



OFFICIAL REPORT
AITHISG OIFIGEIL

Social Justice and Social Security Committee

Thursday 16 March 2023

Session 6



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SOCIAL JUSTICE AND SOCIAL SECURITY COMMITTEE
7th Meeting 2023, Session 6

CONVENER

*Natalie Don (Renfrewshire North and West) (SNP)

DEPUTY CONVENER

*Emma Roddick (Highlands and Islands) (SNP)

COMMITTEE MEMBERS

- *Jeremy Balfour (Lothian) (Con)
- *Miles Briggs (Lothian) (Con)
- *Foyso Choudhury (Lothian) (Lab)
- *James Dornan (Glasgow Cathcart) (SNP)
- *Pam Duncan-Glancy (Glasgow) (Lab)
- *Paul McLennan (East Lothian) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

- Caroline Monk (Scottish Government)
- Rebecca Reid (Scottish Government)
- Shona Robison (Cabinet Secretary for Social Justice, Housing and Local Government)
- Evelyn Tweed (Stirling) (SNP) (Committee Substitute)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Justice and Social Security Committee

Thursday 16 March 2023

[The Convener opened the meeting at 09:32]

Charities (Regulation and Administration) (Scotland) Bill: Stage 1

The Convener (Natalie Don): Good morning, and welcome to the seventh meeting in 2023 of the Social Justice and Social Security Committee. We have received apologies from James Dornan, and I welcome Evelyn Tweed as a committee substitute.

Before we move to our first item of business, I advise members that the committee has received responses to its letters concerning warrants to install prepayment meters. Those letters have been published in the correspondence section of the committee's website, and the committee will consider next steps as part of its work programme.

Our main item of business today is our final evidence session on the Charities (Regulation and Administration) (Scotland) Bill. The bill aims to strengthen and update the current legislative framework for charities by increasing transparency and accountability. It also aims to improve the powers of the Office of the Scottish Charity Regulator and to bring Scottish charity legislation up to date with certain key aspects of regulation in England, Wales and Northern Ireland.

In our previous two meetings, we heard from witnesses representing charities, charity regulation, law, academia, accountancy and audit. We conclude our evidence sessions today by hearing from Shona Robison, the Cabinet Secretary for Social Justice, Housing and Local Government. I welcome the cabinet secretary and the Scottish Government officials who are joining us today. They are Caroline Monk, who is the head of charity law; Melissa Smith, who is the charity law policy manager; and Rebecca Reid and Megan Stefaniak, who are both solicitors.

I will make a couple of quick points about the format of the meeting before we begin. Members who are attending remotely should wait until I say their name before they speak. Colleagues who are in the room and wish to ask supplementary questions should indicate that to me or to the clerks. Members who are joining us online should use the chat box or WhatsApp to indicate that.

I invite the cabinet secretary to make a short opening statement.

The Cabinet Secretary for Social Justice, Housing and Local Government (Shona Robison): I am delighted to have the opportunity to speak to you about the Charities (Regulation and Administration) (Scotland) Bill. The committee will be aware, from its evidence sessions so far, that there is significant support for the bill and for the modernisation of Scottish charity law.

The bill is built around proposals that have been put forward by the Office of the Scottish Charity Regulator—OSCR—that are based on its operational experience since the Charities and Trustee Investment (Scotland) Act 2005 came into force. In addition to the OSCR proposals, and following engagement with OSCR and the Law Society of Scotland, the record of charity mergers at section 12 and a list of minor or technical amendments to the 2005 act were added to the bill. The bill was delayed due to the pandemic, so I am pleased that we are now able to progress it.

The bill covers a range of different provisions that are designed to enhance the existing framework. Each of the provisions falls under one of three primary aims, which I will outline briefly.

The first aim is to increase transparency and accountability in charities by improving public access to information about a charity's operations. The bill will require OSCR to publish the accounts for all charities and to include the names of charity trustees on the Scottish charity register. OSCR will be able to maintain a schedule of charity trustees' details for its own internal use and provide a publicly searchable record of trustees who have been removed from office by the courts.

The second aim is to provide stronger powers for OSCR, including the power to issue positive directions to help charities to address regulatory issues. The bill will give OSCR a new power to issue positive directions to charities, in addition to its existing powers to issue preventative directions. It will also allow OSCR to conduct inquiries into former charities and their trustees.

OSCR's powers and duties in connection with the register will be enhanced by enabling it to remove a charity from the register when that charity fails to provide accounts and is unresponsive to attempts by OSCR to make contact. In addition, there is a new provision that will require OSCR to refuse to enter an applicant charity on the register when it considers that it would not be appropriate to regulate the applicant because the charity has no, or only a negligible, connection to Scotland.

OSCR will be empowered to appoint interim trustees to a charity in certain circumstances—for example, when the charity has no trustees or the

existing trustees cannot be found. Further, the bill will make some adjustments to OSCR's processes around gathering information in connection with inquiries to make those processes more streamlined and efficient.

The third aim of the bill is to bring Scottish charity law up to date with some key aspects of charity regulation in England, Wales and Northern Ireland, thereby enhancing public trust in charities and further protecting charitable assets. That will be achieved through updates to the criteria that apply to the disqualification of charity trustees and the extension of disqualification to individuals who are employed in charities who exercise senior management functions. The bill will enhance protection for charitable assets through the creation of a record of charity mergers and a new provision for redirecting legacies from a charity that has merged and ceased to exist to the charity with which it has merged.

