

Charities (Regulation and Administration) (Scotland) Bill

Business and Regulatory Impact Assessments (BRIA)

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Purpose and intended effect

Background

Charity law in Scotland was last debated when the Charities and Trustee Investment (Scotland) Act 2005¹ was established. The charity sector is a vital partner to Government whose value is as essential now to Covid Recovery as it was to supporting our communities through the pandemic. The Charities (Regulation and Administration) (Scotland) Bill (the Bill) is based on practical proposals put forward by the Scottish Charity Regulator (OSCR) to update the current system of charity regulation by improving transparency and accountability in charities and enhancing OSCR's enforcement powers. The proposals have been consulted on and the vast majority of respondents supported them, including those organisations who also called for wider reforms. Stakeholders are keen to see changes brought forward given it has been 17 years since the 2005 Act was passed.

Objective

The original 10 proposals identified by OSCR broadly focus on increasing transparency and accountability to maintain public trust and confidence in charities and improving OSCR's powers to deal with misconduct, bridging some of the gaps between Scots charity law and charity law in the rest of the UK. Consultations in 2019² and 2021³ showed strong support for all the proposals and stakeholders are keen to see changes brought forward. As a result of the consultations two more proposals were added to the drafting instructions – the creation of a record of charity mergers and provision for the transfer of legacies and a list of minor or technical amendments to the 2005 Act.

During the drafting process of the Bill the decision was made to remove one of the original 10 proposals relating to the reorganisation of charities established under royal charter, warrant or enactment. This proposal will be considered for future review.

¹ Charities and Trustee Investment (Scotland) Act 2005: [Charities and Trustee Investment \(Scotland\) Act 2005 \(legislation.gov.uk\)](https://legislation.gov.uk)

² Scottish charity law: consultation analysis - [Scottish charity law: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot)

³ Strengthening Scottish charity law: analysis of engagement responses [Strengthening Scottish charity law: analysis of engagement responses - gov.scot \(www.gov.scot\)](https://www.gov.scot)

Rationale for Government intervention

In September 2021, the Scottish Government announced its commitment to improve charity law in Scotland as part of its Programme for Government (PfG) 2021-22:

- 'We will bring forward legislation to improve Charity Law, strengthening the legal and regulatory framework and enhancing public trust in this vital sector.'

Charities and their operations cover the full range of national outcomes and ensuring the regulatory framework underpinning charities is fair and proportionate can strengthen the sector's contribution to those outcomes. The legislation will contribute specifically to the delivery of the following Scottish Government's National Outcomes:

- We tackle poverty by sharing opportunities, wealth, and power more equally
- We are creative and our vibrant and diverse cultures are expressed and enjoyed widely

Consultation

- Within Government
We have consulted across government agencies and directorates within the Scottish Government. We are in regular contact with OSCR to continuously consult on the developing policies.
- Public Consultation
7 January - 1 April 2019⁴: Considering OSCR's proposals and the passage of time since the 2005 Act, the Scottish Government consulted on updating the legislation to promote transparency and accountability to maintain public trust and confidence in the sector and OSCR. The consultation was framed around OSCR's 10 proposals. Over 300 responses were received, and the majority of respondents supported the proposals in the consultation, however the analysis report made clear that more policy development work and stakeholder engagement was required before we could bring forward any legislative changes.
- February 2021⁵: A further consultation ran until February 2021, asking specific questions on how proposals put forward by OSCR about improvements to charity regulation in Scotland could be implemented. Over 100 responses were received in addition to feedback from a series of online events run in conjunction with

⁴ [Consultation on Scottish Charity Law - Scottish Government - Citizen Space](#)

⁵ [Strengthening Scottish Charity Law Survey - Scottish Government - Citizen Space \(consult.gov.scot\)](#)

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OSCR, the Scottish Council of Voluntary Organisations (SCVO) and the Association of Chief Officers of Scottish Voluntary Organisations (ACOSVO).

Results relevant to each of the proposals will be explored below.

Business

Although this legislation will impact specifically on the charity sector, around 75% of social enterprises are also charities therefore many charities and respondents to the consultation process have business-like operations. There is an inherent relationship between the private sector business world and a strong, trustworthy third sector that is well regulated. Policy officials have engaged with representative organisations across the charity sector during the public consultation and beyond as required.

Stakeholder engagement

Targeted stakeholder events with partners took place in December 2020 and January 2021 where we engaged with mix of charity professionals, trustees, charity staff, volunteers, and practitioners:

- The Law Society of Scotland, Charity Law sub-committee, made up of practising legal professionals and academics.
- OSCR charities reference group, representatives from approximately 35 charities reflecting the range and breadth of the sector.
- SCVO and ACOSVO jointly hosted two events with 33 attendees.
- Local charities took part in events held by 12 Third Sector Interfaces (TSIs).

