of the role being more relevant than the title, e.g. management and control functions. The majority reported that this would include the Chief Executive, Chief Financial Officer, and Chief Operating Officer, as well as those with delegated responsibility for leading and managing a charity on a day-to-day basis as defined in the Statement of Recommended Practice (SORP), and those with delegated responsibility for controlling the charity’s finances.

43. The 2005 Act already recognises the need for those who are automatically disqualified from acting as charity trustees to be able to apply to OSCR for a waiver from that disqualification. This allows OSCR to assess the individual circumstances of a disqualification and determine whether there are reasons in that case for the disqualification to be waived. The Bill ensures that OSCR’s power to grant a waiver is applied to both the new criteria for automatic disqualification and the new categories of senior employees or other office-holders.

### **Providing OSCR with a new power to issue positive directions to charities (section 15)**

44. The overall policy intention is to enhance OSCR’s effectiveness as a regulator in relation to protecting charitable assets and supporting good governance, by broadening its powers of direction following inquiries. This will be achieved by giving OSCR a power to issue positive directions to charities.

45. OSCR’s role as a regulator includes encouraging, facilitating and monitoring charities’ compliance with the 2005 Act. One way this is achieved is by investigating concerns raised in

relation to charities and, where necessary, issuing directions to charities under the powers conferred on OSCR by the 2005 Act. The purpose of directions is to protect assets of a charity or to remedy and/or prevent further misconduct in the administration of a charity.

46. However, at present, most of OSCR's direction-giving powers are interdictory or preventative, requiring charity trustees or others *not* to take particular actions. For example, OSCR can issue directions restricting transactions that might be entered into or direct a financial institution holding property on behalf of the charity not to part with the property without OSCR's consent. There is, however, no power allowing OSCR to issue positive directions following inquiries.

47. Accordingly, OSCR cannot currently direct charity trustees to take a specified positive action to remedy non-compliance or to protect charitable assets, for example by ensuring a conflict of interest within a charity is properly managed. The absence of such a power has had a negative impact on OSCR's ability to intervene in certain cases. The addition of a power to issue positive directions will enhance OSCR's inquiry and enforcement powers in terms of protecting charitable assets, supporting good governance and improving public trust in particular charities. Comparable general powers are already available to other charity regulators in the UK.

48. This power will rest with OSCR but may only be used where, after inquiries, OSCR considers that there has been misconduct or that it is necessary or desirable to act for the purpose of protecting charity assets. Any use of this power will also be subject to OSCR's duties under the 2005 Act to act proportionately, accountably, consistently, transparently, and for its regulatory activities to be targeted only at cases in which action is needed.

49. It is intended that Designated Religious Charities (DRCs) will be exempt from directions under this new power in line with the precedent set by the 2005 Act exempting DRCs from certain direction provisions in the 2005 Act. The current exemption (set out in section 65(3) and (4) of the 2005 Act, and extended by the consequential modification to section 65(4) made by section 15 of the Bill) recognises that many religious bodies operate effective self-regulatory mechanisms by having an internal organisation with supervisory and disciplinary functions and does not seek to over-regulate such charities.

50. Section 65 of the 2005 Act allows OSCR to designate a charity that meets certain criteria as a DRC. To be designated, the body's main purpose must be the advancement of religion, its main activity the regular holding of public worship and it must have been established in Scotland for at least 10 years and have a membership of at least 3,000 people over the age of 16. In addition, it must have an internal organisation with supervisory and disciplinary functions over all its component parts and a regime for keeping accounting records which OSCR considers corresponds to those for other charities.

### ***Consultation***

51. The 2019 consultation saw 83% of respondents being supportive of OSCR being provided with a power to issue positive directions to charities. However, only just over half agreed this power should be wide-ranging and just under half thought it should be a "specific power". Almost 60% of respondents said that if a charity failed to comply with a positive direction that OSCR had

issued, this should be classed as trustee misconduct. This is the consequence that will apply under the Bill. In contrast to interdictory directions, failure to comply with a positive direction will not be an offence as well. Generally, this proposal was considered beneficial, with responses noting it would provide OSCR with stronger powers to intervene and remedy non-compliance and promote change to protect the reputation of the sector and safeguard charitable assets. Wider points were raised by those in support of the proposal including that such a power would need to be carefully managed with reasonable and proportionate use (which is already the effect of section 1(9) of the 2005 Act).

52. For those who supported a wide-ranging power, it was acknowledged that it would be difficult for the legislation to correctly envisage the different situations in which a positive direction would be needed. For those that indicated the need for the power to issue positive directions to be a “specific power”, the most common feedback reported was that OSCR should only intervene on aspects specific to the governance of charities, rather than having power to issue positive directions relating to the day-to-day operational management of charities.

53. The 2021 consultation considered what should or should not be included in the power of positive direction. The most common areas that were identified for inclusion were around breach of trust or duty or evidence of other non-compliance; misconduct or mismanagement in terms of financial management; safeguarding; and governance. Some responses suggested issues around the day-to-day operational management of charities. The power that is provided for under the Bill would allow these matters to be captured, although OSCR is under a duty to ensure all of its functions are carried out following best regulatory practice.

54. The Bill will provide OSCR with a general power to issue positive directions to enhance its inquiry and enforcement powers in terms of protecting charitable assets and supporting good governance. It is considered that the different situations in which a positive direction may be needed cannot be exhaustively defined. Accordingly, a general power avoids the need for future legislative changes as new circumstances emerge which require OSCR’s intervention. Given OSCR’s first-hand experience of the breadth circumstances in which regulatory action can be required and the practical limitations of some of its current powers, it is considered necessary to ensure that OSCR has a general power to issue positive directions both to support charities and to increase public confidence in the sector and its regulation.

### **Removal from the Scottish Charity Register of unresponsive charities that fail to submit statements of account (section 11)**

55. The overall policy intention is to provide OSCR with a discretionary power to be able to remove a charity from the Register where it has failed to comply with the requirement to submit its statement of account and has failed to engage or make contact with OSCR’s repeated communications. OSCR Surveys<sup>6</sup> continue to demonstrate how vital transparency and accountability are for members of the public, and the ability to view a charity’s statement of account to see evidence of the public benefit it provides, and how donations are spent, is crucial. This discretionary power will improve the comprehensiveness of the Register and increase public trust and confidence, and it aligns with the proposed requirement for OSCR to publish the

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<sup>6</sup> [2022-05-06-oscr-8337\\_2022-charity-survey\\_main-report\\_v50.pdf](#)

statements of account for all charities in the Register. The publishing of statements of account will only be effective to the extent that they are duly submitted.

