



Lucy Scharbert
Clerk to the Delegated Powers and Law
Reform Committee

31 January 2023

Dear Lucy,

I am writing to you in relation to the Charities (Regulation and Administration) (Scotland) Bill ('the Bill') and the Delegated Powers and Law Reform Committee's request for further explanation on certain sections of the Bill, sent to Alison Irvine, Head of Cabinet, Parliament and Governance Division, on 26 January.

The Scottish Government's responses to the Committee's questions are set out below.

Section 4(3)

1. The Committee queries whether it is appropriate to delegate this power and seeks further justification as to why it is being taken (to include examples of similar powers being taken in other primary legislation, if possible).

Section 4 of the Bill makes adjustments to the rules on trustee disqualification where the basis for disqualification is a person's conviction for a criminal offence. At present, section 69(2)(a) of the Charities and Trustee Investment (Scotland) Act 2005 ('the 2005 Act') disqualifies a person from being a charity trustee where that person is convicted of an offence under the 2005 Act or an offence involving dishonesty. The Bill expands this ground for disqualification by adding further offences, conviction for which will mean that the person is disqualified from acting as a charity trustee (and, by virtue of section 6 of the Bill, disqualified from holding office or employment with senior management functions in a charity).

In adding section 69A to the 2005 Act, the Bill takes a more prescriptive approach to the criminal offences resulting in disqualification by listing those offences in the 2005 Act itself (as opposed to relying only on the descriptive label of "an offence involving dishonesty"). As

the Committee's question acknowledges, this specification of further offences broadens the scope of the disqualification criteria in section 69(2)(a) of the 2005 Act.

The main purpose of the disqualification rules is to ensure that those who hold office as charity trustees are fit and proper persons, and to ensure that public trust and confidence in charity trustees is preserved. Persons with certain criminal convictions are automatically disqualified from holding office as a trustee (subject to any waiver granted to them by OSCR). During the period since 2005, the creation of criminal offences in other areas has given rise to a need for this disqualification criteria to be updated. A further driver is the parallel regime of disqualification that operates in England and Wales. As the Policy Memorandum explains, the current disqualification criteria in the 2005 Act match those that were in force in England and Wales when the 2005 Act became law but, given developments in charity law in England and Wales since 2005 (including their more prescriptive approach of specifying offences), the Scottish criteria have fallen behind. The policy intention is for the Scottish system to match – as closely as possible – the regime in operation in England and Wales, rather than be considered weak or vulnerable by comparison.

The power in new section 69A(4) of the 2005 Act would allow the Scottish Ministers to make adjustments to the new list of specified offences by adding or removing an offence. Such a power could be used, for example, to take account of any criminal offences created in future which may be identified as appropriate for inclusion in the list (or to add an offence which is not new but where confusion arises as to whether it is caught by the catch-all rule about offences involving dishonesty). Similarly, the power may be exercised to remove criminal offences which are currently listed but which may in future cease to be considered appropriate for inclusion in the list or which may cease to exist.

It is considered appropriate for the Scottish Ministers to have some flexibility to maintain the list of specified offences without resorting to further primary legislation. The power will build some responsiveness into the system to allow the Government (with Parliamentary approval) to react to changing circumstances in other areas and to ensure an appropriate and proportionate use of Parliamentary time.

In recognition of the consequences of changes to the rules on disqualification for affected individuals, as well as the fact that the power permits amendments to be made to the 2005 Act itself, the power has been made subject to the affirmative procedure. Any regulations will accordingly be subject to Parliamentary debate and approval before they can be made. While the power could be framed so as not to allow for the amendment of primary legislation but rather the specification of further offences in separate regulations, this would fragment the rules on disqualification by splitting them across primary and secondary legislation. The current approach helps to ensure accessibility of the law by keeping all of the specified offences in one place. This is considered important given the centrality of the disqualification criteria to the provisions on trustees in Chapter 9 of Part 1 of the 2005 Act as well as in recognition of the fact that acting as a charity trustee while disqualified amounts to a criminal offence. The logic of this approach also applies to the other powers commented on below,

where it was considered important that the list should remain in one place rather than being split across a variety of pieces of legislation, and where it was considered that the appropriate place for that list to appear was the 2005 Act itself since it is the primary reference point for Scottish charity law.

