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An t-Ionad Fiosrachaidh

Social Justice and Social Security Committee

7th Meeting, 2023 (Session 6), Thursday,
16 March 2023

Charities (Regulation and Administration) (Scotland) Bill

The [Charities \(Regulation and Administration\)\(Scotland\) Bill](#) was introduced in the Scottish Parliament on 15 November 2022. [SPICe has published a briefing on the Bill.](#)

The Committee issued a [written call for evidence](#) on the Bill which ran from 8 December 2022 to 3 February 2023, with the option for respondents to complete either the main call for views, or a shorter survey. There were 55 responses to the short survey and 35 responses to the detailed consultation. [SPICe has prepared a summary of responses to both of these consultation exercises.](#)

The Committee will have its third and final formal evidence session on the Bill on 16 March when it will hear from the Minister responsible for the Bill, Shona Robison, Cabinet Secretary for Social Justice, Housing and Local Government.

This paper provides background and suggested areas of questioning based on the evidence heard to date, both from formal evidence sessions, but also from the informal engagement session with smaller charities held on [1 March 2023](#). The Cabinet Secretary has also [written to the Committee](#) to clarify a number of points arising from the evidence sessions and these are highlighted in this paper. A summary of the main themes to emerge from the formal and informal evidence sessions to date is also provided.

Introduction

The Bill aims to strengthen and update the current legislative framework for charities by:

- increasing transparency and accountability in charities
- making improvements to OSCR's powers

- bringing Scottish charity legislation up to date with certain key aspects of charity regulation in England, Wales and Northern Ireland.

The Scottish Government considers the Bill proposals to be "generally regulatory in nature as opposed to anything more fundamental about charities". Acknowledging that there have been calls for a more fundamental review of the charitable sector, the Scottish Government intends to consult further with the sector following the passage of this Bill.

If passed, the Bill would:

- require OSCR to publish names of trustees on the public Scottish Charity Register
- require OSCR to maintain an internal database of trustee contact details
- update the range of offences and situations that result in disqualification of charity trustees
- extend the criteria for disqualification to apply to senior management positions as well as trustees
- require OSCR to create a searchable record of charity trustees who have been barred by the courts from acting as trustees
- allow OSCR to appoint interim trustees in specific circumstances
- require OSCR to publish annual accounts for all charities on the Register
- allow OSCR to remove charities from the Register if they fail to submit accounts and fails to respond to subsequent communication from OSCR
- require OSCR to keep a record of charity mergers to assist with the transfer of legacies
- allow OSCR to undertake inquiries into former charities and their trustees
- enable OSCR to issue positive directions to charities following inquiry work
- require charities to demonstrate a connection to Scotland if they are to be registered by OSCR.

Further detail as to the Bill's provisions can be found in the [SPICe briefing](#) and in the Bill documents.

Emerging themes

The main themes emerging from both the informal engagement session and formal evidence sessions to date are highlighted below.

- There is broad support for the measures set out in the Bill, although also an appetite for a wider review of the charity sector that is expected to follow the passage of this Bill.
- Charities and representative bodies have noted a lack of detail on how the measures (such as gathering trustee information) will be implemented and have noted that this makes it hard for them to assess the potential impact. For example, if digital platforms are used, this may help to minimise any additional administrative burden. A number stressed the need for effective communication and engagement from OSCR around the new powers.

- The additional workload for OSCR has been noted, with concerns as to whether OSCR will be resourced sufficiently to undertake these additional tasks and (where relevant) develop new digital tools.
- In relation to disqualification of trustees, a number of witnesses raised concerns around the impact that disqualification criteria could have on the recruitment of trustees, which is already challenging. Several witnesses noted that some of the disqualification criteria (for example, bankruptcy) might rule out individuals with valuable lived experience or deter people from rebuilding their lives through involvement in charities. Sarah Latta of **Volunteer Scotland** noted that this might be an area where Scotland could diverge from the criteria applying in England and Wales. [Note, the inclusion of bankruptcy as a criterion for disqualification is not a change from existing law, but this Bill would provide an opportunity to change existing criteria and potentially take a different approach from England and Wales. Also, note that individuals are only barred from acting as trustees while bankruptcy procedures are underway (which usually takes 1-3 years). Once these processes are completed, individuals are able to act as trustees again.]
- In relation to proposals, dispensation mechanisms allowing charities or trustees to apply for information to be withheld from the public Register, witnesses noted that it was not clear how straightforward these processes would be, and that they could act as a deterrent to trustee engagement if they were too onerous.
- The power for OSCR to appoint interim trustees was also identified as an area within the Bill lacking detail. Witnesses were keen to hear how this would work in practice, and how OSCR proposes to find these interim trustees given widespread difficulty within the sector of finding qualified prospective trustees in the first place.
- Several witnesses have noted that proposals to make it easier for statutory charities to make changes to their constitution have not been included in the Bill, despite being part of the initial consultation. Also, some witnesses argued that the Bill presents an opportunity to make it easier for charities wishing to become Scottish Charitable Incorporated Organisations (SCIOs).