56. All charities in Scotland are under a legal duty to prepare a statement of account and submit this to OSCR annually within nine months of the charity's financial year end date. Failure to do so is regarded as misconduct in the administration of a charity. There are charities on the Register for which OSCR does not have up to date statements of account - some of which have never submitted accounts. These are known as "defaulting" charities. As of 29 September 2022, 11% (2,849) of charities are shown as defaulting out of a total of 25,445 charities, and of those defaulting charities, 12% (352) have never provided a complete statement of account. It is likely that some of these charities no longer exist but have failed to notify OSCR to be removed from the Register. OSCR endeavours to understand and pursue "defaulting" charities, but with limited return. As set out on the OSCR website<sup>7</sup>, if a charity fails to send in the required information within the nine month deadline, OSCR will send reminder emails until 10 weeks after the deadline. After this point the charity is classified as "defaulting", and this will be shown on their entry on the Register.

57. Having little or no information about a charity's finances and activities can undermine public trust and confidence in the sector, as it is difficult to know how public money and assets are being accounted for or whether a charity is providing any public benefit. It can also undermine trust in OSCR if it is deemed to have insufficient powers to deal with "defaulting" charities.

58. Whilst there are existing mechanisms for OSCR to remove charities from the Register, failure to provide accounts and otherwise maintain contact with OSCR are not direct routes to removal. Further to this, where a charity fails to submit proper accounting records in accordance with the 2005 Act, OSCR can appoint a suitably qualified person to prepare such an account but only after notifying the charity of its intention to do so. This power is only effective if OSCR knows where the charity trustee or principal office of the charity is. The power is ineffective in the case of "defaulting" charities with whom OSCR cannot establish contact. This proposal focuses on mitigating risks involved in there being little or no information available about a charity's finances and activities, which can undermine public trust and confidence in the sector. The Bill therefore provides a bespoke route to remove a charity from the Register where that charity has failed to provide accounts as required, the deadline for submission has passed and the charity has not responded to repeated communications from OSCR.

### ***Consultation***

59. In the 2019 consultation, 87% of respondents agreed that OSCR should be able to remove charities from the Register if they have persistently failed to submit a statement of account. The general consensus was that there should be consequences for charities which persistently fail to submit annual reports and accounts. It was considered reasonable for OSCR to have a range of appropriate powers to carry out investigations and to implement sanctions/enforcement actions for charities which ignored their legal duty.

60. The 2021 consultation reviewed the factors that could be considered by OSCR when a charity fails to provide accounts, with respondents noting: failure to respond to, engage with, or

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<sup>7</sup> <https://www.oscr.org.uk/managing-a-charity/annual-monitoring/>

act on OSCR's communication (i.e. reminders, adequate prior warning, offer of support); failure to comply with a positive direction, should that power be introduced (e.g. compelling trustees to prepare a trustees' annual report and accounts but no report or accounts were forthcoming); and previous negative regulatory history with OSCR or another regulator.

61. Consideration was given to maintaining the current position whereby removal of charitable status is limited to the existing mechanisms under the 2005 Act. However, it was considered that given the importance to the accountability of the charity sector of producing annual statements of account and providing these to OSCR (as explained in paragraphs 14 to 17), in addition to OSCR's duty to ensure the accuracy and integrity of the Register, a suitable and proportionate mechanism for removing charitable status from the minority of charities which fail to provide statements of account and to communicate with OSCR was necessary.

62. Consideration was also given to the action a charity must take in order to halt the removal process (for example, whether the provision of a statement of account should be required or whether a response advising OSCR of a delay should suffice). It was felt that where a charity responds to OSCR and therefore establishes a line of communication then the charity is no longer unresponsive and OSCR's other enforcement powers can be deployed if necessary.

#### **A requirement for all charities in the Scottish Charity Register to have and retain a connection to Scotland (section 16)**

63. The overall policy intention is to ensure all charities on the Register have, and retain, a connection to Scotland. Under the 2005 Act, all organisations which wish to represent themselves as charities in Scotland, with limited exceptions<sup>8</sup>, must register with OSCR. Where a charity has no or a negligible connection to Scotland, there is no need to be on the Scottish Charity Register. However, with the exception of Scottish Charitable Incorporated Organisations, there is currently no requirement for a charity to have a particular link with Scotland in order to be entered on the Register and section 16 seeks to amend this given concerns about the ability of OSCR to effectively regulate such charities. The intention is not to preclude the registration of cross-border charities, which should continue being able to register with both the CCEW, and the Charity Commission for Northern Ireland (CCNI), and OSCR, where such charities have a connection to Scotland. Similarly, the policy is not to exclude charities operating in Scotland for the benefit of those outwith Scotland (e.g. overseas aid charities). This proposal is only aimed at addressing the concern that OSCR cannot be an effective regulator of bodies which have no or negligible connection to Scotland (for example, where the body does not occupy any premises in Scotland, and none of its trustees are resident in Scotland), and that it is therefore not appropriate for them to be regulated by OSCR (e.g. given the inherent difficulties in OSCR ascertaining what activities the charity is carrying out and how they are providing public benefit, as well as the increased risk of OSCR losing touch with such charities).

64. To be a registered charity in Scotland, a body must meet the charity test, which is the legal set of requirements that an organisation must pass to become a charity and be entered in the Scottish Charity Register, as set out in section 7 of the 2005 Act. OSCR must refuse to enter an

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<sup>8</sup> The 2005 Act provides that where a body is registered elsewhere (for example in England and Wales) and is entitled to call itself a charity in that country, but does not have substantive activity in Scotland, it may still refer to itself as a charity despite not being registered with OSCR.

applicant in the Register if it has an objectionable name as set out in section 10 of the 2005 Act. This Bill will provide OSCR with a further duty to refuse to enter an applicant if it considers that it would not be appropriate to regulate the applicant because the applicant has no or negligible connection to Scotland. Further, where a charity is already entered in the Register but OSCR considers it would not be appropriate for it to continue to regulate that charity because it does not or no longer has a connection to Scotland, OSCR will also be required to direct the charity to take such steps as it considers necessary for the purposes of establishing a connection to Scotland. If the charity does not comply with that direction, OSCR must remove it from the Register. Any decision to issue a direction or to remove a charity for failure to comply with a direction can be appealed.