Options

The Bill presents a package of proposals aimed at increasing transparency and accountability in charities, improving to OSCR's powers and bringing Scottish charity legislation up to date with key aspects of charity regulation in England and Wales and Northern Ireland. Although some proposals are more closely linked than others, they are all essentially independent therefore the choice in each case was simply whether to include the proposal in the Bill or not. With this in mind each proposal has been examined as a separate option in this assessment with a single "do nothing" alternative for the full Bill.

Option 1: Do Nothing

This option would mean that the current legislation would remain as it is and no additional or strengthening of powers would be provided to OSCR. This would mean that the risks identified below and throughout this assessment would persist and the benefits would not be realised.

Stakeholder expectations of primary legislation have been raised by the four previous PfG commitments and widespread support in the 2019 consultation responses (307 responses). The 2019 consultation publicly highlighted some deficiencies with current charity regulation and OSCR's powers, especially when compared to other charity regulators in the UK.

The 2005 Act is now 17 years old and many feel that the charity sector has moved on significantly in this time but that the legislation in Scotland (as opposed to other parts of the UK) has remained largely static. In addition, the safeguarding agenda has brought issues around transparency and misconduct in charities into sharp relief and measures aimed at strengthening legislation to ensure OSCR are equipped to help prevent, identify and deal with risk and to act preventatively have merit.

Changes have already been made to charity legislation across the rest of the UK. Further changes to charity law in other parts of the UK are possible, which would widen the gap between regimes further in areas where consistency would be beneficial. This disparity opens Scotland to risk of our charity sector being abused or the regulator being seen as a 'soft touch.'

For these reasons we can conclude that this option is not suitable.

Sectors and groups affected-

OSCR

Charities

Beneficiaries of charities

Funders

Benefits

This option would maintain the status quo. The Scottish charity regulation system does have important strengths, however with the advancement of changes to charity law across the rest of the UK, changes are required to maintain the efficacy of Scotland's Charity Regulator. The Scottish Government has committed to bringing forward these changes to charity law in the legislative programme of the 22-23 Programme for Government. Accordingly, no benefits have been identified relating to this option.

Costs/savings

As there would be no changes made to the current legislation there are no additional costs associated with maintaining the status quo.

Option 2: Each proposal that forms the whole Bill has been analysed individually below.

- A requirement on OSCR to publish the statements of account for all charities in the Scottish Charity Register

All charities in Scotland are under a legal duty to prepare statements of account, which they then submit to OSCR. There is currently no legal requirement for statements of account to be published on the Scottish Charity Register ("the Register"), although charities are required to supply a copy to anyone who requests it. Publishing statements of account for every charity on the Register would enhance transparency and accountability in the sector, and clearly identify those charities who are not complying with that duty.

Sectors and groups affected-

OSCR

Charities

Benefits

This benefits the charity sector by increasing public trust and confidence in the sector by making more information about charities publicly available. OSCR has been publishing copies of statements of account for charities with an income over £25,000 and all Scottish Charitable Incorporated Organisations (SCIOs) since April 2016. OSCR's bi-annual public surveys consistently show that open access to accounts improves public trust in charities.

Publishing statements of account for all charities will benefit the wider public by making it quicker and easier for funders/donors to see how charities' funds are being spent. This enables banks, donors, and funders to do due diligence.

Making statements of account accessible to the public online would reduce the number of inquiries OSCR make as a result of charities not complying with section 23⁶ requests (while the number of inquiries is not high it is steady).

Making it possible for OSCR to publish all statements of account more easily would bring OSCR in line with the Charity Commission in England and Wales (CCEW), Charity Commission of Northern Ireland (CCNI) and other regulators.

In the 2019 consultation, 82% of respondents agreed that OSCR should be able to publish statements of account in full for all charities and felt it was a sensible proposal. The majority of respondents felt it would lead to increased scrutiny, transparency, accountability, and openness of charities to the public and other interested parties. The majority also noted that much of this information was currently in the public domain by either being available from charities directly or from other regulators such as Companies House.