This themes paper is structured around 9 themes:

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Theme 1: Consultation and plans for wider review

The Bill largely reflects proposals put forward by OSCR in a [2018 paper to Scottish Ministers](#). On 7 January 2019, the Scottish Government [launched a consultation based on OSCR's proposals](#), seeking views on potential improvements to the statutory charity regulation framework in Scotland. A further consultation was launched in 2020 with a further [consultation exercise](#) and targeted engagement sessions with stakeholders.

Acknowledging that there have been calls for a more fundamental review of the charitable sector, the Scottish Government intends to consult further with the sector following the passage of this Bill. Respondents to the call for views, as well as those taking part in informal and formal evidence sessions have been supportive of the plans for a wider review, but many have noted the need to engage effectively with smaller charities to ensure a broad range of views are taken into account. Several witnesses (including **SCVO**) stressed the need for any review to be independent.

Giving [evidence on 2 March](#), Jason Henderson of **SCVO** noted that the Bill is focused on the concerns of the regulator and does not reflect the views of the wider sector – emphasising the need for wider review:

“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 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, as the process has probably not provided the opportunity to discuss and debate what more could have been done.”

At the evidence session on 9 March, witnesses (including Dr John Picton of the **Charity Law and Policy Unit** at the University of Liverpool and Gavin McEwan of the **Charity Law Association (CLA)**) noted some disappointment that one area of the initial consultation had not been taken forward in the Bill. The [2019 consultation](#) had considered whether OSCR's powers should be extended so that it could approve the reorganisation of charities established under a royal charter, warrant, or enactment. The 2019 consultation paper said:

“If charities want to reorganise they need to apply to OSCR for approval; however it is not clear in the legislation whether it is competent for OSCR to

approve reorganisation schemes proposed by certain charities established under a royal charter, warrant, or enactment.

While this issue only affects a very small number of cases, there has been substantial expense to the charities involved and consequent use of parliamentary time, putting through private bills that could have been avoided if the legislation was less ambiguous.

One option would be to clarify the legislation to make clear whether OSCR can approve a reorganisation scheme for charities that have been established by royal charter, warrant or enactment.”

There was widespread support for changes to the legislation to allow OSCR to approve reorganisation of such charities, with more than three-quarters of respondents supportive of the proposal. However, the Bill did not include any provisions in this area. The [Policy Memorandum](#) notes that:

“...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.”

Alan Eccles of the **Law Society of Scotland** also noted that the Bill could have done more to make it easier for unincorporated charities to change their legal form to a Scottish Charitable Incorporated Organisation (SCIO).

Bòrd na Gàidhlig suggested that there should be scope for including a charity’s Gaelic name as well as its English name on the Register of Charities.

Members may wish to ask:

- 1. Does the Minister accept the need for a wider review of the charity sector, and acknowledge that this Bill reflects the views of OSCR, rather than the wider charity sector?**
- 2. When would the Minister anticipate the proposed wider review of the charity sector taking place and over what timescale?**
- 3. What areas is this review expected to cover and how will the scope of the review be determined?**
- 4. How would the Minister intend to ensure that smaller charities are effectively engaged in the wider review?**

5. **Is the Scottish Government committed to further consideration of legislative changes to support the reorganisation of statutory charities?**
6. **Could this Bill introduce measures to help simplify the process for a charity wishing to change its status to a Scottish Charitable Incorporated Organisation (SCIO)?**
7. **Is there scope for including a charity's Gaelic name on the charity Register, as well as its English name? What changes would be required to enable this?**

Theme 2: General principles of the Bill

Reform of charity law has been on the Scottish Government's agenda for some time. The Scottish Government considered that reform was needed, given that the legal framework had not been updated since the 2005 Act, and given that corresponding legislation in England and Wales had been updated since 2005.