### ***Consultation***

65. In the 2019 consultation, 82% supported the proposal that all charities registered in Scotland should be required to have and retain a connection with Scotland. The main feedback from respondents was that this was a reasonable proposition, and that it was appropriate that OSCR's remit should only extend to charities with a "genuine interest in Scotland", and whose activities were carried out at least partly in Scotland. It was viewed as essential that all charities on the Scottish Charity Register should have and retain a connection to Scotland, and that it would be broadly consistent with the approach in England and Wales.

66. In this regard, many respondents questioned why a charity with no connection with Scotland would wish to register with OSCR. Some concerns raised included that there was a "danger of unscrupulous people registering with OSCR because of perceived gaps in the regulatory framework by comparison with other jurisdictions", and that it could lead to corruption or fraudulent activity.

67. The 2021 consultation considered whether having and retaining a connection to Scotland meant charities had to have a physical presence in Scotland such as an office address or trustee address. Around 88% of responses agreed with this but other areas to be considered were noted as charitable activities being carried out in Scotland, or the charity's constitution clearly stipulating its objectives relate to Scotland.

68. The Bill sets out factors that OSCR must have regard to when considering in all the circumstances of a particular case whether there is a connection to Scotland. A power is also taken to amend that list as necessary, in light of developing experience and changing circumstances.

### **A power for OSCR to conduct inquiries into former charities and their charity trustees etc. (section 13)**

69. The overall policy intention is that OSCR should be able to make inquiries into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist. A power to do so will allow OSCR to investigate where an allegation of misconduct comes to light after the charity in question has been removed from the Register and, if necessary, to gather the evidence it needs to make an application to the Court of Session to permanently disqualify individuals from being charity trustees or holding office or employment with senior management functions in charities.

70. At present, OSCR is not able to make inquiries into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist. This means that if OSCR is not aware of potential misconduct before a charity ceases to exist or ceases to be a charity, or before a body ceases to be controlled by a charity, OSCR cannot open an inquiry if information subsequently becomes known.

71. If OSCR cannot open an inquiry, it cannot gather the necessary evidence to allow it to make an application to the Court of Session. This poses a risk that charity trustees who are guilty of serious misconduct could go on to be charity trustees of other charities, in cases where the misconduct was only discovered after the body in question ceased to exist or ceased to be a charity.

72. Allowing OSCR to make inquiries into former charities, charities that have ceased to exist and bodies formerly controlled by a charity, in relation to the period where the charity/ body fell within OSCR's remit as a regulator, would safeguard charitable assets and improve public trust and confidence in charities.

### **Consultation**

73. In the 2019 consultation, 83% agreed that OSCR should be able to make inquiries into former trustees of a body which is no longer a charity, a charity which has ceased to exist and individuals who were involved in the management and control of a body which is no longer controlled by a charity. On balance, the granting of such a power to OSCR was considered prudent, conducive to effective regulation, and a power that would strengthen the legislation as it currently stood. Much of the feedback was that this would strengthen transparency and accountability and foster public trust in the charity sector.

74. The majority of respondents emphasised the importance of OSCR having sufficient powers at its disposal and greater scope to investigate potential wrongdoing and misconduct, and to take appropriate enforcement action where required. It was reported that this would help to ensure that former trustees were not able to evade investigation or regulatory scrutiny by OSCR, and from a due diligence perspective it would mitigate the risk of trustees that were guilty of serious misconduct becoming trustees of another charity.

75. Only 6% did not support the proposal, noting concerns that OSCR should have robust evidence of misconduct before investigating, and that any potential historical criminal offences should be re-directed to the police or other relevant agency.

76. However, the approach OSCR currently takes to investigation in respect of existing charities<sup>9</sup> would apply equally to former trustees of a body which is no longer a charity, a charity which has ceased to exist or individuals who were involved in the management and control of a body which is no longer controlled by a charity. OSCR would not initiate inquiries without good reason and it would continue to defer to the police or other relevant agency where that is appropriate, as happens with its inquiry work at present. For example, where there is potential criminal activity, OSCR will defer to the police, or where the former charity had been subject to another regulator such as the Care Inspectorate and the areas of concern would be more

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<sup>9</sup> [OSCR | How OSCR deals with concerns and inquiries](#)



appropriately dealt with by that other regulator, OSCR would defer in those cases to that other regulator (where applicable in line with their established Memoranda of Understanding with the other agency<sup>10</sup>). In cases where the area of concern relates to charity trustee conduct or other matters specific to charity law, then OSCR would be the most appropriate body to investigate. However, using primary legislation to limit the cases where OSCR may act would lack nuance and flexibility as it would require the drawing of lines which may not be appropriate in a particular given case. As such, it is considered appropriate that the current position relating to inquiries into charities should apply (particularly bearing in mind that the provision is concerned only with permitting the investigation of something which, had it come to light and been investigated earlier, would have fallen within OSCR's inquiry powers under the 2005 Act as originally enacted).

### **A requirement for de-registered charities' assets to continue to be used to provide public benefit (schedule, paragraph 7)**

77. This proposal fixes a technical issue with the 2005 Act. The intention of that Act was to ensure that even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively "locked" for charitable uses. It has widely been taken as read that that meant that the assets must be applied in accordance with the body's (previous) charitable purposes *and* for public benefit, in order to meet both pillars of the charity test (see section 7(1) of the 2005 Act).