- Requirements on OSCR to include charity trustee names in the Scottish Charity Register, to keep an internal schedule of charity trustees' details and to keep a publicly searchable record of removed charity trustees

OSCR currently holds limited information on the 180,000+ charity trustees involved in over 25,000 charities registered in Scotland. The law only requires the Scottish Charity Register to set out the principal office of the charity or the name and address of one of its trustees. The option proposed is for OSCR to publish the names of charity trustees on the Register and to establish a separate internal database of trustees containing their information and contact details as well as to establish a publicly searchable record of individuals that have been removed from being concerned in the management or control of any body by the Court of Session (and are therefore permanently disqualified from acting as a charity trustee, unless OSCR grants them a waiver). This would increase transparency and accountability and provide valuable and relevant information to better support effective regulation of charities and their trustees, through improved compliance, investigation, and engagement work.

Sectors and groups affected-

OSCR

Charities

Charity Trustees

Individuals permanently disqualified from acting as a charity trustee

⁶ [Charities and Trustee Investment \(Scotland\) Act 2005 \(legislation.gov.uk\)](#) – Section 23

Benefits

Actively obtaining trustee details from all charities for the internal database will give OSCR valuable and relevant information to better support effective regulation of charities and their trustees, through improved compliance, investigation, and engagement work.

It would enable OSCR to act more quickly/decisively where vulnerable beneficiaries or charitable assets may be at risk and make it easier to establish if a person is a trustee of more than one charity, making it easier to act more swiftly to protect assets/vulnerable beneficiaries of other connected charities where there is concern over conduct.

It could also help to prevent charities becoming unresponsive as it would be easier for OSCR to contact them.

Inclusion of names of charity trustees on the Register would make it easier to identify who is in control and management of charities. Principal contact details provided in the Register are not necessarily a trustee, they may be a solicitor or accountant. This will provide clarity for the public, who can often have a perception that someone is in control/involved in a charity, but they may not be a trustee. It also makes the distinction between trustees and staff – which can also be confused in the public's mind. Any complaints would come from a more informed perspective.

Importantly, inclusion of names of charity trustees on the Register will increase transparency of governance, bringing Scot's law in line with CCEW, CCNI and Jersey. There is potential for it to encourage more charities to have gender balanced boards if their governance is in public domain.

With regard to the record of removed trustees, this will assist charities in making their due diligence checks on prospective trustees. Charities currently have no way of accessing information on persons removed as charity trustees by the Court of Session. This means that while charities can obtain information in relation to other grounds for disqualification from being a charity trustee from sources such as the register of disqualified company directors, the Register of Removed Trustees provided by the Charity Commission for England and Wales or the Accountant in Bankruptcy's Register of Insolvencies, they are unable to check whether a prospective trustee is disqualified by virtue of having been removed as a trustee by the Court of Session. It is a criminal offence to act as a charity trustee while disqualified.

The 2019 consultation responses showed that 79% of respondents agreed that OSCR should be able to collect trustee information for use in an internal database, only 13% disagreed. 71% agreed that the names of trustees should be published on

the external register, 21% disagreed. 79% agreed that the names of removed trustees should be published on the external register, 11% disagreed. 58% agreed that trustees should be allowed to apply for dispensation from their name being included on the Register and 31% disagreed. Wider benefits that were identified included increased transparency and openness of the charity sector and that the proposals would support effective regulation, reduce fraudulent behaviour, and support due diligence.

The follow-up consultation in 2021 produced a similar level of support for this proposal: strong support was expressed for a reduced external register of charity trustees for public use within the online survey (circa 75%). Around two-thirds felt there should be exceptions to being included in a public list.

- Updating the criteria for the automatic disqualification of charity trustees and extending it to individuals with senior management positions in charities

Changes to charity legislation for England and Wales have extended the list of automatic disqualification criteria for charity trustees and extended the provisions to certain senior employees of charities. To ensure criteria in Scotland are fit for purpose, the option proposed is to extend the criteria to ensure parity as far as possible with the equivalent legislation in England and Wales. Individuals could still apply to OSCR for a waiver from automatic disqualification as the law currently allows.

Sectors and groups affected

OSCR

Charities

Charity Trustees

Certain Senior management positions within charities

Benefits

Changes introduced by Charities (Protection and Social Investment) Act 2016 in England and Wales have extended the existing automatic disqualification criteria, as well as making all disqualification criteria applicable to individuals holding senior management functions within the charity. The four additional grounds for disqualification are as follows;

- Unspent convictions for perjury, perverting the course of justice, misconduct in public office, contempt of court and specified bribery, terrorism, and money laundering offences.
- Individuals subject to terrorist asset freezing orders.
- Disobedience of specified Charity Commission orders
- Individuals subject to notification requirements of Part 2 Sexual Offences Act 2003 (on the Sex Offenders register).

Updating the disqualifications to match 2016 Act would add disqualification for unspent convictions for offences related to terrorism, money laundering, bribery, and misconduct in public office; as well as individuals who are subject to notification requirements under sexual offences legislation. This would provide consistency with other regulators and lead to efficiencies in co-operation. (OSCR receive information from CCEW and CCNI when they disqualify a trustee).