The Scottish Government considers the Bill proposals to be "generally regulatory in nature as opposed to anything more fundamental about charities". The proposals are aimed at improving transparency and accountability in the charity sector and extending OSCR's powers to strengthen their regulatory role.

Witnesses have been generally supportive of the general principles of the Bill and do not consider that it will impose too much additional burden on charities. There is also broad agreement that the new powers for OSCR will bring greater transparency and accountability within the charity sector. Respondents to the call for views also felt that this would lead to the public being better protected than at present, leading to greater trust from the public as to the sector itself.

In the informal engagement session and in the evidence session on 2 March, a number of witnesses noted that, while they were generally supportive of the Bill, there was limited detail on how the proposals would be implemented, making it difficult to assess the likely impact on individual organisations. For example, respondents and witnesses were unclear on how additional information on trustees would be collected, or how dispensation mechanisms for withholding information from the public Register would operate.

Members may wish to ask:

8. **Does the Minister consider that there are weaknesses at present in relation to transparency and accountability in the charity sector? Will this Bill do enough to address any perceived weaknesses in relation to transparency and accountability, or is further action required?**
9. **Does the Minister acknowledge the concerns within the charity sector around a lack of detail on how the Bill proposals will be implemented?**

When will further detail be available on the implementation plans and how will this be communicated?

10. Does OSCR undertake its regulatory role effectively and are the proposed extensions to OSCR's powers appropriate and proportionate?

Theme 3: Information about charity trustees

The Bill proposes that names of trustees are included on the public Scottish Charity Register. Charities and trustees will be able to request that names are withheld if there are safety or security concerns and OSCR will decide if such requests are accepted. If the charity or trustee disagrees with OSCR's decision, they will have the right to appeal the decision.

The Bill would also require OSCR to gather and keep up-to-date contact information on trustees for its own internal use. Charities will be required to inform OSCR when trustees change and provide updated details.

More detail on these provisions is available in the [SPICe briefing](#).

A number of respondents to the call for views stated making trustee names available on the public Register would increase transparency and protect the public against "rogue trustees" who previously would be able to avoid scrutiny. However, some witnesses have noted the challenges in recruiting charity trustees and were concerned that these new proposals might make recruitment more challenging. Some concerns were also noted around the impact the proposals might have on the diversity of charity trustees. Giving [evidence to the Committee on 2 March](#), Sarah Latto of **Volunteer Scotland** said:

"...we do not have a lot of information about the makeup of charity trustees in Scotland but, from the Charity Commission in England and Wales, we know that 75 per cent of charity trustees have an income that is above the median, 51 per cent are retired and 92 per cent are white—so, almost certainly, there is a real challenge when it comes to trustee diversity."

Witnesses welcomed that trustees will be able to apply to OSCR to have their names withheld from the public Register but noted that this might not be enough to encourage individuals to apply to be trustees. Giving [evidence t on 2 March](#), Sarah Latto of **Volunteer Scotland** said:

"...we welcome the dispensation scheme, which goes some way to reassuring those potential charity trustees with lived experience who might experience some concerns about becoming a trustee if doing so meant that their personal details would be made public. However, we still feel that the process is quite onerous and not particularly transparent. There is not an awful lot of detail yet about the dispensation but, certainly, the criteria for the existing scheme for

waiving disqualification are not particularly transparent. From that perspective, we have concerns.”

Jason Henderson, of **SCVO** added:

“We are potentially talking about some very small charities, with a handful of volunteers. They need to know that the dispensation mechanism is not going to be intrusive or complex, for example. They need to know that the processes are going to reach the correct decision, so anybody from any background or from a marginalised community needs to know that, when they put themselves forward to become a trustee or anything else for a charity, they are not going to face some sort of uphill battle or be discriminated against.”