78. In practice, former charities have continued to apply their charitable assets in a way which does provide such public benefit since, on the face of it, they are under a continuing obligation to apply such assets in the same way as if they were still a charity. However, the 2005 Act refers only to assets being applied "in accordance with the charity's purposes as set out in the charity's entry in the Register immediately before its removal" so does not in clear terms explicitly restrict their use of the assets to charitable purposes which give rise to the provision of public as opposed to private gain. The Bill makes a technical change to fix this oversight so that the 2005 Act operates as intended. No changes are made to what is meant by "public benefit" in either the context of registered charities or former charities. The existing meaning of public benefit as set out in the 2005 Act will apply to the charitable assets of former charities.

### **Consultation**

79. In the 2019 consultation, 69% of respondents agreed that bodies that have de-registered as charities should be required to continue to use the assets held at the time of removal from the Register to provide public benefit. The main feedback was that there was an inherent duty or obligation to safeguard charitable assets and to ensure continued public benefit rather than use for private gain. Here, many respondents commented that if assets were subsequently used for private gain this would be misleading to donors or the public who had awarded or donated monies to the charity in the good faith that their contribution would be used for public benefit. It was felt that this would have a negative impact on public trust and confidence in the charity sector.

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<sup>10</sup> <https://www.oscr.org.uk/about-oscr/our-work-2/memoranda-of-understanding/>



80. Of the 17% who did not support the proposal, common concerns centred around the definition of “public benefit” being open to interpretation, and the complexities and challenges for long-established charities with assets acquired prior to the 2005 Act.

81. However, this matter only arises in relation to bodies that have previously been charities. The question of public benefit is therefore not new to them, and it is something which they will have provided during their period on the Register. This proposal does not impact on the definition of public benefit or alter the charity test in any way; it simply clarifies the long-held assumption that the charitable assets of former charities must continue to be applied to advance charitable purpose(s) and to provide public benefit. This change will ensure that there is no ambiguity, the requirements applying to former charities are clear and the risk of charitable assets being used for private gain is minimised. As set out in paragraph 12 above, the intention of this Bill is not to make fundamental changes to charity law such as the definition of public benefit.

**Clarification of existing provision, to improve speed and efficiency regarding OSCR’s powers to gather information for inquiries (section 14)**

82. The overall policy intention is twofold. Firstly, to put beyond doubt who requires to be notified by OSCR when OSCR is carrying out inquiries and requests information for that purpose. For example, where OSCR is making an inquiry with regard to a charity that has ceased to exist, OSCR should not be required to give notice to the non-existent charity when requesting information from a third party. OSCR should instead be required to notify any persons who are former trustees of the charity with regard to which the inquiry is made (and such persons should be able to ask OSCR to review its decision in line with the existing provisions in the 2005 Act). Secondly, to amend the legislation to make clear how the various notice periods and time limits in the legislation are intended to interact when OSCR is carrying out an inquiry and requests information.

83. OSCR can require any person to provide information which it considers necessary for its inquiries. If OSCR requests such information about a charity from a third party, it must also give notice to the charity in question that it is the subject of the request and provide the charity with the right to review. However, the 2005 Act does not take account of situations where the body in respect of which information is sought is not a charity (e.g. a body that is misrepresenting itself as a charity or a charity that has ceased to exist). The effect of this is that OSCR cannot require a third party to provide information as it cannot serve the required notice on a ‘charity’, effectively creating an impasse. This potentially hinders OSCR in its inquiries as it cannot access all the information it may require.

84. Where OSCR decides to request information from a third party about a charity to help with its inquiries, OSCR must notify the charity of its decision prior to doing so. This must be done within specified time limits and the charity has a right of review against OSCR’s decision. There is some doubt as to how these various notice periods and time limits are intended to interact and the Bill will clarify the position, thereby making the process more efficient.

***Consultation***

85. In the 2019 consultation, 87% of respondents supported this proposal with it being considered vital that OSCR had effective powers of investigation (and was able to undertake

inquiries in a timely fashion), and that this was in the best interests of strengthening transparency and accountability of the charity sector. As such, the proposal was generally viewed as a reasonable extension to OSCR's powers. Secondly, it was felt that the proposed changes would have a positive impact on strengthening public reassurance, trust and confidence in charities. Only 2% did not support the proposal.

86. The option of not taking forward this proposal was considered to continue the current anomaly of OSCR being able to make inquiries into certain 'non-charities' (e.g. a body or individual that is misrepresenting themselves as a charity) but being unable to request information from a third party as they cannot serve the required notice of intent to request information on a 'non-charity'. It was also considered that the confusion over notice periods and time limits would continue if this proposal were not taken forward, which would be to the detriment of charities and OSCR.

### **The creation of a record of charity mergers providing for the transfer of legacies (section 12)**

87. The overall policy intention is to prevent loss of legacy income to charities through the creation of a record of charity mergers, together with a new rule providing for the transfer of a legacy made out in favour of a charity which has merged ("the transferor") to the charity it has merged with ("the transferee"). The record of charity mergers can be reviewed to identify the transferee and the legacy can then be transferred to the transferee, and not lost to the charitable sector.

88. Charities can receive significant income from legacies in wills. A 2021 report<sup>11</sup> estimates that gifts in wills raise over £90 million annually for Scottish charities. This report also sets out that around 500 Scottish charities are named in wills each year and 64% of those are small charities.

89. In Scotland, there is a risk that a legacy will be lost to the charitable sector where a charity changes its legal form or merges with another charity because the charity named in the will (the transferor) has ceased to exist.

90. The 2005 Act does not allow a body entered in the Register to change its legal form while retaining a continuous identity as a charity, including the same charity registration number. There are a number of circumstances in which a charity may consider changing its legal form, or transferring its assets to another charity, including:

- Where a trust or unincorporated association becomes a Scottish Charitable Incorporated Organisation (SCIO) or a charitable company;
- Where one or more charities are winding up their activities and transferring all property, rights and liabilities to another charity; or
- Where two or more charities are merging and continuing to provide benefit under a new charity with the name of one of the previous charities, or under a new name.

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<sup>11</sup> [legacyresiliencereport\\_scotland\\_aw\\_digital.pdf \(rememberacharity.org.uk\)](#)

91. The potential loss of legacies can be a significant concern for charities, who may seek to mitigate the risk in a number of ways, including by holding off updating their legal form or merging. This can result in a charity failing to benefit from better governance. Charities may also change their legal form or merge but retain the original legal entity as a means of collecting legacies. Legacies received by the original legal entity can then be transferred to the new legal entity or successor charity. This creates burdens for the charity and OSCR. It is also a source of confusion for the public and donors due to the presence of two separate but apparently near-identical charities on the Register.