While the risk of terrorism and money laundering are generally thought to be lower in Scotland, it would seem sensible to future proof the legislation to protect against these type crimes, which may become more prevalent in the coming years. This change could also prevent criminals targeting Scottish charities as the legislation is weaker.

The 2019 consultation responses showed a great deal of support for this proposal: 84% of respondents agreed that the disqualification and removal of charity trustees should be extended to match the criteria in England and Wales. 79% agreed that the criteria for disqualification should also be extended to certain senior management functions.

By extending the criteria that trigger automatic disqualification in Scotland to match the rest of the UK we will ensure that there are consistent criteria for the disqualification and removal of trustees across the UK, and prevent Scotland being left vulnerable or seen as a 'soft touch.'

- Providing OSCR with a new power to issue positive directions to charities
OSCR has legal powers to issue specific types of direction to charities and charity trustees. Most of OSCR's powers are interdictory or preventative, requiring charity trustees or others not to take particular actions. OSCR cannot direct charity trustees to take a specified positive action to remedy non-compliance or protect charitable assets. A power of positive direction would enhance OSCR's inquiry and enforcement powers in terms of protecting charitable assets and supporting good governance.

Sectors and groups affected

OSCR

Charities

Benefits

OSCR will have a general power to issue positive directions to enhance its inquiry and enforcement powers in terms of protecting charitable assets and supporting good governance. A general power avoids the need for future iterative legislative changes as new circumstances emerge which require OSCR's intervention and

reflects the fact that the different situations in which a positive direction may be needed is not exhaustive.

A general power to issue positive directions will enable OSCR to better protect charitable assets and support good governance.

Examples of cases where the power might be of regulatory benefit, include directing a charity to:

- Comply with its constitution
- Take steps to protect vulnerable beneficiaries
- Take steps to improve public accountability
- Improve governance
- Comply with a statutory requirement
- Recover the loss of charitable assets.

This power could improve public confidence that OSCR are taking positive steps to remedy misconduct and protect assets.

This power would bring OSCR in line with other charity regulators across the UK. CCEW and CCNI have comparable general powers of positive direction.

83% of respondents to the 2019 consultation agreed that OSCR should be given a positive power of direction, with only 6% disagreeing (11% did not answer). Respondents were split on whether the power should be wide ranging (54%) or specific (44%). 60% agreed that failing to comply with a positive direction should be classed as trustee misconduct.

- Removal from the Scottish Charity Register of unresponsive charities that fail to submit statements of account

All charities in Scotland are under a legal duty to prepare annual reports and accounts and submit these to OSCR. Failure to do so can be regarded as misconduct in the administration of a charity. There are charities on the Scottish Charity Register for which OSCR does not have up to date reports and accounts - some of which have never submitted accounts. It is thought that some charities no longer exist but have failed to notify OSCR to be removed from the Register. Whilst there are existing mechanisms for OSCR to remove charities, failure to provide accounts and misconduct are not direct routes to removal.

Sectors and groups affected

OSCR

Charities

Benefits

Having little or no information about a charity's finances and activities undermines public trust and confidence in the sector, as it is difficult to know how public money, granted by both public donations and government funding, and assets are being accounted for or whether a charity is providing any public benefit. This also undermines trust in OSCR if it is deemed to have insufficient powers to deal with defaulting charities.

OSCR have invested significant resources into understanding and pursuing defaulting charities with minimal return. Defaulting charities have a negative impact on public trust and confidence in the sector, and on OSCR as a regulator, and should be removed from the register.

By granting explicit power to remove defaulting charities from the register it would potentially save OSCR time and money pursuing defaulting charities and would demonstrate to the public and charities that OSCR is acting against non-compliance, which may in turn make more charities comply. The power to remove defaulting charities would provide reassurance that all charities on the register are operating and providing public benefit and that assets are both protected and being used appropriately.

Consultation results showed that 87% of respondents agreed that OSCR should be able to remove non-submitting charities from the Register (only 3% disagreed – 10% did not answer). 83% agreed OSCR should have a positive power of direction to direct a charity to prepare annual reports and accounts, and 74% agreed non-compliance with such a direction should be classed as trustee misconduct. The submission of accounts is seen as vitally important to improve the overall transparency and accountability of the charity sector, and to safeguard and build public/donor/stakeholder trust and confidence in charities and charity regulation.