The bill will make practical improvements and updates to existing charity regulation and the role of OSCR. We consulted on those aspects pre-pandemic, and we are now taking them forward.

I believe that there is also a need for a broader review of the future of charity regulation, which is why I have committed to begin such a review following the passage of the bill. We will ensure that we engage with the charity sector on the scope of that review.

I am happy to take questions, convener.

The Convener: Thank you, cabinet secretary. Our questions will be directed to you, but you are welcome to invite any of your officials to respond, should you wish to do so.

We have a lot of questions, so I would be grateful if answers could be kept as brief as possible.

To kick off, I go to Pam Duncan-Glancy.

Pam Duncan-Glancy (Glasgow) (Lab): Good morning to you and the officials who are joining you, cabinet secretary.

Two weeks ago, we heard from a third sector organisation that

"The proposals that have been consulted on were developed at the very beginning by OSCR and the Scottish Government without input from the SCVO or the"

third

"sector, so the process has very much been focused on proposals favoured by the regulator. I think that that speaks to the increasing calls for a wider review".—[*Official Report, Social Justice and Social Security Committee, 2 March 2023; c 2.*]

What is the cabinet secretary's response to that quote from an organisation in the sector?

Shona Robison: I acknowledge that there is an appetite for a wider review of the charity sector, but I thought that it was important to move forward, as we were ready to do, with some of the technical aspects that had already been consulted on.

Once scrutiny of the bill under the parliamentary process is completed, it will be important for us to scope what the wider review should look like, together with SCVO and the sector more widely. There will be varying views on the scope of the review and on what should be covered, and I am open-minded on that. I think that the role of SCVO will be critical. I have discussed the matter directly with SCVO; as you can imagine, it has raised it with me directly. The Parliament will have a view, and the committee will have a view about its scope, too.

Given that some aspects of the proposals have been somewhat delayed because of the pandemic, it is important to progress the bill, and we should then consider the wider review. Whether that review throws up the need for further legislation remains to be seen, and I am open-minded about its scope, as I have said.

Pam Duncan-Glancy: On that basis, would the cabinet secretary be prepared to consider further legislation if that were the outcome of such a review?

Shona Robison: If the outcome is that legislation is required—be it secondary legislation or primary legislation—we should be open-minded about that. Clearly, we need to wait and see what comes out of the review. If the review concludes that there is a need for change, which in turn requires legislative change, we will, of course, have to consider that, and we will have to examine where in the parliamentary schedule that would be possible. At the moment, I am fairly open-minded about that.

Pam Duncan-Glancy: Could the review be independent? Would you consider that? A number of organisations told the committee that they felt that the review should be independent. Are you prepared to commit to that?

Shona Robison: Again, I am open-minded on that. There are pros and cons around that, but I have not come to any fixed view on it. That is open for further discussion and consideration.

Pam Duncan-Glancy: Finally on the review, how do you intend to involve smaller charities?

Shona Robison: The third sector interfaces might offer a good starting point, given their reach into some of the smaller charities. It is important that we involve them, so that would be very much on my radar. The TSIs would be a good

mechanism—so would others, but TSIs would probably be the first port of call.

Pam Duncan-Glancy: Thank you for those answers.

On another point, witnesses have suggested that a proposal from the original consultation on allowing the reorganisation of charities that were established under royal charters was not included in the bill and that one option would be to clarify the legislation to make it clear that OSCR could approve the reorganisation of such schemes. Would you consider that, whether under the bill or in future legislation, and could the bill introduce measures to help to simplify the process for a charity wishing to change its status to a Scottish charitable incorporated organisation?

Shona Robison: A specific process for incorporation or change of legal form is not part of the bill, and that is not being consulted on, as you know. Creating a bespoke process for an unincorporated charity to become incorporated, usually by becoming a SCIO, would require extensive consultation with the sector, especially when it comes to small charities and those that have already been through the process. We would want to explore and capture that in the wider review. I understand that there are benefits to charities becoming SCIOs or companies, the ability to access secure funding streams being a key one, as well as having limited liability. The problems that charities can face when going through the incorporation process are largely outside the remit of charity regulation and the OSCR process.

I think that there are two provisions in the bill that would assist charities wishing to incorporate. I do not know whether Caroline Monk wishes to say more, but I would refer to the record of mergers, and the schedule to the bill contains a provision

“to allow duplicate charity names as part of merger”.

I do not know whether you would like more detail on that, but the main point is that we would want to consider it as part of the wider review.

09:45

Caroline Monk (Scottish Government): As the cabinet secretary has said, two provisions in the bill would assist charities that are looking to incorporate. The first is the record of mergers. One of the things that can put charities off incorporation is the fact that the incorporation process means starting a new charity, closing the old one and transferring everything across. An issue that charities have raised is the matter of lost legacies due to the old charity having to close; the record of mergers will take away that particular issue.

Another thing that can be quite off-putting for charities in that process is that a new charity has to be set up, and charity law requires that you cannot have two charities with the same name on the register—the new charity has to have a different name from the old one, at least for a period. The technical provisions in the schedule will mean that, when it becomes part of the incorporation process, charities will be allowed to keep the same name, which is important to many of them.

The Convener: Foysol Choudhury is joining us online with a brief supplementary question.