92. The Bill would provide for a creation of a record of charity mergers. Where a merger is recorded, the transferee charity under the merger (i.e. the new charity) will be entitled to a legacy bequeathed in a will to the transferor charity without any further step being required, unless it is clear from the terms of the will that the testator intended otherwise.

93. This would ensure income from legacies is not lost to the charitable sector and it would also be consistent with corresponding legislation in England and Wales. It would also mean charities are no longer in effect being prevented from restructuring because of the need to collect legacies.

94. The option of not taking forward this proposal was therefore considered to put Scottish charities at a disadvantage compared to their English and Welsh counterparts, to encourage the keeping of less suitable charity structures, and to encourage the existence of “shell” charities which serve little broader public good. The rule is only to be a default and can be disapplied by the testator. The change will be accompanied by a communications campaign. In the majority of cases, the change will likely give effect to what the testator would have wanted. It is also likely, in many cases, to result in relatively little practical difference from testators’ perspective as current practice is often for charities to put off changing structure or to keep shell charities intact so legacies are collected anyway. The difference will therefore primarily be seen at a practical level for charities (for example, no longer having to expend resources on retaining shell charities).

95. In taking forward this proposal, the alternative option of a broader rule about all gifts, not just legacies, was considered. While the rule in England and Wales is broader and covers all gifts, the Scottish Government considers that the acute difficulty arises in relation to legacies and it is only there that intervention is needed. The difficulty is that it is not possible for the testator to remedy the matter themselves as the problem only comes to light after their death. In contrast, if there is a contractual agreement to make a gift and the person making the gift is still alive, that contract can be revisited by the parties concerned. It is also thought that, although Part 16 of the Charities Act 2011 covers all gifts, in practice it will primarily be legacies that are affected as lifetime gifts do not normally have the same gap between the decision to make the gift and the gift taking effect whereas individuals often make a will many years before dying.

### ***Consultation***

96. This proposal was suggested by the Law Society of Scotland in response<sup>12</sup> to the 2021 consultation. As such this aspect has not been publicly consulted on. However, the Scottish

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<sup>12</sup> [Response 311644915 to Strengthening Scottish Charity Law Survey - Scottish Government - Citizen Space \(consult.gov.scot\)](https://www.consult.gov.scot)

Government has engaged with the Law Society of Scotland, and OSCR is aware that the potential loss of legacies is a known issue for the charity sector. There have also been individual public calls from practitioners in the sector for a change of this nature.<sup>13</sup>

97. OSCR is aware that loss of legacies can be a barrier to charities modernising their governance structures, in that there can be reluctance to change legal form from an unincorporated body to a SCIO or company with the benefit of limited liability. The incorporation process<sup>14</sup> requires the unincorporated charity to wind up and establish a new incorporated charity transferring all assets and liabilities to the new charity. Some charities are reluctant to go through the process as winding up the unincorporated charity could lead to the potential loss of legacies once that charity no longer exists.

### **Providing OSCR with a power to appoint interim trustees (section 8)**

98. The policy intention is to ensure that charitable assets continue to be used for charitable purposes, in cases where a charity has no trustees or the existing trustees cannot be found or are unable or unwilling to act, by giving OSCR a power to appoint interim trustees.

99. Under the 2005 Act, OSCR has a power to appoint acting charity trustees at the request of a charity where the charity has insufficient trustees to form a quorum to appoint charity trustees under its governing document and the governing document does not provide a mechanism for appointing charity trustees in such circumstances.

100. OSCR has no power to appoint interim charity trustees where this is not requested by the charity (for example, where there are no charity trustees, or where the existing charity trustees cannot be found or will not act). In such circumstances, a judicial factor may be appointed by the Court of Session, on application by OSCR. However, this can be a costly process and is usually only used in cases of charities with significant assets. A power to appoint interim charity trustees, where a charity has no trustees or the existing trustees cannot be found or are not acting and are not expected to resume acting, would be of particular use in cases where the charity has limited assets or assets which are important to the community but of limited value.

101. OSCR being able to appoint interim trustees (who would then appoint charity trustees in terms of the charity's constitution) in such circumstances would ensure that the assets continue to be used for charitable purposes either by the charity or another charity to which they are transferred when the charity is wound up.

### ***Consultation***

102. This proposal was put forward by OSCR in their response<sup>15</sup> to the 2019 consultation as part of the list of technical amendments to the 2005 Act and has not been publicly consulted on. However, charity trustee recruitment and retention are longstanding concerns in the charity sector. This is also an area where there is precedent in England and Wales for trustees to be appointed on

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<sup>13</sup> <https://www.lawscot.org.uk/members/journal/issues/vol-66-issue-11/when-the-name-doesnt-fit/>

<sup>14</sup> [OSCR | A Guide to Incorporation](#)

<sup>15</sup> [Response 144510042 to Consultation on Scottish Charity Law - Scottish Government - Citizen Space](#)

the regulator's own initiative in such circumstances. Further, although the extension of this power to allow OSCR to act of its own accord is new, the concept of interim trustees and the rules surrounding their tenure are not. The ability to exercise the power also only applies in very limited circumstances (i.e. where the charity cannot make a request itself) and the appointment is inherently temporary in nature. Providing OSCR with a power to appoint interim trustees will help ensure that charitable assets are not 'lost' because trustees are unable or unwilling to act, and not proceeding with this change would continue to leave a gap in the current provision.

### **List of minor or technical amendments to the 2005 Act (schedule)**

103. Through OSCR's practical knowledge of applying the provisions of the 2005 Act, OSCR has highlighted a number of technical changes which would benefit from being made and these have been taken forward in the Bill. For the most part, these changes are clarifying existing statutory provisions, or supplementing them.