This power will protect the charity brand, ensure the accuracy of the register and that basic transparency and accountability requirements for charities are met. Having this power will improve the accuracy of the Register by making sure that the charities on the Register are actively working to achieve their charitable purposes, which in turn has a positive impact on public trust and confidence in the sector and in OSCR.

- A requirement for all charities in the Scottish Charity Register to have and retain a connection to Scotland

To be a registered charity in Scotland a body must have wholly charitable purposes and provide public benefit, but there is no requirement for the body to have any connection to Scotland (except for SCIOs). This means that OSCR might be compelled to register a charity that meets the charity test but has no activities in Scotland and no apparent connection with Scotland. The proposed option would be to require all charities in the Scottish Charity Register to have, and retain, a

connection to Scotland. This would not preclude the registration of cross-border charities, which could continue to register with both the Charity Commission for England and Wales and OSCR.

Sectors and groups affected

OSCR

Charities

Benefits

If a charity has no or negligible connection to Scotland, it can make it more difficult for OSCR to effectively regulate them. This is because it can be difficult for OSCR to ascertain what activities the charity is carrying out and how they are providing public benefit. There is also a higher risk of OSCR losing touch with such charities.

As with the proposals above, this would broadly replicate the position in England and Wales, and Northern Ireland.

Overall, 82% of respondents supported this proposal, with the main feedback being that this was a reasonable proposition, and it was appropriate that OSCR's remit should only extend to charities with a genuine interest in Scotland, and whose activities were carried out at least partly in Scotland.

- A power for OSCR to conduct inquiries into former charities and their charity trustees etc.

The Court of Session, on application from OSCR, has the power to permanently disqualify the following individuals from being charity trustees:

- former charity trustees of a body which is no longer a charity
- former trustees of a charity which has ceased to exist, and
- individuals who were in management or control of a body which is no longer controlled by a charity.

However, OSCR does not have a corresponding power to make inquiries into a body which is no longer a charity, a body which is no longer controlled by a charity or a charity which has ceased to exist. This means that if OSCR is not aware of potential misconduct before a charity ceases to exist or ceases to be a charity, or before a body ceases to be controlled by a charity, OSCR cannot open an inquiry if information subsequently comes to light. If OSCR cannot open an inquiry, it cannot gather the necessary evidence to allow it to make an application to the Court of Session. This poses a risk that charity trustees who are guilty of serious misconduct could go on to be trustees of other charities, in cases where the misconduct was only discovered after the body in question ceased to exist or ceased to be a charity.

Sectors and groups affected

OSCR

Charities

Former Charity Trustees

Benefits

By extending the range of bodies that may be subject to inquiries, OSCR will be able to make inquiries into individuals who acted for or on behalf of those bodies (including former charity trustees), to allow OSCR to gather the necessary information about such individuals to support an application to the Court of Session for their permanent disqualification. This protects existing charities by ensuring that individuals who are guilty of serious misconduct do not go on to be trustees of other charities.

This power would mean that charity trustees who were guilty of misconduct could be permanently disqualified from being trustees in cases where the misconduct was only discovered after the charity ceased to exist or ceased to be a charity. As a result, charities and beneficiaries will be better protected.

This power would lead to increased public confidence and trust in charities and in OSCR as the regulator.

OSCR would use this power in accordance with its inquiry policy, which is publicly available on its website. The inquiry policy sets out how OSCR responds to concerns about charities and makes clear that they act in the public interest (and not on behalf of individuals). It also makes clear that OSCR operates in accordance with their values, which include acting independently, fairly, and proportionately, and targeting action where it is needed.

OSCR will only investigate former charity trustees or individuals concerned in the management or control of a charity or body where there was suspicion of wrongdoing, and it is in the public interest to do so.

In the consultation 83% of respondents supported this proposal as it was considered prudent, conducive to effective regulation and would strengthen the legislation.

- A requirement for de-registered charities' assets to continue to be used to provide public benefit

If a charity is removed from the Scottish Charity Register but continues to operate as a non-charitable body, it is under a duty to use the assets it held before it de-registered for the charitable purposes then set out in its Register entry.

While any such "pre-removal" assets must be used for charitable purposes, there is no requirement for them to be used to provide public benefit. This means that assets

that have been built up during the life of the charity could potentially be used for private gain once the charity is removed from the Register.

Sectors and groups affected

OSCR

Charities

Former charities

Benefits

This change would require bodies that have de-registered (and continue to operate, just not as a charity) to be required to use the assets held at the time of removal for charitable purposes and to provide public benefit, to protect charitable assets.

The effect will be that the current charity test will continue to apply to the pre-removal assets despite the body no longer being a registered charity, thus continuing to provide benefit to communities and the Scottish public.