Foysol Choudhury (Lothian) (Lab): Good morning, cabinet secretary. I have a small question. Do you believe that enough small organisations have been consulted? Have any areas of regulation not been sufficiently covered in the consultation process?

Shona Robison: There has been extensive consultation, including with a number of small organisations. The bill has been the subject of two 12-week consultations and there is a total of, I think, more than 400 written responses from bodies of all sizes, including a number of small organisations.

The question whether things have been included in the bill comes back to the need for a wider review, in which there will be scope to consider those things. I want to take the time with the sector, including small organisations, to scope out what that wider review would cover, because there are differing views on that. It is important to have a really full, open discussion with all aspects of the sector, including large and small organisations.

Foysol Choudhury: Thank you very much. Before I finish, I want to declare an interest: I am the chair of Edinburgh and Lothians Regional Equality Council, which is a registered charity organisation.

The Convener: Thank you, Foysol.

Emma Roddick (Highlands and Islands) (SNP): Good morning, cabinet secretary. We took evidence from Bòrd na Gàidhlig a few weeks ago, and it was keen to know whether a charity’s Gaelic name could be included on the register alongside its English name. Would you be open to considering that?

Shona Robison: As I understand it, OSCR already includes the Gaelic charity name on the Scottish charity register when the charity has requested it. The question is whether the register could include a Gaelic version of every charity name, which would be a matter for OSCR to consider as part of its duties and resources as an independent public body. The member might want

to raise the question directly with the organisation to see whether it would be willing to consider that.

Paul McLennan (East Lothian) (SNP): Good morning, cabinet secretary. One of the general principles of the bill is about improving transparency and accountability. Before the bill was introduced, were there any weaknesses that needed to be addressed? What action is being taken to address those weaknesses?

Shona Robison: As I set out in my opening remarks, one of the overarching aims of the bill is to increase transparency and accountability in the charity sector. Responding directly to the views of the public in OSCR's surveys and giving people the ability to see how a charity has spent the donations that it has received and who has made those decisions are key elements in increasing public trust. To go back to the provisions in the bill, publishing charity accounts and providing the names of trustees on the register will help to provide the increased transparency and accountability that the public are looking for.

In addition, the bill will bring information about Scottish charities up to the same standard that there is in other parts of the United Kingdom. That is important and is a key plank of the bill. It is not that there is a major issue with public confidence, but anything that can be done to strengthen the public's confidence in the donations that they give and in accountability and transparency is important.

Paul McLennan: I have another couple of questions. One is about the implementation of what is proposed in the bill. I would not call it concern, but there are questions about how the bill will be implemented and how the Government will work with charities when it is implemented.

Shona Robison: You would not expect the detail of implementation to be in the bill, because OSCR, as an independent public body, will want to detail how it will implement the new powers and duties. OSCR has said that it intends to produce guidance on various provisions in the bill, alongside relevant communication campaigns. It has given evidence to the committee on some of those plans, and the bill team is working closely with it on the commencement and implementation plans, to ensure a phased roll-out.

It is probably important to make the point that the bill does not make fundamental changes to the way in which charities are regulated; it is about enhancing and clarifying the existing regime. Apart from the inclusion of trustee names on the register and the provision to OSCR of the names and addresses of trustees for the internal schedule, most charities will not see a huge difference in how they are regulated.

However, communication is going to be important, and OSCR has that well in hand, by the sound of it.

Paul McLennan: I have a final question. You touched on OSCR, which has given evidence. One of the things that we discussed with OSCR was whether the powers were appropriate and proportionate. Do you have any comments on that? OSCR seemed quite comfortable about the additional powers.

Shona Robison: It is. I met OSCR recently. The powers will be important to it. It wants them and believes that they are necessary and proportionate.

Evelyn Tweed (Stirling) (SNP): Good morning, cabinet secretary and officials. Cabinet secretary, how might the dispensation mechanism operate, and how can it be ensured that it does not act as a deterrent to individuals who might have valid reasons for wanting their name to be withheld from the public register?

Shona Robison: I know that the committee has looked at that area in some detail. Currently, the ability to apply for a dispensation from the inclusion of certain information in the register is provided for in the 2005 act. The bill extends the current dispensation provisions to cover the new trustee information on the register. The ability to do that is already there and is being extended to cover the new trustee information.

OSCR will operate the mechanism in the same way as it does now: assessing the information that is provided case by case. In addition, the bill gives OSCR the power to exclude information from the register of its own accord, if it believes that the safety or the security of a person or property could be jeopardised, without a charity or a trustee having to apply first. That could relate to a specific charity or type of charity, such as a women's refuge.

On your second point, about a deterrent, I stress once again that the bill does not alter anything about the dispensation mechanism that OSCR has been operating since the 2005 act was passed. As I said earlier, the bill extends that mechanism to the new provisions.

A charity or any of its trustees will be able to apply to OSCR for a dispensation from the requirement to publish the name or names of charity trustees on the register where, as I said, publication could

"jeopardise the safety or security of"

a person or property.

OSCR has an established procedure in place for dispensation and is well used to assessing requests and working with those who are applying

for a dispensation before information is entered in the register, so it knows how to do that. The names of trustees are already contained in a charity's accounts, and the accounts are already publicly available simply by way of a request that is made to a charity directly as opposed to automatically. The measures in the bill will put information on every charity in a single place in order to enhance access by the public.