#### *Register review and accuracy*

104. As required by section 1(9)(a) of the 2005 Act, OSCR is to perform its functions with regard to the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed. At present, section 3(6) places a duty on OSCR to review 'each' entry in the Register from time to time and, whilst there are no set timescales to which OSCR must perform this duty, there is a concern that such a requirement in relation to 'each' charity is not proportionate and does not allow OSCR to work in a targeted manner. It is also not considered feasible for OSCR to do this given there are over 25,000 entries on the charity register. An amendment to section 3(6) so that OSCR "may" review "any" entry in the Register (i.e. OSCR is permitted but no longer required to review each entry) will ensure OSCR continues to have the powers to carry out this function, but in a proportionate and targeted way.

#### *Removal of former bodies*

105. Section 3 of the 2005 Act relates to the keeping and maintenance of the Scottish Charity Register. Currently OSCR has the power to amend any inaccuracies in entries in the Register, but not the express power to remove a charity where OSCR has information that the charity no longer exists (for example, where a charitable company has dissolved and been removed from the Companies House Register). These changes will put beyond doubt OSCR's ability to remove an entry in the Scottish Charity Register where such evidence exists and will help to ensure the accuracy of the Register.

#### *Change of legal form names*

106. When charities apply to change their legal form, a "new" charity is set up with a new charity number to allow for the "old" charity to transfer all assets and liabilities over before winding itself up. The issue in this process surrounds the charity's name. Under section 10 of the 2005 Act, OSCR cannot enter a body with the same name as (or a very similar name to) another body on the Register. Currently, then, charities either need to apply to change the name of the "old" charity so that the "new" charity can be established with the charity's preferred and historic name, or the "new" charity must register with a temporary name until such time as the "old" charity has wound up, before then applying for consent to change its name to the preferred and historic name. A

proposed amendment to section 5 of the 2005 Act to allow OSCR the discretion to enter a body with the same name on the register provided this is only part of a merger would streamline this process for charities and for OSCR. There is already functionality on the Register to link an “old” and “new” charity to provide clarity for the public which would continue.

*Clarification on consent for applications to change a charity’s name*

107. When a charity applies to OSCR to change its name, section 11(3) of the 2005 Act sets out that unless OSCR, within 28 days of a notice being given to it, directs the charity not to change its name, OSCR is to be taken as having given its consent. This has posed some practical difficulties for OSCR in circumstances where they require further information from the charity in order to make a decision on whether the proposed new name is objectionable, as set out in section 10. Furthermore, OSCR can only refuse an application for consent to a name change where the proposed new name falls within section 10.

108. It is not always possible to obtain the further information within 28 days and therefore OSCR is left only with the action of directing the charity not to change its name. The charity would then need to make a new application with a different name for OSCR to consider. The preferable and more proportionate option would be to direct the charity not to take action for a set period of time (no more than six months) while OSCR carries out further inquiries with the charity, similar to the options available under section 16(6) of the 2005 Act for other changes that require consent such as a change of charitable purposes. The charity would then have more time to discuss its proposed name change with OSCR and provide sufficient information for OSCR to make a decision. This proposed amendment aligns section 11 more closely with section 16 and provides OSCR with a more practical means of making decisions on change of name applications.

109. Further to this, there are occasions where, after making reasonable inquiries, OSCR is unable to satisfy itself that the proposed new name does not fall within section 10 (objectionable names). In those circumstances OSCR is left in a difficult position due to section 11(4) only providing for refusal when the proposed name does fall within section 10. Section 11(4) is therefore amended to make a related change to when OSCR is entitled to refuse an application, specifically where OSCR has been unable to satisfy itself that the proposed new name does not fall within section 10. Further flexibility is also added by ensuring that OSCR can agree a different proposed new name (for example, in discussions with the charity) without requiring a fresh application.

*Working names*

110. There are many charities more commonly known to the public by a different name to the legal name entered on the Register, referred to as a ‘working name’. In the case of working names, the provisions for objectionable names under section 10 of the 2005 Act do not currently apply. This means that a charity could use a working name that is the same as another charity’s legal name, which could be confusing and misleading to the public. It could also use a working name which is objectionable in other ways. An amendment is proposed to provide OSCR with the powers over working names, including to direct a charity to stop using a working name if that working name is objectionable. However, in recognition of the fact that a charity does not need to have a working name (nor is it obliged to record it on its Register entry) and any such name is usually of lesser significance, a charity would not be put at risk of removal from the Register if there was a problem with its working name. In contrast, charities with names which are too alike

are removed from the Register if they disregard a direction to change name. This is because duplicate names will cause difficulties for those searching the Register.

*Clarification of wording in section 17*

111. Section 17(1) of the 2005 Act sets out the changes that charities must provide notification to OSCR of, for example a change in principal office address. This also includes at subsection (1)(c) any change to its constitution and at subsection (1)(d) any change set out in section 16(2)(b) to (d), for example winding itself up. However section 17(2) appears to contradict this by stating that subsection (1) does not apply in relation to any action which requires OSCR's consent under section 16. Therefore a minor technical amendment is proposed to rectify this and amend section (2) to confirm that paragraphs (c) and (d) of subsection (1) are subject to section 16, to align with the process of seeking consent.

*Timescale for charities to provide a copy of their constitution or statement of account*

112. Section 23 of the 2005 Act sets out that charities must provide a copy of their constitution or the latest copy of their statement of account if this is reasonably requested. There is currently no specific timescale in which they must do so and as a result, OSCR receives complaints from members of the public who have requested a copy but have not received it within the time that they considered appropriate. It is proposed that a 28-day timescale from the date of request being received be added to this section to provide clarity to charities and to manage the expectations of any person requesting the documentation.

*Retention of accounting records*

113. Section 44(2) of the 2005 Act sets out that charities must retain accounting records for six years from the end of the financial year in which they are made. This in practice has caused confusion where a statement of account was prepared over two financial years. A minor change to confirm that charities should keep the accounts from the end of the financial year to which they relate would clarify matters. Furthermore, this requirement does not explicitly apply to former charities and therefore a new section 44(2A) would be added to confirm this, which aligns with the proposed power for OSCR to conduct inquiries into former charities and their charity trustees as it may be necessary for OSCR to request accounts of a former charity as part of their inquiry.

*Section 46 reports by auditors and independent examiners to be in writing*

114. Section 46(2) of the 2005 Act requires auditors and independent examiners to report immediately to OSCR anything that arises as part of examining the accounts that they believe is likely to be of material significance to OSCR's functions under certain sections of the 2005 Act. At present, it is not specified how they should report this to OSCR and therefore an amendment to include that this should be in writing is proposed to be added to ensure that this information is captured fully and accurately.