Public benefit will continue to be derived from charitable assets despite the charity de-registering. This will provide assurance that assets that have been built up during the life of the charity are still benefitting the public and are not being used for private gain. That is appropriate as those assets are likely to have been financed by public money/donations.

This will mean that the public continue to benefit during the period OSCR continue to monitor the assets.

69% of consultation respondents supported this proposal. There was strong support for the protection of charitable assets and respondents felt it was important that assets should be locked for the purpose they were donated for.

- Clarification of existing provision, to improve the speed and efficiency regarding OSCR's powers to gather information for inquiries

There are 2 aspects to this proposal:

A) inquiries into former charities and those misrepresenting themselves as charities
OSCR can require any person to provide information which it considers necessary for its inquiries. If OSCR requests such information about a charity from a third party, it must also give notice to the charity in question that it is the subject of the request and provide the charity with the right to review. However, the 2005 Act does not take account of situations where the body in respect of which information is sought is not a charity (e.g., a body that is misrepresenting itself as a charity or a charity that has ceased to exist). The effect of this is that OSCR cannot require a third party to provide information as it cannot serve the required notice on a 'charity.' This

potentially hinders OSCR's inquiries as it cannot access all the information it may require.

B) timescales for requesting information

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

Sectors and groups affected

OSCR

Charities

Benefits

A) This proposal allows OSCR to give the required notice to a body or individual that is misrepresenting themselves as a charity, bodies which are no longer charities and former trustees of charities which have ceased to exist. This would align OSCR's notice requirement powers with its inquiry powers, enabling them to gather any necessary information to support those inquiries.

87% of respondents supported the proposal to extend OSCR's power of inquiry. Most respondents felt it was vital that OSCR had effective powers of investigation and felt this was a reasonable extension of those powers. Others noted that this would help to prevent unscrupulous individuals evading investigation, preventing fraudulent activity, and it was important for lessons to be learned to prevent the abuse of Scottish charity law.

B) The amendments proposed will make it clear how the various notice periods and time limits in the legislation are intended to interact when OSCR is carrying out an inquiry and requests information, thereby making the process more efficient.

82% of respondents supported clarification for charities which are subject to requests for information that notice periods can overlap. The main points raised were inefficient use of OSCR resource and delays to action being taken against a body or individual.

The result of this action will contribute to the protection of the charity brand and build trust in the regulator by ensuring that, where regulatory action is necessary, OSCR can act efficiently.

- The creation of a record of charity mergers and provision for the transfer of legacies

Charities can receive significant income from legacies in Wills. In Scotland there is a risk that a legacy will be lost to the charity sector where a charity changes its legal form or merges with another charity.

These provisions would enable a transferee charity in Scotland to register a merger on the Record of Mergers held by OSCR. Once registered a legacy to a transferee would be deemed to be a legacy to the transferor. In addition, there would be a link from a charity's entry on the Scottish Charity Register to the Record of Mergers, ensuring clarity for the public.

Sectors and groups affected

OSCR

Charities

Individuals

Benefits

This proposal would establish a record of merged charities in Scotland with a statutory mechanism to deal with legacies in favour of charities which have merged. This is consistent with legislation in England and Wales⁷.

There is a risk in circumstances where a charity changes its legal form or merges with another charity that legacies may be lost because the charity named in the Will (the transferor charity) has ceased to exist. Where a legacy fails, it may pass to other beneficiaries named in the Will failing which the laws of intestacy will determine who these funds will pass to. In most cases this will be the deceased's relatives however, in limited circumstances, the Crown via the King's and Lord Treasurer's Remembrancer (the KLTR) may benefit.

The risk of losing valuable legacy income has meant that some charities which have changed legal form or merged have kept the original transferor charity as a 'shell charity' to collect legacies and pass these to the successor charity. Retaining the shell charity creates an additional financial and administrative burden for the charity and OSCR and can be confusing to the public and donors.

This proposal was not included in the original 10 proposals that were consulted on in 2019 and 2021 but came about because of those consultation responses and discussion with the Law Society of Scotland and OSCR on their development.

- Providing OSCR with a power to appoint interim trustees, together with a list of minor amendments to the Charities and Trustee Investment (Scotland) 2005 Act

⁷ [Charities Act 2011 \(legislation.gov.uk\)](https://legislation.gov.uk) – Part 16, Charity Mergers

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Sectors and groups affected

OSCR

Charities

Individuals

Benefits

This is a list of technical changes to the Charities and Trustee Investment (Scotland) Act 2005. These changes, put forward by OSCR and the Law Society during consultation, will serve to clarify specific elements of the existing legislation and ensure that there is less ambiguity in the law.