I think that that is the right balance, and it does not make a huge fundamental change.

Evelyn Tweed: What are the implications for charities, with regard to their administrative functions, of the proposals for OSCR to gather and maintain up-to-date information on trustees? I am thinking in particular of smaller charities that may not have paid staff. How might any additional burden be minimised?

Shona Robison: That is an important point. Again, it is important to say that the main additional requirement for all charities will be to provide OSCR with the charity trustee names and contact details, including postal and email addresses. Charities should already hold that information, so the requirement should not be onerous. The provision of trustee details will take place through OSCR's existing system, with which charities are already familiar, so the process will not be new or strange to them.

Importantly, OSCR's data shows that the average number of trustees in a charity is eight, so, for many charities, providing the name and contact details of trustees will not create huge additional burdens; it will be part and parcel of what they would normally do as part of their routine reporting to OSCR. It is important to stress that there is nothing onerous in that respect.

The Convener: We move back to Foyso Choudhury, who joins us online.

Foyso Choudhury: Does the cabinet secretary have any concerns that the bill could disproportionately affect smaller charities—particularly ethnic minority charities that are already struggling to stay in business given the cost of living crisis?

Shona Robison: No, I do not think so. I go back to the points that I have just made in relation to smaller charities. There is nothing burdensome in the bill; we are talking about the provision of details with which charities will already be familiar. They will have that information, so there will not be a huge additional burden.

For many charities, providing the name and contact details of trustees will not create additional burdens—they will already have that information and will be used to providing it as part of their routine reporting to OSCR. I do not believe,

therefore, that that requirement will give them any particular difficulties.

The development, introduction and population of the internal schedule of charity trustees is likely to take place over two to three years, and charities will therefore have significant time in which to prepare for that specific change, so I do not think that it will be onerous.

Foyso Choudhury: Do you have any concerns regarding the provisions for charities to redact certain information from published accounts where there might be safety or security concerns?

10:00

Shona Robison: Given what I mentioned earlier about what happens where there is a concern, the bill gives OSCR the power to exclude information from its register of its own accord where it would have "safety or security" concerns about a person or property.

If you are thinking, for example, about an organisation that may have been targeted for whatever reason, OSCR is able to take that into account and exclude the information, even without the charity or trustee having to apply first. If OSCR believes that there could be a security risk, it has the power to exclude that information.

I gave the example earlier of a women's refuge; I am sure that we could think of other examples. If a property pertaining to a charity was in danger of being targeted for whatever reason, OSCR would look at that very seriously indeed.

Foyso Choudhury: I am sure that you would agree that a smaller organisation will probably need more support from OSCR and the Government. Can that be provided?

Shona Robison: OSCR is very much aware of the needs of smaller charities in particular, and it already recognises those needs in the way in which it conducts its business. What OSCR requires of a huge charitable organisation is quite different in comparison with what it requires from a small local charity.

OSCR has experience of working with organisations of vastly differing scopes and sizes. With regard to the changes in the bill, OSCR recognises that, although there is nothing onerous in the requirements, smaller charities may need additional support, or may simply need to be reassured about what will be required of them.

Foyso Choudhury: Thank you, cabinet secretary.

Convener, I should have said that I am part of a small third sector organisation.

The Convener: Thank you, Foyso.

Cabinet secretary, what are your views specifically on the suggestion that the committee has heard of different thresholds for charities, depending on their level of income? Would there be any merit in raising the threshold above which charities must prepare full audited accounts?

Shona Robison: Allowing an exemption for smaller charities from the requirement to publish accounts or to provide information to OSCR would, I think, defeat the aim of ensuring transparency and accountability across the whole sector. More than half of charities in the sector have an income of less than £25,000 and are therefore considered to be small charities. That is a huge part of the sector, and an exemption would potentially mean that the public and the regulator would not have access to a large proportion of it.

In practice, the situation will be very similar to what it currently is. OSCR already publishes the redacted accounts of charities with an income of more than £25,000, and financial reporting to OSCR is already staggered depending on income levels, with smaller charities providing less information than larger ones. The point that I was getting at earlier was that OSCR already takes that into account with regard to the requirement for financial reporting. It is proportionate to the size of the organisation; one would expect a multimillion-pound charity to be required to provide a greater level of financial information.

The audit threshold for charities in Scotland and Northern Ireland is currently set at £500,000. In England and Wales, the threshold is higher, at £1 million. However, I think that the view is that £500,000 is right for Scotland, given that the incomes of charities in Scotland are a bit different from those in England, and that it is appropriate that that remains the threshold.

The Convener: Can any detail be provided on how the process of engagement between OSCR and charities that have failed to submit accounts will work? Equally, can any assurance be provided that, when charities have not submitted accounts because of a lack of resources, skills or knowledge, OSCR will provide appropriate support to seek to avoid them being removed from the register when there is a willingness to comply but an inability to do so?

Shona Robison: That is an important point. In section 11, on the removal of charities, the bill provides OSCR with a bespoke route to remove a charity from the register when it has failed to provide accounts as required, the deadline for submission has passed, and the charity—this is important in relation to your previous point—has not responded to any communications from OSCR.

The removal process is not automatic. The power is discretionary for OSCR and it will take into account all the information that it has. The removal process starts with giving the charity notice of the intention to remove it, after which it has three months to act. If it makes contact with OSCR in any way during those three months, the process stops and OSCR can use its other powers to ensure that the charity complies with its duty to provide a statement of accounts.