*Annual report completion*

115. OSCR obtains information about charities through online annual returns submitted by charities each year. The information obtained and updated through annual returns includes details such as charity address, contact details for principal contact or number of charity trustees and paid employees.

116. There is no statutory requirement for charities to submit annual returns. The information obtained through annual returns is key to OSCR being able to keep the Register accurate as well as supporting OSCR's other regulatory functions. Therefore, an amendment is proposed to put the matter of annual returns on a clear statutory footing by introducing a duty requiring all charities to submit annual returns to OSCR.

#### *SCIO charity numbers*

117. Section 52 of the 2005 Act describes the information which SCIOs must include on such documents signed or issued by, or on behalf of, SCIOs, as are specified in regulations made under section 52(1). Section 52(4) disapplies section 15 of the 2005 Act to SCIOs, meaning that the Charities References in Documents (Scotland) Regulations 2007, which require charities to state their Scottish charity number on specified documents, do not apply to SCIOs. This appears to be an oversight and therefore an amendment is proposed to the enabling power in section 52(1) of the 2005 Act so that SCIO numbers may be specified in regulations as information that must be included in the relevant documents.

#### *Trustee remuneration*

118. Section 67 of the 2005 Act details when it is permissible for a charity trustee or service provider to be remunerated, and subsection (3) sets out the conditions. Currently, less than half of the total number of charity trustees of the charity can be remunerated, directly or indirectly. This includes where a charity trustee provides services to or on behalf of the charity (directly), or where they might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected (indirectly). Subsection (4) only sets out indirect benefit charity trustees might receive from other charity trustees but does not include, for example, where a charity trustee's spouse is remunerated under a service provision agreement. This could lead to a situation where a majority of charity trustees benefit indirectly from remuneration paid by the charity to persons connected with the trustees. A minor technical amendment is proposed to rectify this by ensuring that 'connected persons' is broadened out. An adjustment is also made to section 67(2)(b) so that the test for entitlement to remuneration is determined by reference to whether a trustee is connected to a service provider rather than whether the trustee might benefit from any remuneration paid to a service provider. These changes will ensure that the rules apply consistently throughout the whole of this section of the 2005 Act, and that remuneration paid to connected persons is properly taken into account.

#### *Notices*

119. Section 100 of the 2005 Act sets out the manner in which OSCR must issue formal communications to charities and others (for example, when serving a notice or direction on a charity). These changes will ensure that where OSCR has reason to believe that serving a notice to the main address in the Register will not reach the charity (for example, because previous correspondence sent to the address has been returned undeliverable), OSCR may send it to another address or addresses for the charity or a charity trustee of the charity. This will help in ensuring that charities receive information from OSCR.

#### *Consultation*

120. These proposals were put forward by OSCR, many of them in its response to the 2019 consultation, and are technical amendments to the 2005 Act. These proposals have not been



publicly consulted on but are largely designed to clarify existing requirements in the 2005 Act. Many of the technical amendments seek to address known issues with the current wording of the 2005 Act and were also highlighted in the Law Society of Scotland's 2019 consultation response.

121. In many cases, the changes being proposed should be largely uncontroversial (for example, the requirement for auditors' and examiners' reports on particular issues to be made by written means). The proposed changes also often do not lend themselves particularly well to a detailed consultation because they are often so minor, so technical or the best means of addressing them is self-evident. For example, charities currently complete an annual return voluntarily (and if they did not then it could be required of them under section 22 of the 2005 Act) so placing it on a statutory footing will have minimal impact for charities. The changes being introduced in relation to SCIO documents mirror what can already be done in relation to non-SCIO charities. The wording in section 17 of the 2005 Act could really only be clarified in one way without revisiting the entire regime of consents and notifications (and the change reflects what currently happens in practice, as well as what is thought to be the intention of the 2005 Act). Other changes relate very specifically to OSCR's experience of regulating charities, and most charities or other persons would not have particular insight into OSCR's operations which would alter the changes that are required in that respect (for example, the practicality of OSCR reviewing every single Register entry).

## **ALTERNATIVE APPROACHES**

### **No legislative change**

122. This option would mean that the current legislation would remain as it is, there would be no improvements to public trust and confidence, there would be no increase in transparency and accountability for charities, and no additional or strengthening of powers would be provided to OSCR.

123. Stakeholder expectations of primary legislation have been raised by the Scottish Government's public consultations which received widespread support. The 2019 consultation publicly highlighted some deficiencies with current Scottish charity regulation and OSCR's powers, especially when compared to other similar regulators in the UK.

124. Maintaining the status quo would mean the shortfalls identified by OSCR and made public during consultation would continue; and Scotland could in turn continue to fall behind the regimes in England and Wales, and Northern Ireland, both in terms of transparency and powers.

125. The 2005 Act is now 17 years old and the charity sector has changed in that time but the legislation in Scotland has remained largely static. Changes have already been made to charity legislation across the rest of the UK to reflect changes in the sector.

126. Overall, this would mean that the risks identified throughout the Business and Regulatory Impact Assessment (BRIA) would persist and the benefits would not be realised. For these reasons, the Scottish Government has concluded that this option is not suitable.

## **Further legislative change implementing the consultation proposals**

127. Within the 2019 consultation, one proposal related to amendments to the process for reorganisation for certain charities established by Royal warrant, Royal charter or enactment. The consultation suggested clarifying the provision currently in the 2005 Act for such charities to be able to reorganise any endowments that they may have. The proposal to clarify the position was supported by 78% of respondents but views were not generally expressed as to what the position as clarified should be. It was also noted by respondents that the issue affects very few charities. In addition, concerns were expressed by some charities directly affected that it was important to retain and respect their long and privileged connections with the Scottish Parliament or Privy Council.