Members may wish to ask:

- 11. Can the Minister provide any further detail on how OSCR might gather information on trustees and ensure this is kept up-to-date? Will digital solutions be used and – if so – are any plans in place for development of digital tools?**
- 12. Does the Minister acknowledge that the proposals to publish names of trustees might create further challenges in relation to the recruitment of trustees?**
- 13. Can the Minister provide any detail on how the dispensation mechanism might operate?**
- 14. What plans are in place to ensure the dispensation mechanism does not act as a deterrent to individuals wanting to act as trustees, but who might have valid reasons for wanting their name withheld from the public Register?**
- 15. What are the implications for charities in relation to their administrative functions of the proposals for OSCR to gather and maintain up-to-date information on trustees, especially those charities that do not have paid staff, or smaller charities? How can any additional burden be minimised?**

Theme 4: Publication of charity accounts

At present, all charities are required to submit annual accounts to OSCR. The type of accounts that need to be prepared will depend on the annual income of the charity and their constitution, but all charities must prepare and submit some form of independently examined accounts. However, at present, OSCR only publishes accounts on the Register for charities with annual income of £25,000 or more (and any personal information is redacted). [Note that if accounts are also published with Companies House, OSCR will link to these unredacted accounts]. Under the Bill’s

proposals, unredacted annual accounts would be published for all charities, regardless of size.

As with the publication of trustee names, there will be scope for charities to request that certain information is withheld from the published accounts where there might be security or safety concerns. Such requests will be considered by OSCR and charities will be able to request a review of these decisions if they are in disagreement.

If charities fail to submit annual accounts to OSCR and then subsequently fail to respond to subsequent communication from OSCR, the changes introduced by the Bill would mean that OSCR can remove them from the Scottish Charities Register.

More information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

There was broad consensus among those who made written submissions and gave oral evidence that this would meet the Bill's aim of increasing transparency. However, some noted that it was important that the mechanisms for allowing charities to request that information is withheld from published accounts were effective. Giving [evidence to the Committee on 2 March](#), Jason Henderson of **SCVO** said:

“...we have no great concerns overall about the part of the bill that relates to publishing accounts. We support that and we think that it will increase transparency and accountability. However, again, it is about getting it right and ensuring that the processes are there and that dispensation is awarded where it is needed.”

Some witnesses and some of those submitting written responses have suggested that requirements should vary according to the size of the charity. In the evidence session on 2 March, witnesses from **Aberdeen City Council** and **Bòrd na Gàidhlig** suggested that reporting requirements could be lighter for smaller charities. However, at the evidence session on 9 March, Alan Eccles of the **Law Society** disagreed and felt that all charities should be required to provide the same level of information.

A [written submission from the Society of Antiquaries of Scotland](#) also highlighted the challenges for charities in identifying auditors willing to undertake work for charities at an affordable fee and noted that the threshold above which a full audit (as opposed to an independent examination) is required could be increased from the current threshold of annual income of £500,000. The equivalent threshold in England and Wales is annual income of £1 million and charities with an income of less than £25,000 are not required to prepare full accounts. [Note that there are also conditions attached to the level of gross assets that a charity has.]

In relation to the proposal to allow OSCR to remove from the Register a charity that fails to submit accounts and then also fails to engage with OSCR in relation to requests for accounts, most respondents and witnesses were in favour. However, some noted concerns as to the extent to which smaller charities might be supported if a failure to submit accounts reflected a lack of resources or knowledge, rather than

a deliberate act. Giving [evidence on 2 March](#), Vicki Cahill of **Alzheimer Scotland** noted that removal of charities for failure to submit accounts should be a last resort and that charities should be offered support:

“We feel that removing someone from the register because they have failed to submit and publish accounts in accordance with the legislation is quite a draconian step. That should be the last possible step of a built-in process. It is important to ensure that OSCR provides reasonable support and guidance to enable charities to meet the criteria and obligations set out for them.

There has to be a recognition that there might be good reasons why there might be a failure to comply with a particular direction, especially around the submission and publication of accounts. Those reasons might include lack of capacity in the organisation or administrative issues around how that is done. There could also be issues such as conflict among existing trustees about when and how things should be done. It is therefore important that OSCR has a role in issuing guidance around that and providing support.”

In relation to charities (such as individual churches) that are overseen by a parent body, David Gibson of the **Methodist Church in Scotland**, requested that the parent charity be informed if there were any issues with organisations within the umbrella organisation:

“I would make a plea with regard to, for example, parent charities. For example, all our church councils are individual charities, and the Methodist Church is the parent charity. Therefore, if a particular church was not doing what it should be doing, if notice could be given to the parent charity at the same time as the notice was given to the individual charity, the centre would understand that there was an issue, which it might not have been aware of, and could seek to address it.”