There are various points at which a charity can avoid its removal from the register, and engagement with OSCR is obviously key. If the delay has been caused by either an oversight or problems within the charity, OSCR will want to work with the charity. It is not in anybody's interests for a charity that is doing good work to end up being removed from the register because of practical issues or problems that have emerged within the organisation.

The Convener: I have one final question on this theme. What are your views on how OSCR might communicate with parent charities if there are issues with individual charities not submitting accounts? For example, would it be appropriate for OSCR to communicate with a church body if there were issues with a specific church?

Shona Robison: The committee has taken evidence on that. OSCR already works with umbrella charities or parent charities in cases of charities not submitting, and it has done so for a number of years. When a charity fails to provide accounts on time, it is shown on the Scottish charity register and there is nothing to prevent OSCR sharing that information with the parent or umbrella organisation and working with it to ensure compliance by the individual charity. For example, if you take a church body that is not a designated religious charity, exactly the same applies. The supervisory functions of the designated religious charity in respect of the individual church would apply and it would be for the DRC to deal with that.

I hope that that gives you some clarity.

The Convener: Absolutely. Thank you.

Jeremy Balfour (Lothian) (Con): You will be aware that the Information Commissioner has raised some questions about data protection issues. Have those been addressed sufficiently in the bill or in related evidence, or does the bill need some tweaking?

Shona Robison: A consultation with the Information Commissioner's Office has been carried out as required by the general data protection regulations. As part of the consultation, the Information Commissioner's Office raised some points that were addressed during the policy development stage. Any amendments made by

this bill and involving the processing of personal data all operate within the framework of and, importantly, are consistent with general data protection regulation and the Data Protection Act 2018.

There is a strong argument for members of the public being able easily to access charities' financial information and information about those who are doing the important work of running charities, given that that involves having responsibility for charitable property and for donations from the public. It is also important that those provisions are accompanied by appropriate safeguards. The dispensation mechanisms that we spoke about earlier allow for certain information to be excluded from the register, the statement of accounts and the record of removed trustees, where inclusion of such information would be

"likely to jeopardise the safety or security of any person"

We covered that earlier.

Rather than concerns having been raised, there are points to consider. As I have just explained, those have been taken on board.

Jeremy Balfour: For clarity, do you think that those issues have been addressed in the bill?

Shona Robison: I believe so. I can bring in Caroline Monk to talk more about the detail. The consultation with the ICO happened at quite an early stage in the process and we are content that the points that were raised have been addressed.

Caroline Monk: As the cabinet secretary has said, the bill provides a dispensation for the safety and security of people and properties. That was the main thing that came both from the public consultation on data protection and from the discussion with the ICO.

Jeremy Balfour: Who would be liable if there was a breach: OSCR or the Scottish Government?

Shona Robison: OSCR would be liable, because any personal data would be held by OSCR, which is the independent public body. It has, and will have, duties and responsibilities in relation to data processing, just as any organisation does. OSCR will be the data controller for trustee information and the bill provides a legal basis for OSCR to process that personal information. In short, it is for OSCR to determine what information is to be collected and the systems used to process that information. If there were to be a data breach, OSCR would be liable. That is why we will ensure that OSCR, like any other public body, has systems in place to avoid that.

Jeremy Balfour: I will move to the issue of interim trustees, which is something that OSCR can now deal with. If OSCR appoints an interim trustee, will that person be remunerated, or is it a voluntary role? If there are costs connected to that, is OSCR liable for those, or is that the charity's liability?

Shona Robison: First, it is important to say that any appointment of interim trustees would very much be a time-limited measure to safeguard charities. There might be a scenario in which there is a falling-out within a charity, the trustees all walk away, the charity's good work cannot continue and something has to be done to safeguard the work of that charity while new trustees are appointed. The circumstances would be very specific and would be time limited.

Interim trustees would not routinely be remunerated. The 2005 act sets out the rules for charity trustee remuneration, starting from the basis that, in general, trustees should not be remunerated for their role as a trustee, although trustees can reclaim expenses—such as the cost of travelling to a trustee meeting—from the charity, and interim trustees would be able to reclaim expenses from the charity in the same way. I think that that would only be fair because, if we do not put that provision in place, there might be financial barriers that prevent someone who does not have a particularly great income from serving as a trustee, whether or not that is on an interim basis. We do not want to put barriers in the way of that person. I hope that my answer has clarified that issue.

10:15

Jeremy Balfour: Thank you, cabinet secretary. That is helpful.

Obviously, I hope that this situation will not happen very often but, as we have heard from evidence in previous sessions, at the moment, there is a lack of people who are willing to volunteer to be trustees. It might be an issue for OSCR more than for you, but do you see OSCR as having a bank of people who are ready to step in if required? If not, how do you expect OSCR to find those people at fairly short notice?

Shona Robison: I think that OSCR has indicated that interim trustee positions would, for example, be advertised in the local press, and a recruitment panel would be convened with the assistance of the local third sector interface, such as SCVO or a similar organisation. The expectation is that TSIs for each local authority area could also hold a list of individuals who are willing to step in and act as temporary trustees. As you said, that situation will not happen very often, and it just requires an urgent response for a time-

limited period, so having that as a back-up sounds quite sensible.

