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STAGE 1 REPORT ON THE CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL

Dear Convener,

In my letter of 5 May 2023 regarding the Committees Stage 1 Report on the Charities (Regulation and Administration) (Scotland) I committed to write again on two recommendations the Committee made about interim trustees and lifetime gifts.

I have considered these recommendations and a response is attached as an Annex to this letter.

I hope the Committee finds this response helpful.

Yours sincerely,

SHIRLEY-ANNE SOMERVILLE

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Committee recommendation – interim trustees

102. We ask the Scottish Government to review whether this provision would benefit from a dispute mechanism to address potential issues regarding the appointment of interim trustees before any Stage 2 consideration.

1. Section 8 of the Bill provides OSCR with a new power to appoint interim trustees to a charity where there are no charity trustees, or where the existing charity trustees cannot be found or will not act.
2. Currently under the 2005 Act, OSCR has a power to appoint acting charity trustees **at the request of a charity** where the charity has insufficient trustees to form a quorum to appoint additional charity trustees and the governing document does not provide a mechanism for appointing charity trustees in such circumstances.
3. The Bill extends this power to allow OSCR to appoint interim charity trustees (for a maximum of 12 months, unless the appointment is extended) **where there is no one to make a request to OSCR**. Specifically, where:
 - a) the charity has no existing charity trustees,
 - b) all of the charity's existing charity trustees either cannot be found or are not acting and are not expected to resume acting, or
 - c) the number of the charity's existing charity trustees is such that the charity is unable to make a request direct to OSCR.
4. OSCR appointing interim trustees will allow those interim trustees to take the necessary steps to appoint enough charity trustees in terms of the charity's constitution and make decisions to get the charity back on track.
5. Members have been advised that the use of this power by OSCR will be limited. OSCR estimates less than five times a year and cases where there is anyone able to make a review request will be even more infrequent. OSCR expect to be in a position to assist charities before they get into such a position.
6. This power will be of particular use in cases where the charity has limited assets or assets which are important to the community but of limited value. Currently in these cases a judicial factor may be appointed by the Court of Session, on application by OSCR. However, this can be a costly process and is usually only used in cases of charities with significant assets.

Possible options

7. The Scottish Government has identified three possible options regarding a dispute mechanism:

- A. Extend the existing review and appeal provisions under the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act) to apply to section 8 of the Bill where there is an existing charity trustee.
- B. Create a new bespoke dispute mechanism specifically for the new power.
- C. Leave the Bill unamended with no right of review or appeal.

8. Option A would ensure that in those cases where there was an existing trustee within the charity, they had access to a dispute mechanism via the established review and appeal procedure open to charity trustees in the 2005 Act.

9. Option B would require significant policy development to determine who would be eligible to raise a dispute, what a dispute would cover, for example would it be OSCR's decision to appoint, the choice/suitability of individual appointed, the actions or decisions of the interim trustee, or the entirety of the process? If an independent arbiter was needed to oversee the dispute mechanism who should that be? Would it be appropriate for the First-tier tribunal?

10. Following discussions between officials, Committee clerks and SPICe, the Scottish Government understands that members envisage a dispute mechanism in the circumstances outlined in option A.

11. It may be helpful to note that once an individual is appointed as an interim trustee, they are bound by all the same legal duties and responsibilities as any other charity trustee, and subject to OSCR's inquiry making powers. Therefore, if the actions of an interim trustee were called into question OSCR would be able to make inquiries and take appropriate action as they would with any other charity trustee.

12. The Scottish Government can confirm we will table a stage 2 amendment to extend the existing review and appeal provisions under the Charities and Trustee Investment (Scotland) Act 2005 to apply to section 8 of the Bill where there is an existing charity trustee.

Committee recommendation – lifetime gifts

125. We ask the Scottish Government to examine the suggestion that lifetime gifts be addressed within the merger provisions for this Bill and provide us with an analysis of the benefits and disadvantages in advance of any Stage 2 consideration of the Bill.

13. Section 12 provides for the creation of a record of charity mergers and provision for the transfer of legacies. Many charities in Scotland receive legacies from individuals through donations left in Wills. This section will ensure income from legacies is not lost to the charitable sector when a charity or charities merge and mean charities are no longer in effect being prevented from restructuring because of the need to collect legacies.

14. There is a lack of clarity over what a lifetime gift might mean in practice. Various types of gifts could be caught such as; an inter vivos trust, monthly direct debits, standing orders, payroll giving, grants from grant makers, fundraising activities, ad hoc gifts. There are questions about whether a lifetime gift can only apply to individual donors, or to corporate donations and grant giving foundations.

15. Inherent in the principles of charitable giving are the wishes of the donor. Section 12 seeks to deal with the circumstances where the donors wishes can no longer be ascertained as they are deceased. In the case of lifetime gifts donor wishes can still be established, although it is appreciated that the capacity of some donors may be limited.

16. The addition of the record of mergers and treatment of legacies in the Bill was made following representations from the Law Society of Scotland and discussions with them and OSCR. The proposal was not subject to full public consultation in large part because it was felt to be uncontroversial and of benefit to charities, having little impact on the public. Widening the provisions to include gifts from living donors could have wider consequences which need to be fully explored.

17. The Scottish Government position is that more analysis and consultation would therefore be required before a decision on lifetime gifts could be made and we will therefore include this in the wider review of charity regulation planned for after the passage of the Bill.