Members may wish to ask:

- 16. What are the Minister’s views on the suggestion of different reporting thresholds for charities depending on their level of income and would there be merit in raising the threshold above which charities must prepare full audited accounts?**
- 17. Can the Minister provide any detail on how the process of engagement between OSCR and charities that have failed to submit accounts will work?**
- 18. Can the Minister provide assurance that where charities have not submitted accounts due to a lack of resources, skills or knowledge, appropriate support will be provided by OSCR to seek to avoid them being removed from the Register where there is a willingness to comply?**
- 19. What are the Minister’s 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 are issues with an individual church?

Theme 5: Disqualification from being a charity trustee or holding a senior management position

The Bill updates the criteria for disqualification of trustees to bring them in line with the criteria in place in England and Wales. It would also extend these criteria so that they also apply to those holding senior management positions in charities.

Under the Bill proposals, OSCR would also be required to maintain a record of those individuals who have been disqualified by the Court of Session from acting as a charity trustee. This record would not cover all disqualified trustees, only those who have been barred from acting as a trustee by the Court of Session, usually due to cases of serious misconduct in relation to a charity. In her letter to the Committee of 10 March, the Cabinet Secretary noted that OSCR had confirmed that there are only 50 such individuals who have been disqualified in this way.

This record of disqualified individuals would be searchable by name. It is not clear from the Bill and associated documents how the search function would operate and how, for example, any risk of misidentification might be handled. For example, there could be a risk that an individual is wrongly identified as having been disqualified because they have the same name as another individual who has been disqualified.

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

In the evidence sessions to date, witnesses have stated that they consider some of the criteria for disqualification to be too punitive – particularly around bankruptcy. They state this may lead to issues in recruiting, for example, trustees with lived experience or from more deprived backgrounds. [Note that individuals disqualified on the grounds of bankruptcy would not be included on the searchable record of disqualified individuals, as this record would only cover individuals barred by the Court of Session.]

Giving [evidence on 2 March](#), Sarah Latto of **Volunteer Scotland** said:

“We feel that the criteria for automatic disqualification might be a bit too punitive, particularly around bankruptcy. In some ways, it is almost like it is criminalising poverty, particularly given where we are at the moment because of the cost of living crisis. I have some figures on that, from the Joseph Rowntree Foundation. At the moment, in Scotland, we have 160,000 households with debt that is five times their monthly income, so, recognising how widespread debt is and the fact that going down the route of bankruptcy

is sometimes the only option for a lot of people who experience poverty—it is worth recognising that lower-income households are far more likely to be in debt—it feels unfair that that would be an automatic barrier to people becoming a trustee, particularly given the number of charities in Scotland that are supporting people who are experiencing poverty. There is a direct challenge if we want to have trustees who have lived experience when poverty is one of the key focuses.”

It should be noted that bankruptcy is already a reason for disqualification under the current framework, and is not a new measure being introduced by the Bill. Also, as noted above and as emphasised in the letter of 10 March from the Cabinet Secretary, individuals are only barred from acting as trustees while they are “undischarged”. This means the individuals are only disqualified for the duration of any bankruptcy proceedings and once these are complete (normally 1-3 years), they can again act as trustees. Also, there are currently provisions for individuals to apply to OSCR for a waiver from disqualification and these would continue to apply. Similarly, for other convictions, individuals can act as trustees again once the convictions are spent. A spent conviction is a criminal conviction that, under the [Rehabilitation of Offenders Act 1974](#), can be treated as 'spent' after a certain length of time.

Witnesses at the [evidence session on 2 March](#) suggested that the disqualification criteria might be an area where Scotland could choose to take a different approach from the rest of the UK. Sarah Latto of **Volunteer Scotland** said:

“I feel that there is no need for us to be in line with the rest of the UK. We could go further and have a much more inclusive approach to disqualification.”

At the evidence session on 9 March, witnesses from **OSCR** and the **Law Society** stated that they both consider consistency with England and Wales to be important and **OSCR** stated that they would not support a different approach towards disqualification of trustees. Martin Tyson from **OSCR** also stressed that an individual disqualified from acting as a trustee could still volunteer or work for a charity. Martin Tyson from **OSCR** also acknowledged that awareness around the existing criteria could be improved.