Jeremy Balfour: If, for example, a charity has one remaining trustee and OSCR decides to bring in another couple of interim trustees to keep the charity going but that present trustee does not want those people to be appointed, there is no appeal mechanism for that. Are we saying that OSCR can supersede a present trustee's role and appoint interim trustees whenever that is necessary? What does the charity do if it does not like the trustees who have been appointed?

Shona Robison: I take your point. As you said, the bill does not include any dispute mechanism in relation to the appointment of interim trustees, and you have highlighted the unlikely—but potential—scenario in which someone could dispute the process. I think that the new power, by its nature, will be used only in circumstances where, in effect, no one is running the charity. If there were concerns in relation to appointments, I would expect OSCR to engage on a case-by-case basis with those who are raising concerns. If an individual remained and there were no concerns about them continuing as a trustee, I would expect OSCR to work with that remaining trustee to help to recruit on an urgent basis some interim trustees that they could work with. If you are thinking of an extreme scenario, in which the person said, "I am not going to work with anyone," you are into territory where the person is obstructing the work of the charity. In that unlikely scenario, it would be for OSCR to determine the most appropriate route to take for the good of the charity.

Jeremy Balfour: You touched on this issue in one of your earlier answers to Pam Duncan-Glancy. The provisions in the bill that relate to charity mergers are restricted to legacies but, in England, the equivalent provisions relate to both legacies and gifts. Why have we not gone down that road, in order to allow both legacies and gifts to be included with regard to a merger?

Shona Robison: Our policy intention is to capture those cases in which the donor is not able to change where the gift goes—for example, because they are deceased. The record of mergers was included following discussions with the Law Society of Scotland on the difficulties of legacies that have been left to charities that have ceased. We are not aware of any difficulties around lifetime gifts. Caroline Monk is probably closer to the detail on this, so I will bring her in.

Caroline Monk: The record of mergers was brought in following discussions with the Law Society, which raised only the issue of legacies in wills. As yet, nobody has directly raised an issue with lifetime gifts but, obviously, we could pick that up with legal professionals if it is as big an issue as legacies.

Jeremy Balfour: I suppose that that would just make things clearer. It is not a negative thing; it seems to be positive. We might be able to look at it later.

My other couple of questions will be quick, as I am conscious of time. From all the evidence that we have taken, the requirement for charities to demonstrate a connection to Scotland seems to have received pretty welcoming support. Why does the bill not have an absolutely clear definition of what that means? Instead, it leaves it open to some interpretation. Is it too difficult to define legally? What was the reasoning behind that?

Shona Robison: We consider that OSCR is best placed to make decisions on what constitutes a connection to Scotland in individual cases. It would be guided by the facts and circumstances of the case, its extensive experience as a regulator and the guidance that it will produce on that part of the bill, which it will consult on.

The provision is unlikely to impact on the vast majority of charities or applicants to become a charity. OSCR's data indicates that two charities out of 25,000 do not appear to have a connection to Scotland. Its decisions on whether an applicant charity or an existing charity has a sufficient connection to Scotland will be subject to the review and appeal mechanisms that are already in place under the 2005 act.

It is not a huge issue, and leaving it to OSCR to look at each individual case is a sensible approach.

Jeremy Balfour: A system whereby people could appeal to a tribunal was included in the 2005 act. That has now changed. My question arises from my own ignorance: does that tribunal still exist in law, and, if so, should we not remove it from the legislation?

Shona Robison: I ask Rebecca Reid to come in.

Rebecca Reid (Scottish Government): You are referring, I think, to the Scottish charity appeals panel, which was set up in 2005 to have oversight of some of the decision making. That was abolished as part of the general reforms to tribunal law that were put in place following the Tribunals (Scotland) Act 2014, so that gap—if I can call it that—no longer exists. The panel's functions and personnel were transferred to the First-tier Tribunal for Scotland by subordinate legislation, and the references to the SCAP in the 2005 act were updated to refer to the First-tier Tribunal instead.

Jeremy Balfour: Thank you. That is helpful.

The Convener: We move back to questions from the deputy convener, Emma Roddick.

Emma Roddick: I have quite a few questions on disqualifications. It was suggested at our previous session that there could be scope for a different regime in Scotland that would allow people who would normally be disqualified to act as trustees, with certain conditions attached. Does the cabinet secretary have any thoughts on that?

Shona Robison: The current and proposed disqualification criteria are based on behaviour or conduct that the Government considers makes a person unsuitable to hold office as a charity trustee. That goes back to the importance of the trustee role and the fact that trustees are responsible for managing money and property that have been donated by the public in good faith. However, it is recognised that in some circumstances a person might have valuable experience and expertise to bring to the role of trustee, notwithstanding that they would otherwise be disqualified.

Automatic disqualification for bankruptcy is time limited and applies only until the debtor is discharged. On discharge, which can happen quite quickly—in a matter of months, in some cases—the disqualification falls away.

It is also open to anyone who would otherwise be disqualified from acting as a trustee on any of the disqualification grounds to apply to OSCR for a waiver. The existence of the waiver mechanism means that, although disqualification is automatic, it is not absolute, and it can be waived at the regulator's discretion.

The existing waiver system and its extension to the new automatic disqualification criteria demonstrates a recognition by the law that there will be cases in which a person who is disqualified can still hold a trustee or senior management position. Again, though, it is for OSCR to make that judgment.