128. While the focus of the 2019 consultation related to clarifying the current provision about reorganisation, in analysing those responses and considering the issues, it has become clear that concerns about the reorganisation of statutory charities go much wider and there are many complexities to consider. Some respondents felt that the focus of this aspect of the consultation was too narrow and called for a ‘root and branch’ review of Chapter 5 of the 2005 Act. Recent changes have been made to equivalent processes in the Charities Act 2022 for the reorganisation of statutory charities in England and Wales. There may be valuable lessons to be learned from the practical experience of charities under these new procedures that will help inform the Scottish approach. It was therefore not thought appropriate to proceed with an amendment in the Bill as introduced; however, the Scottish Government will continue to consider the matters raised by the proposal.

## **Secondary Legislation**

129. Regulations under section 3(3)(f) of the 2005 Act cover any other information in relation to the charity which the Scottish Ministers by regulations require to be set out in the Register. Section 3 regulations could be brought forward to require charities’ annual reports and accounts to become part of the register entry and include the requirement to list the names of current trustees of the charity on the register entry.

130. On balance, whilst publishing statements of accounts and trustee names on the Register could be taken forward in regulations, the other aspects of the Bill require a change to primary legislation and, as such, there would be little to gain by taking forward some aspects through a different means. The main focus of the Bill is to update and improve the existing primary legislation.

## **EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

131. A suite of Impact Assessments has been drafted for the Bill and will be published on the Scottish Government website. These include the Equality Impact Assessment (EQIA), BRIA and Data Protection Impact Assessment (DPIA). Other impact assessments were screened and it was determined that the proposed changes in the Bill would not have an impact on these: Island Communities Impact Assessment (ICIA), Fairer Scotland Duty Assessment; Child Rights and Wellbeing Impact Assessment (CRWIA); and Strategic Environment Assessment (SEA).

## **Equal opportunities**

132. Equality legislation<sup>16</sup> covers the protected characteristics of: age, disability, gender reassignment, gender including pregnancy and maternity, race, religion and belief, and sexual orientation. There are some aspects of this Bill that may impact on individuals who fall within these categories. These are mitigated, in some part, by data protection legislation and the option to apply for a waiver or dispensation under particular circumstances. Provision to withhold the principal address of the charity (or name and address of one of its charity trustees if this is provided instead of principal address) from the Register, where the inclusion of that information is “likely to jeopardise the safety or security of any person or premises”, is already contained in section 3(4) of the 2005 Act and will be extended to names of charity trustees.

133. An Equality Impact Assessment (EQIA) has been carried out in respect of the proposals contained in the Bill. It has been determined that the bulk of the proposals addressed in the Bill will have a direct impact on charities as legal entities rather than on individuals or groups of individuals. Some of the proposals in the Bill will impact all charities, such as the publication of statements of account; other proposals will only impact certain charities, for example providing OSCR with the power to issue positive directions. However, charities only exist by virtue of the individuals which run them. While no direct impacts have been identified for any of the protected characteristics, the Scottish Government has considered that there is potential, particularly with respect to the proposals on publishing statements of account and trustee names, that an inference may be made about an individual’s protected characteristics, in part due to the nature of the charity with which they are involved. This is mitigated by the ability to apply for a dispensation as explained above and balanced against the public interest in understanding who is in management and control of a charity.

134. The equality impact analysis has not had a wide-ranging impact on the development of the policy, as many of the issues highlighted by the analysis were already addressed and mitigated against during the policy design stage.

## **Human rights**

135. The Scottish Government is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights (ECHR). In particular, the Government has considered the effect of the provisions of the Bill in relation to Article 8 of the ECHR (right to respect for private and family life, home and correspondence), particularly with regard to OSCR publishing information which includes personal data. However, it is considered that the requirements surrounding the proposed publication of charity accounts online and the publication of charity trustees’ names in the Scottish Charity Register, as well as the establishment of a record of persons removed as charity trustees by the Court of Session, can be justified and are proportionate on the basis of the public interest in the proper regulation and transparency of charitable activity. In relation to the provisions which require the publication of charity trustees’ details, there are safeguards in place such as the possibility of a dispensation where the publication of such

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<sup>16</sup> Principally the Equality Act 2010, and the Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012: <https://www.legislation.gov.uk/ssi/2012/162/contents/made>

information would be likely to jeopardise the safety or security of any person or premises. A DPIA has also been carried out in respect of the proposals contained in the Bill.

### **Island communities**

136. No differential impact on island communities is expected as a result of this Bill. The provisions will apply equally across all parts of Scotland.

### **Local government**

137. The Bill will not affect local government in Scotland. Arms-Length External Organisations (ALEOs) are independent charities and therefore they will not be relevant to the consideration of impact on local authorities. Many local authorities manage historic trusts and, in those circumstances, they would be affected by the changes made by the Bill. However, they would not be affected any differently from any other charity.

### **Sustainable development**

138. The Bill has no negative effect on any aspect of sustainable development. Some of the Bill provisions may assist charities which have sustainable development as part of their charitable purpose(s), for example Community Development Trusts. Any increases in public trust and confidence from the additional transparency and accountability measures in the Bill could increase support for these charities and aid in the promotion of sustainable development in local communities.

### **CROWN CONSENT**

139. It is the Scottish Government's view that the Bill as introduced does not require Crown consent. Crown consent is required, and must be signified during the Bill's passage, where the Bill impacts the Royal prerogative, the hereditary revenues of the Crown or the personal property or interests of the Sovereign, the Prince and Steward of Scotland or the Duke of Cornwall. The Scottish Government's view is that this Bill does none of these things.

140. For the source of the requirement for Crown consent, see paragraph 7 of schedule 3 of the Scotland Act 1998<sup>17</sup>, and rule 9.11 of the Parliament's Standing Orders<sup>18</sup>. For further information about the considerations that go into determining whether Crown consent is required for a Bill see *Erskine May*<sup>19</sup>, the guide to procedure in the UK Parliament.

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<sup>17</sup> <https://www.legislation.gov.uk/ukpga/1998/46/schedule/3/crossheading/crown-interests>

<sup>18</sup> <https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-9-public-bill-procedures>

<sup>19</sup> <https://erskinemay.parliament.uk/section/6542/queens-consent-on-bills/>



*This document relates to the Charities (Regulation and Administration) (Scotland) Bill (SP Bill 20) as introduced in the Scottish Parliament on 15 November 2022*

# **CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL**

## **POLICY MEMORANDUM**

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