Dr John Picton of the **Charity Law and Policy Unit** at the University of Liverpool suggested that the OSCR could be more generous in allowing dispensation in order to create a “softer” regime in Scotland that would allow a wider range of individuals who would otherwise be disqualified to act as charity trustees. He acknowledged that this required the regulator to accept a level of risk where dispensation is granted. Nick Holroyd of the **Faculty of Advocates** suggested that different conditions could be applied rather than full disqualification e.g. not allowing individuals undergoing bankruptcy proceedings to act as Treasurer

In relation to the searchable record of those trustees disqualified by the Court of Session, Martin Tyson from **OSCR** noted that this would provide sufficient information e.g. on Court action to avoid any cases of mistaken identity. He also said that OSCR would be able to assist with verification if necessary.

Members may wish to ask:

- 20. What are the Minister's views on the comments expressed by a number of organisations around disqualification of trustees on the grounds of bankruptcy? Would the Minister agree that the disqualification of individuals undergoing bankruptcy proceedings excludes many individuals who might bring valuable lived experience as a trustee?**
- 21. Would the Minister consider it appropriate to take a different approach in Scotland in respect of the disqualification of individuals undergoing bankruptcy proceedings to allow a wider range of individuals (including those with lived experience of poverty) to participate as charity trustees?**
- 22. Do the disqualification criteria make it harder to ensure diversity among charity trustees and what can be done to mitigate this? Is there scope for a different regime in Scotland that would allow a wider range of individuals to act as trustees, perhaps with certain conditions attached to the roles they can perform?**
- 23. In relation to the searchable record of disqualified trustees, does the Minister have any concerns that this could result in cases of mistaken identity? What measures are proposed to avoid this?**

Theme 6: OSCR inquiries

The ability to undertake inquiries is an important aspect of OSCR's regulatory and assurance role. Any individual can report a concern about a charity to OSCR. In 2021-22, a total of 563 concerns were raised with OSCR. Following assessment of the issues, OSCR determined that an inquiry was appropriate for 60 of these cases. The 2005 Act that created OSCR requires it to act in a manner which is "proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed".

Inquiries into former charities

The changes proposed by this Bill would allow OSCR to investigate former charities and their trustees. Under the current legislation, this is not possible, and inquiries can only be undertaken where the charity still exists. This raises the risk that trustees of charities that no longer exist could go on to act as trustees of other charities.

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

Issuing positive directions following inquiries

At present, OSCR only has powers to issue *negative* directions following inquiries into charities. For example, OSCR can direct charities to stop doing certain activities. However, it cannot issue *positive* directions to charities requiring them to take certain actions, for example to remedy non-compliance. As in all areas of its activities, OSCR will be required to act in a proportionate manner when issuing directions. Directions can only be issued following an inquiry by OSCR. As with certain other direction-giving powers, this provision will not apply to Designated Religious Charities (DRC). This is because DRCs argued for exemption under the existing law due to having internal structures in place and appropriate supervisory measures to ensure appropriate self-regulation and disciplinary procedures

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

The **Methodist Church in Scotland** is not a DRC, so would not be exempt from the provisions in respect of OSCR issuing positive directions following an inquiry. In the evidence session on 2 March, David Gibson of the Methodist Church in Scotland suggested that parent bodies (such as the Methodist Church central body) be informed if directions were to be issued to a body within its remit (such as an individual church). However, at the evidence session on 9 March, OSCR noted that, where a parent body is not a DRC there is no formal route for such engagement other than where issues relate to information that is in the public domain, such as annual accounts. OSCR noted that there could be sensitivities in taking such an approach, for example if the individual charity has issues in relation to the parent body. OSCR noted that there are many examples of parent bodies that it has regulatory responsibility for, such as church organisations and the Girlguiding and Scouting associations.

At the evidence session on 9 March, Gavin McEwan of the **Charity Law Association (CLA)** noted that some members of the CLA are opposed to the exemptions available to DRCs and would like to see this aspect of the law reviewed.

Also on 9 March, John Maton of the **Charities Commission for England and Wales (CCEW)** noted that the CCEW already has powers to issue positive directions to charities and that this power is used relatively frequently e.g. to issue action plans to charities.

Members may wish to ask:

- 24. How frequently would the Minister envisage that OSCR would use new powers to issue positive directions following inquiry work?**
- 25. Can the Minister provide examples of where inquiry work is currently hampered by the lack of positive direction-giving powers?**
- 26. Is it appropriate for Designated Religious Charities to be exempt from OSCR's direction-giving powers and does the Minister acknowledge that some within the sector would like this exemption to be reviewed?**

Theme 7: Data protection

Many of the proposals within the Bill have implications around GDPR and privacy and respondents to the Call for Views highlighted a number of concerns around data protection issues.