Emma Roddick: A number of organisations have raised concerns about the specific issue of bankruptcy. Given that it is an existing criterion, does the cabinet secretary think that there might be a lack of communication or enforcement in that respect? Is the bill likely to mean that, in the future, people facing bankruptcy will be treated differently to how they are treated now?

Shona Robison: I take your point about whether there is an awareness issue here, but I would just say that disqualification on grounds of bankruptcy applies during the period when the bankruptcy is undischarged. Perhaps communication from OSCR will make it very clear that, once the bankruptcy is discharged, the disqualification will fall away and the individual will be free to take up a trustee position, should they wish to do so, or the individual can apply for a waiver. As I have said, there might need to be

some communication from OSCR with regard to that process in order to make things clear.

The other point that I should make is that being disqualified does not stop someone volunteering or working with the charity in a role other than that of a trustee and having a different kind of day-to-day interaction with the charity. What will be important is communication from OSCR to ensure that people understand the current process, the waiver and the opportunity for the individual in question to continue their relationship with a charity in some other role.

Emma Roddick: Does the cabinet secretary think that it would be appropriate to have a different bankruptcy regime in Scotland? Is that needed?

Shona Robison: I have just set out what is important. We take the point about the need to ensure diversity of experience on charity boards; that is important. However, it is also important that the law treats all charity trustees equally and that no trustee position—such as the treasurer or chair, for example—is more responsible as far as charity regulation is concerned. All trustees are equally responsible for the charity.

I would just reiterate that a person who is otherwise disqualified can apply to OSCR for a waiver from disqualification. Such a mechanism is appropriate in ensuring that disqualification rules are fair and proportionate, and it will serve the Scottish charitable sector well.

Emma Roddick: We have heard quite a few concerns about lack of diversity being an issue because of the criteria. Does the cabinet secretary share those concerns to any extent, and does she think that the bill provides enough scope to get around that issue?

Shona Robison: As I have said, I think that diversity is vital. We want charities to be able to draw on people from various backgrounds, but the law needs to treat all charity trustees equally.

10:30

With regard to whether OSCR would apply a waiver from disqualification, it would have to do that on the circumstances of the case, which would involve looking at whether the person concerned posed a risk to the charity. That would be the important thing rather than whether the person came from a diverse background.

OSCR would probably take quite an objective test as to whether the person's disqualification—or whether applying a waiver—would pose a risk to the charity. I think that that is how OSCR would set up the application process for a waiver. Caroline, you might want to make it a bit clearer than I have.

Caroline Monk: No, I think that you have made it very clear. The starting position is that automatic disqualification is because of things that have happened in an individual's life, outwith charity roles, that mean that they might not be suitable or that there might be risks to their being in charge of a charity. That is particularly the case given the amount of public trust that charities hold and the fact that the vast majority of them get donations and support from the public. It is important that the public can trust and have faith and confidence in those individuals.

However, as we have said, diversity and lived experience can be very important parts of running a charity, which is why the waiver mechanism exists and will continue under the new criteria.

Emma Roddick: Thank you. I agree, and I think that that is clear.

Does the cabinet secretary have any concerns about the possibility of mistaken identity in relation to the searchable record of disqualified trustees?

Shona Robison: That is a record of around 50 individuals who have been removed from being a charity trustee by the Court of Session since 1990—following an application from OSCR or its predecessor. The reason for their removal would be serious concerns about their conduct while they were serving as a charity trustee. It is important that charities are able to find out whether a person that they might wish to recruit has been removed by the courts from that role in the past.

I do not believe that the provision will result in cases of mistaken identity, because, if the searcher is unclear as to the identity of an individual—for example, if they are searching for John Smith—they can contact OSCR with further information to establish identity. The Charity Commission for England and Wales already employs a similar search function in relation to removed individuals in that jurisdiction and it works perfectly well.

Miles Briggs (Lothian) (Con): Good morning. In relation to the issuing of positive directions following inquiries, how frequently does the cabinet secretary envisage that OSCR will use those new powers? Are there any examples of inquiry work being hampered due to the lack of ability to issue positive directions?

Shona Robison: On the first question, the new power is not being proposed with a view to its being used a certain number of times; it is more a case of ensuring that the regulator has appropriate remedies to support its important inquiry work, where those are needed. A positive direction would be issued only following an inquiry and where the circumstances of the case required formal action to be taken because OSCR had reached the view that there had been misconduct

in the charity or that it was necessary for it to act to protect charitable property. Of course, OSCR is required to publish a report when any direction is made.

I think that the power is unlikely to be used frequently. The annual report for 2021-22 shows that, in that year, OSCR opened 60 new inquiries about charities and closed 99 inquiry cases. There was one incidence of regulatory powers being used, and a third of inquiry cases closed with recommendations or guidance to trustees. That is the context to what we are talking about.

On your second question, there are a number of areas in which OSCR anticipates using a positive power of direction. Those include directions to appoint additional trustees to form a quorum or to meet a minimum number that is specified in a governing document; to take a specific action in line with the charity's governing document, such as holding an annual general meeting to make a specific decision; to take action to remove a trustee in line with the powers that they have; to manage a conflict of interest effectively and demonstrably; and to prepare and submit a compliant statement of accounts.