This proposal was not included in the original 10 proposals that were consulted on in 2019 and 2021 but came about as a result of those consultation responses through discussion with the Law Society of Scotland and OSCR.

Costs/savings

OSCR is a Non-Ministerial Office and a separate part of the Scottish Administration, the costs to the Scottish Administration have been identified by OSCR in relation to its operations. All costs are resource costs.

Costs to Scottish Administration for all proposals

(£)-Year 1- 438,229 – 655,770

(£)-Year 2- 66,825 – 182,785

(£)-Year 3- 63,607 – 177,886

(£)-Total- 568,661 – 1,016,441

The Financial Memorandum for the Bill sets out the breakdown of costs and savings for each proposal. The Scottish Government approached a small representative sample of charities to ascertain estimated costs and savings of the Bill provisions which will directly impact all charities. Feedback from the charities is reflected in the detailed examination of the proposals below. Overall, the charities who fed back did not anticipate incurring anything other than minor costs and were supportive of the proposals set out.

Scottish Firms Impact Test

Although this legislation will impact specifically on the charity sector, around 75% of social enterprises are also charities therefore many charities and respondents to the consultation process have business-like operations. There is an inherent relationship

between the private sector business world and a strong, trustworthy third sector that is well regulated.

Of the 307 respondents to the 2019 consultation 180 of those were classified as 'organisations', of those 164 were charity sector organisations⁸. A diverse range of charity sector organisations responded to the consultation. This ranged from local to national charities, and from membership bodies to cross-border charities and social enterprises. Consultation responses are analysed in the table above.

Regular meetings between Scottish Government policy officials and OSCR have taken place throughout the development of the proposals and continue throughout the Bill process.

Competition Assessment

The proposals are not expected to impact significantly on any businesses or firms more than others. There is no known impact that strengthening of regulation in the charity sector would have on the competition of the markets in Scotland. There will be no limiting of the number or range of suppliers directly or indirectly, there will be no impact on the ability of suppliers to compete and there will be no reduction in the incentives of suppliers to compete vigorously as a result of the proposals outlined in this Bill.

Consumer Assessment

Consumers impacted by these proposals are the beneficiaries of charities. The intended outcomes of these proposals should have a positive impact on the beneficiaries of charities as the aim is to improve charity regulation thereby increasing transparency and accountability in charities and bringing Scottish charity legislation up to date with key aspects of charity regulation in England and Wales and Northern Ireland. This should provide more protection for consumers and enhance the charity brand.

Test run of business forms

No new business forms will be introduced as a result of these regulations therefore there is no requirement for a test run.

Digital Impact Test

OSCR is already in the process of moving most of its functions online, including, once this Bill is passed, the collection and publication of accounts and trustee

⁸ [Appendix A: Consultation Respondents - Scottish charity law: consultation analysis - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/consultations/charities-law/appendix-a/consultation-respondents-scottish-charity-law-consultation-analysis-gov.scot/)

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information. The result of this on various communities and those with protected characteristics have been explored in more depth in the EQIA⁹ and the ICIA¹⁰ for the Bill.

Legal Aid Impact Test

No impact on legal aid has been identified as a result of the proposals in this Bill.

Enforcement, sanctions, and monitoring

Monitoring and enforcement of the new provisions will be subsumed into OSCR's existing processes. Where charities are required to comply with the new provisions failure to do so will be treated as trustee misconduct and subject to the powers currently available to OSCR. No new offences or 'sanctions' will be created by the Bill.

Implementation and delivery plan

The provisions in relation to strengthening regulation of the charity sector are being instructed as part of the Charities (Regulation and Administration) (Scotland) Bill, to be introduced in Parliament in November 2022.

Post-implementation review

The Scottish Government is committed to carrying out a wider review after the passage of this legislation.

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

- Summary and recommendation

We explored 2 options in this assessment:

1. Do Nothing – this option was deemed unsuitable
2. Progress the proposals developed for the Charities (Regulation and Administration) (Scotland) Bill

⁹ [Charities Amendment Bill -Equality Impact Assessment record](#)

¹⁰ [Islands Communities Impact Assessment \(ICIA\)](#)

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Option 2 is the preferred option. We recommend that the proposals are brought forward to achieve the goals laid out in this document. There are 3 main policy drivers for the Bill:

- 1- transparency: making information more accessible to the public
- 2- Increased powers for OSCR to support charities who are struggling and direct charities in positive courses of action.
- 3- Bridging gaps between Scottish Charity law and Charity Law in the rest of the UK.