The Committee has asked for examples of similar powers being taken in other primary legislation, and **Annex A** to this letter sets out some examples. The closest comparator to the power in section 4(3), however, is the power conferred on UK Ministers by section 178A(4) of the Charities Act 2011. This permits UK Ministers to amend the specified offences which are listed for the purposes of section 178 of the 2011 Act (persons disqualified from being charity trustees). That power was added by section 9(7) of the Charities (Protection and Social Investment) Act 2016 and, as with the power under section 4(3) of the Bill, it enables an offence to be added to a list for a similar purpose (i.e. conviction for that offence results in a person being disqualified as a charity trustee). Whilst it does not appear that this power has been exercised yet, the existence of the power and the potential for it to be used in future gives rise to scope for further divergence between the disqualification criteria in the 2011 Act and those in the 2005 Act. The ability to make regulations under section 4(3) of the Bill would allow that divergence to be addressed.

Section 5(3)

2. The Committee queries whether it is appropriate to delegate this power and seeks further justification as to why it is being taken.

Section 5 of the Bill makes amendments to the wider disqualification criteria (rather than simply the offence-related criteria in section 69(2)(a)). In particular, it expands section 69(2)(b) of the 2005 Act by adding further bankruptcy-related measures (defined in section 70 as amended by the Bill); it adjusts the criteria for disqualification based on removal from a similar position in England and Wales or Northern Ireland (including the introduction of a new ground of removal by the Charity Commission for England and Wales under section 181A of the Charities Act 2011); and it disqualifies persons who are designated under specified sanctions regulations.

As noted in the Delegated Powers Memorandum, and above, the criteria for automatic disqualification of charity trustees in Scotland have not been updated since the 2005 Act was enacted. The disqualification criteria at that time mirrored the equivalent criteria in England and Wales which have since been substantially updated and expanded. As a result, the Scottish system has fallen behind the parallel regime in England and Wales. This is undesirable from a policy perspective as it allows for the possibility of a person disqualified in England and Wales nevertheless being able to hold office as a charity trustee in Scotland. The policy intention underpinning the changes the Bill makes to the disqualification provisions in the 2005 Act is to maintain as close an alignment with the system of trustee disqualification in England and Wales as is possible, and to ensure that the Scottish system is not left vulnerable as a result, or perceived as weaker or more lenient than the comparable rules that apply elsewhere.

From a policy perspective, it would have been preferable to have updated the disqualification grounds (both in terms of specifying criminal offences and the wider criteria) prior to now. The fact that the criteria have not been updated since 2005 is at least in part due to there being no available power to make updates in regulations (as opposed to by primary legislation), and had it been possible to amend the criteria by secondary legislation before now, it is likely that these changes would have been made earlier.

The Scottish Government considers it foreseeable that further developments in the law, either in Scotland or elsewhere in the UK, may prompt the need for additional adjustments to the disqualification criteria. Rather than leaving the position as it currently is, where updates require to be made by primary legislation, it is considered appropriate for Ministers to have a power to make those changes in future by way of regulations (subject to Parliamentary approval), in order to ensure there is flexibility within the system and in order to make appropriate use of valuable Parliamentary time.

While it is not possible to predict in advance how frequently the power might require to be used, it is considered that the frequency with which changes might need to be made should not be determinative of whether it is appropriate to take this power or the broadly comparable power in section 4(3). Rather, it is considered that what is crucial is (a) whether, in order to protect public trust in the charity sector, the change ought to be capable of being made promptly once the need for it is identified, (b) whether, in the absence of other related changes in this area of the law, it would be an appropriate use of Parliamentary time to deal with what might be a relatively small and technical change by primary legislation, and (c) whether it can appropriately be delegated.

Given the importance of the disqualification criteria, for individuals and for charities, as well as the fact that acting as a trustee while disqualified is a criminal offence, regulations made in exercise of this power will be subject to the affirmative procedure and will, as such, require to be debated and approved by the Parliament before they can be made. This therefore ensures that there will be a suitable level of scrutiny and that no change to the law occurs without a positive vote by the Parliament in favour of that change.