Non-compliance with a positive direction would be classed as trustee misconduct, and OSCR would be able to take enforcement action against the trustees, taking into account the specifics of any case.

Miles Briggs: That is helpful. Thank you for that clarity.

Do ministers still believe that it is appropriate for designated religious charities to be exempt from OSCR's direction-giving powers? Do ministers intend that any future reviews would include consideration of that exemption?

Shona Robison: We touched earlier on the point about designated religious charities. It is intended that DRCs will be exempt from positive directions, in line with the precedent that was set by the 2005 act.

The bill seeks to update and improve the existing law rather than to change the original policy intent of the 2005 act, which recognises that many religious bodies operate effective self-regulatory mechanisms through internal supervisory and disciplinary functions.

There is a balance to be struck in relation to not wanting to overregulate such charities, but I recognise the point that Miles Briggs makes. There are varying views on the subject, and some in the sector would like the exemption to be reviewed. It probably could be considered as part of the wider review—we could come back to that. However, we felt that it was not appropriate to review the exemption at this time.

The Convener: We move to our final theme, on the financial implications of the bill. Does the cabinet secretary anticipate that OSCR will be able to absorb the additional responsibilities within its existing budget, or will additional resources be required?

Shona Robison: The financial memorandum sets out the additional costs and resource that OSCR itself has forecast for implementation of the bill. Most of those relate to OSCR's staff costs to enable it to carry out communications and engagement activities—we talked earlier about the importance of that aspect—to provide support to charities and other stakeholders, and to process casework.

Funding for OSCR more generally will be negotiated in the usual way, taking into account the projected costs of its functions at that time. In line with the standard practice for budget forecasting, the additional staff costs have been calculated on the assumption of 3 per cent annual uplifts to salary figures for 2021-22.

I met the chair and the chief executive of OSCR in February, and funding was discussed. The financial situation is challenging across the whole public sector, and OSCR is not being treated any differently in that regard. Officials are in regular contact with OSCR about its resourcing requirements. We agreed that we would keep a watching brief over its financial resilience, and those discussions with OSCR will continue, but I do not anticipate any particular challenges around any additional costs arising from the bill.

The Convener: You have touched on the topic of my next question. We have discussed communication and engagement, and there will have to be allowance for the potential development of new digital tools to help with the collection of data and to minimise any administrative burden on charities. Are discussions with OSCR on whether that is appropriate on-going?

Shona Robison: Yes. The financial memorandum sets out the estimated costs of developing the database for the internal schedule of charity trustees as well as the on-going maintenance of the database. OSCR has made and will continue to make that important investment as part of its delivery.

The Convener: Finally, on that point, does the cabinet secretary believe that, although costs for individual charities might be minor, they could add up to a significant sum across the sector as a whole?

Shona Robison: We have touched on some of that. The bill does not introduce significant additional costs to charities, and I do not think that what charities are being asked to do is

burdensome. A lot of that information is already held, so I do not think that there will be huge additional costs. I do not think that that will be the case for councils that administer charities either, or for the sector as a whole.

Previous evidence sessions have noted that there would be a small resource requirement to comply with the new provisions. We approached a small representative sample of charities to ascertain estimated costs and savings as a result of the bill's provisions, which will directly impact all charities. Overall, the charities that fed back did not anticipate incurring anything other than minor costs and were supportive of the proposals as set out. The benefit that the bill will bring to the sector as a whole will far outweigh the very minor costs to charities.

The Convener: Given that time allows, I will return to theme 1 of our committee paper, which is on the wider review of the charity sector. I would be grateful if you would confirm a few points on that topic. When do you anticipate the proposed wider review taking place and over what timescale?

Shona Robison: It is important to progress the bill, so I envisage the substantive discussions around the scope of the review happening after stage 3, but there is probably some groundwork on the mechanics of how we would take forward those discussions that could already be taking place. However, I do not want to redirect these guys beside me, who are working on the bill, to carry out that work while they are doing so, so we need to manage resources appropriately. The main scoping with the sector will have to take place after stage 3.

I do not want to be too restrictive about how long it will take after that, because it depends on the scope. If the scope is extensive, we will need to take as long it takes to get it right. Once stage 3 is complete, I am prepared to set out more detail on that process. We will then have the capacity to look at that in more detail.

The Convener: I have a final question. Is the Scottish Government committed to further consideration of legislative changes to support the reorganisation of statutory charities? We have seen wide support for that in the evidence that we have taken so far.

Shona Robison: I will bring Rebecca Reid back in on that point.

Rebecca Reid: I appreciate that the issue was raised earlier. That was one of the questions in the original consultation, and it is to do with a particular section of the 2005 act and an ambiguity that has been identified in how it operates. The reorganisation of statutory charities is not included in the bill at present, but there has been helpful

engagement with some of the legal stakeholders who have an interest through cases that they have been involved in since its introduction.

We are still considering the matter, but it is bound up with wider general issues about statutory charities that will perhaps be considered as part of the wider review. The reason that it is not included in the bill is that the two things are enmeshed. We felt that it might be better to consider them more holistically in a root-and-branch way as part of the wider review. There has been helpful discussion since introduction, and we are still looking at the issue.

The Convener: I thank the cabinet secretary and her officials for their evidence and for their clear and concise responses. Our next step will be to publish a stage 1 report on the general principles of the bill. That concludes our public business.

10:45

Meeting continued in private until 11:08.

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