There have been four revisions of charity law in England and Wales since the introduction of the 2005 Act in Scotland. While the intention is not to replicate all the changes that have taken place across the rest of the UK, it is clear that changes require to be made to protect Scotland's charity sector, and to ensure that OSCR is not seen as a 'soft touch.'

Stakeholders are keen to see changes brought forward given it has been 17 years since the 2005 Act was passed.

Stakeholder expectations of primary legislation have been raised by four PfG commitments and many already see the legislative changes as taking too long, viewing the changes as straightforward and technical.

Summary costs and benefits

- Option 1 – Do Nothing

Total benefit per annum: economic, environmental, social:

-No benefit – many risks have been identified with this option

Total cost per annum: economic, environmental, social policy and administrative:

- No cost.

- Option 2 – Progress the Bill

Total benefit per annum: economic, environmental, social:

-Increasing transparency and accountability in charities will lead to an increase in public trust in the charity sector.

-A number of the proposals will introduce improvements to OSCR's enforcement powers, introducing efficiencies for compliance, investigation, and engagement work.

-Bringing Scottish charity legislation up to date with key aspects of charity regulation in England and Wales and Northern Ireland. This protects the

Scottish Charity sector from those looking to exploit the disparity between the legislation in UK and Scotland.

-Publishing statements of account for all charities will make it quicker and easier for funders/donors to see how public money is being spent. It will enable banks and funders to do due diligence. It will also free up resources within OSCR, allowing it to target its limited resources more effectively.

-Including names of charity trustees on the Register and creating an internal database of charity trustees will make it easier to identify who is in control and management of charities. It will enable OSCR to act more quickly and decisively where vulnerable beneficiaries or charitable assets may be at risk.

Additionally, this information will make it easier to establish if a person is a trustee of more than one charity, making it easier for OSCR to act more swiftly to protect assets or vulnerable beneficiaries of other connected charities where there is concern over conduct.

The record of removed trustees will assist charities in carrying out their due diligence checks on prospective trustees.

-This Bill aims to make it easier for OSCR to remove from the register charities that are persistently failing to submit accounts and may no longer exist. By providing OSCR an explicit power to remove a charity that has ceased to exist or no longer operates they will make a significant saving on resources that have previously gone into understanding and pursuing defaulting charities with minimal return.

Defaulting charities have a negative impact on public trust and confidence in the sector, and OSCR as a regulator, and that such charities should be removed from the register. If charities are not communicating with OSCR they have no way of knowing how public money/assets are being accounted for, or if the charity is providing public benefit.

-It will also make it easier for OSCR to ascertain what activities a charity is carrying out and how they are providing public benefit. It also reduces risk of OSCR losing touch with such charities.

-Extending the range of bodies that may be subject to inquiries, enables OSCR to make inquiries into individuals who acted for or on behalf of those bodies (including former charity trustees). This will allow OSCR to gather the necessary information about such individuals to support an application to the Court of Session for their permanent disqualification. This reduces risk that trustees who are guilty of serious misconduct could go on to be trustees of

other charities if the misconduct were only discovered after the charity in question ceased to exist or ceased to be a charity.

-A requirement for bodies that have de-registered (and continue to operate) to use the assets held at the time of removal for charitable purposes and to provide public benefit, in order to protect charitable assets.

-The Bill will also provide clarification of existing provisions in relation to notices and notice periods/ time limits when OSCR is carrying out inquiries, to improve speed and efficiency regarding OSCR's powers to gather information for inquiries.

-At a time when the charity sector is expecting to see a huge influx in the public requiring their services due to the socioeconomic situation brought about by the ongoing covid recovery, public sector spending reform and the cost-of-living crisis only growing in urgency. Building trust in the sector will only benefit Scotland in the long run.

-The Bill is not anticipated to require significant additional activity by charities, other bodies, individuals or businesses and any new costs are considered to be negligible.

Total cost per annum: economic, environmental, social policy and administrative:

-Best estimates of the costs to the Scottish Administration as a result of the activities affected by the provisions of the Bill over the course of the first three years from commencement have been calculated by OSCR. This includes both initial implementation costs as well as any ongoing annual costs. All costs below are resource costs:

Year 1: £438,229 – £655,770

Year 2: £66,825 – £182,785

Year 3: £63,607 – £177,886

Total: £568,661 – £1,016,441

Declaration and publication

- **Sign-off for Final BRIAs:**

I have read the Business and Regulatory Impact Assessment and I am satisfied that (a) it represents a fair and reasonable view of the expected costs, benefits, and

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impact of the policy, and (b) that the benefits justify the costs. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed:

Date: 02/10/2022

Minister's name: Shona Robison

Minister's title: Cabinet Secretary for Social Justice Housing and Local Government

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