The Scottish Government published a [Data Protection Impact Assessment](#) (DPIA) alongside the Bill. The purpose of this is to assess the potential GDPR and privacy impact, as well as evaluate how the protection of personal data has been considered and addressed in the proposals.

The DPIA highlights that OSCR has a statutory power to process data, so processing of data is appropriate. However, no mention is made of the proportionality of the proposals and very little discussion on the different types of processing. The majority of the DPIA focuses on publishing accounts, rather than the databases of trustees or the database of individuals disqualified.

There is also a requirement for public sector organisations to consult with the Information Commissioner's Office (ICO) on any legislative measure which require processing of personal data. This process is set out in [Article 36\(4\)](#).

The ICO [responded to the Scottish Government's 2019 consultation](#) and raised a number of concerns around the proposals. The DPIA also refers to the Scottish Government having a meeting with the ICO on 12 February 2020, but there is no information on the outcome of this meeting. It is therefore unclear as to how the legislative proposals reflect the ICO's concerns. The consultation with ICO appears to have preceded the publication of the DPIA, so it is unclear whether the ICO has provided feedback on the DPIA

Members may wish to ask:

- 27. Can the Minister explain how the concerns raised by the Information Commissioner's Office (ICO) in respect of data protection issues have been addressed in the Bill?**
- 28. Can the Minister provide assurance that the ICO has been offered the opportunity to comment on the Data Protection Impact Assessment and can she provide any further information on the response of the ICO to the Data Protection Impact Assessment?**
- 29. Is the Minister confident that all data protection issues have been addressed in the Bill and that appropriate measures will be in place to handle personal data and keep this up-to-date?**
- 30. In the event of any data breach, who would be liable – OSCR or the Scottish Government?**

Theme 8: Other miscellaneous issues

There are a number of further areas covered by the Bill and its accompanying documents, which include:

- Power for OSCR to appoint interim charity trustees
- Requirement for OSCR to maintain a record of charity mergers
- Connection with Scotland

Appointment of interim charity trustees

Under the existing legislation, OSCR can appoint an interim charity trustee where this is requested by the charity. If passed, the Bill would allow OSCR to appoint interim trustees in situations where this is not requested by the charity itself. This would include situations, for example, where there are no trustees, or where they cannot be located, or are unwilling to act. In her letter to the Committee of 10 March, the Cabinet Secretary emphasised that this is intended as a short-term, emergency measure to prevent a charity stagnating and allow it (where appropriate) to continue to operate until permanent trustees can be appointed.

This would allow OSCR to avoid costly court action to appoint a judicial factor and provide an easier route to protect charity assets. In contrast to other areas of the Bill, there are no dispute mechanisms around the proposed new power for OSCR to appoint interim trustees (for example, if the charity has any concerns or issues with an individual appointed as an interim trustee by OSCR).

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

Giving evidence on 9 March, Gavin McEwan, of the **Charity Law Association** questioned how OSCR might go about identifying appropriate trustees, given the general challenges identified by witnesses in recruiting charity trustees. Nick Holroyd of the **Faculty of Advocates** also raised the issue of whether the interim trustees would be paid and – if so – who would be responsible for the costs.

Charity mergers

The Bill would require OSCR to keep a record of charity mergers, which would make it easier to ensure that legacies are preserved where these are made to a charity which subsequently merges with another charity and changes name.

The Bill provisions in this area will make it easier for legacies to be preserved where the charity concerned has been part of a merger. However, in contrast to the position in England and Wales, the Scottish Government did not make the provision broader so as to apply to gifts as well as legacies. The Policy Note for the Bill explains that this is because, in the case of gifts, the individual will still be alive to remedy any issues arising as a result of a merger, whereas this is not the case where a legacy is concerned. At the evidence session on 9 March, Gavin McEwan,

of the **Charity Law Association** noted that this left Scotland at a disadvantage relative to the position in England and Wales.

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

Connection with Scotland

The Bill would introduce a requirement that charities registered on the Scottish Charities Register can demonstrate a connection with Scotland. The Bill sets out various conditions that can be taken into account by OSCR when assessing whether such a connection exists, such as having an office or land in Scotland, having trustees or staff based in Scotland, or undertaking activities in Scotland.