Section 16(3)

3. The Committee queries whether it is appropriate to delegate this power and seeks further justification as to why it is being taken.

As noted in the Delegated Powers Memorandum, this power is taken to provide flexibility for changes to be made in the future for items that are necessary to be added to or removed from section 5, recognising that the question of what constitutes (or what should constitute) a connection to Scotland may develop in light of both experience and changing circumstances. For example, since the pandemic, many charities have adapted to remote working, and now deliver their services online without premises which is not something that could have been predicted. It is anticipated that there may be other changes of circumstances which would

prompt a review of the list of factors that are or are not relevant to the question of whether an applicant has a connection to Scotland.

As the Committee notes, the Scottish Charity Register is central to the scheme of regulation set up by the 2005 Act. There are, however, other powers in the 2005 Act that permit regulations to specify certain matters in connection with the Register. Section 3(3)(f) of the 2005 Act allows regulations to set out matters additional to those specified in section 3(3) which the Scottish Ministers require to be included in the Register. Ministers also have the power under section 6(1) to specify the procedure for applying and determining applications for entry in the Register. In relation to the question of the charity test itself, there is a power in section 7(5) for Ministers to be able to disapply certain rules. It is therefore already the position under the 2005 Act that certain matters are specified in secondary legislation, and the power in new section 5(5) is intended to fit into that framework.

From a practical policy perspective, it is important to have flexibility to make changes to this section to future-proof its application. It will not be possible to identify any shortcomings in the current list until they are applied in practice by OSCR and OSCR can reflect on its experience of operating the provisions. As such, it is possible that this power will never require to be exercised because the list as currently set out in section 16 works as intended but, in case it turns out that some adjustments would improve the operation of OSCR's new function of determining whether an applicant has a connection to Scotland, we consider that it will be more efficient and a better use of parliamentary time for such changes to be made by regulations, subject to affirmative procedure, as opposed to by primary legislation.

As the Committee notes, this power enables amendment to primary legislation. The Government considers that it will be clearer to the reader if all of the factors to which OSCR must have regard for the purposes of section 5(2)(aa) are found in one place in the 2005 Act, rather than being spread across the 2005 Act and regulations. It is also important to note that the factors mentioned in new section 5(4)(a) to (e) are not determinative as they are only factors to be considered. In addition, by virtue of section 5(4)(f), OSCR must also have regard to any other relevant factor so other factors will already be capable of forming part of OSCR's consideration. However, from an accessibility of law perspective, it is considered preferable (through the use of regulations) for these factors to be capable of being specified on the face of the 2005 Act in cases where they are factors that are likely to be of widespread relevance. OSCR has confirmed it will produce guidance on this topic to assist an applicant in understanding what is needed for OSCR to consider it to have a Scottish connection and for the guidance to address the question of other relevant factors.

I hope these responses are helpful for the Committee in its scrutiny of Stage 1 of the Bill.

Yours Sincerely,

Jane O'Donnell
Deputy Director, Community Empowerment, Reform & Governance

Annex A – some examples of powers to amend lists of criminal offences in other legislation

Scotland

- Section 85(9) of the Antisocial Behaviour etc. (Scotland) Act 2004, as amended by section 1 of the Private Rented Housing (Scotland) Act 2011 allows Ministers to adjust the list of offences and other behaviour that can cause a person not to be classified as a fit and proper person for the purpose of being a registered landlord.
- Section 40A(4) of the Antisocial Behaviour etc. (Scotland) Act 2004 as amended by section 99 of the Criminal Justice and Licensing (Scotland) Act 2010 allows Ministers to adjust the list of offences that are classified as “exploitation offences”.
- Section 39(6) of the Sexual Offences (Scotland) Act 2009 allows Ministers to modify the list of offences against a child which are classified as involving sexual conduct.
- Section 288C(6) of the Criminal Procedure (Scotland) Act 1995 as amended by section 1 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 allows Ministers to adjust the list of offences where the defendant is prohibited from representing themselves in court and needs to conduct the defence through a legal representative.

England and Wales

- Section 191 of the Police, Crime, Sentencing and Courts Act 2022
- Section 20(9) of the Terrorism Act 2006
- Section 156(4) of the Serious Organised Crime and Police Act 2005