OSCR will have the right to refuse entry on the Register to those unable to demonstrate a link, or require existing charities to take action to establish a link. Where an existing charity is directed to take measures to establish a link and fails to do so, OSCR will remove its charitable status. Charities will be able to appeal such decisions.

The proposals are not intended to exclude any charities operating in Scotland but benefiting those outside Scotland e.g. international aid charities. The presence of an office in Scotland and staff/trustees/volunteers resident in Scotland will represent a connection with Scotland.

Further information on this aspect of the Bill can be found in the [relevant section of the SPICe briefing](#).

Members may wish to ask:

- 31. Can the Minister provide any indication of the frequency with which OSCR would be expected to require to appoint interim trustees and how might such trustees be identified? Would they be remunerated and, if so, who will cover the costs of any remuneration?**
- 32. The Bill does not include any dispute mechanism in relation to the appointment of interim trustees. What options are available to charities if they are not content with an interim trustee appointed by OSCR?**
- 33. The provisions in the Bill relating to charity mergers are restricted to legacies, while the equivalent provisions in England and Wales relate to both legacies and gifts. Can the Minister explain why this narrower approach was taken in Scotland and would there be any issues in extending the Bill provisions to relate to both legacies and gifts?**
- 34. Does the Minister consider the requirement for charities to demonstrate a connection to Scotland to be an appropriate measure and are the definitions included in the Bill sufficiently clear?**

Theme 9: Financial implications of the Bill

The Financial Memorandum (FM) for the Bill outlines estimated costs of between £0.6 million and £1 million across the first three years following implementation. Costs are expected to fall fully on the Scottish Administration (which includes OSCR), with no anticipated costs for local authorities.

The [Financial Memorandum](#) (FM) for the Bill noted that:

“[The FM] figures are not spending commitments and should not be used as a tool for future budgeting, as costs may be affected by other factors in addition to the changes made by the Bill. Funding for OSCR will be negotiated in the usual way, taking into account the projected costs of its functions at the time.”

A number of witnesses expressed concern over the ability of OSCR to absorb these additional duties within its existing budget. In particular, a number of witnesses noted that significant effort would be required from OSCR in communicating the changes and engaging with the sector around the new requirements. Although allowance has been made for related costs in the FM, some witnesses noted that it was unclear whether sufficient budget had been allowed in respect of this. **SCVO** noted that “there is a possibility that the need for communication, engagement, guidance, and clarification from OSCR to charities as a result of this Bill may have been underestimated to some extent”.

In its [response to the Finance and Public Administration Committee’s call for views on the Bill’s FM](#), OSCR said:

“OSCR is working with the Scottish Government to ensure that there is enough funding available for procurement, implementation, and ongoing costs in OSCR to implement the measures in the Bill, in addition to OSCR’s existing core costs.”

Giving evidence on 9 March, John Maton of the **Charity Commission for England and Wales (CCEW)** noted that when similar provisions were introduced in England and Wales the need for early and clear guidance and communications presented challenges for CCEW and this element of the Bill’s implementation should not be under-estimated.

The Scottish Government does not estimate that the Bill would require significant additional activity on the part of individual charities, so has not included any costs for these bodies in the Bill documents. However, as noted in the [SPICe briefing](#), even very minor additional costs could have an impact on smaller charities. Also, with over 25,000 charities in Scotland, even minor additional costs for each of these charities would imply a significant additional cost across the sector. Most witnesses agreed that additional costs and administrative burdens should be minimal but some noted that it was hard to be certain until the details of the arrangements for gathering information were clearer.

Further information on the Financial Memorandum can be found in the relevant section of the [SPICe briefing](#).

Members may wish to ask:

- 35. Does the Minister anticipate that OSCR will be able to absorb these additional responsibilities within its existing budget, or will additional resources be required?**
- 36. Witnesses have highlighted that effective communication and engagement will be essential for effective implementation of the Bill provisions. Is the Minister confident that sufficient allowance has been made for this in the Bill costings?**
- 37. To what extent do the cost estimates allow for development of new digital tools to help with collection of the data and minimise any administrative burden on charities?**
- 38. Does the Minister accept that, although costs for individual charities may be minor, these could add up to a significant sum across the sector as a whole?**

**Nicola Hudson, Senior Analyst, SPICe Research
March 2023**

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The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot