

Charities (Regulation and Administration) (Scotland) Bill

[As amended at Stage 2]

Revised Explanatory Notes

Introduction

1. As required under Rule 9.7.8A of the Parliament’s Standing Orders, these revised Explanatory Notes are published to accompany the Charities (Regulation and Administration) (Scotland) Bill (which was introduced in the Scottish Parliament on 15 November 2022) as amended at Stage 2. Text has been added or deleted as necessary to reflect the amendments made to the Bill at Stage 2 and these changes are indicated by sidelining in the right margin.
2. These revised Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

Note on interpretation etc.

4. In these notes, the following abbreviations are used—
 - “the 2005 Act” means the Charities and Trustee Investment (Scotland) Act 2005,
 - “OSCR” means the Office of the Scottish Charity Regulator,
 - “the Register” means the Scottish Charity Register,
 - “SCIO” means a Scottish Charitable Incorporated Organisation (this is a bespoke legal entity with limited liability status which is available only to charities; see Chapter 7 of Part 1 of the 2005 Act).

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5. The Bill proposes a number of amendments to the 2005 Act. The Scottish Government has prepared a copy of the relevant portions of the 2005 Act as prospectively amended, with the proposed amendments made by the Bill as introduced shown in tracked changes. This is published on the Scottish Parliament’s webpage for the Bill¹. However, that text is provided for illustrative purposes only and its accuracy cannot be guaranteed. It does not incorporate any changes made at Stage 2.

6. It is worth noting that text that a Bill inserts into other enactments is interpreted in accordance with the interpretation legislation that applies to that enactment. As such, text inserted into the 2005 Act by the Bill falls to be interpreted in accordance with the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 (SI 1999/1379). Among other things, this provides default definitions for certain expressions (such as “person” and “writing”) and default rules for common situations (such as when something is presumed to arrive when it is sent by post).

Crown application

7. Section 20 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) provides that the Crown will be bound by an Act of the Scottish Parliament or Scottish statutory instrument unless the provision expressly exempts it. As such, technically this Bill applies to the Crown in the same way as it applies to everyone else. However, the substantive provisions of the Bill will almost exclusively be inserted into the 2005 Act. The 2005 Act, as it predated ILRA, did not bind the Crown when enacted, and so the amendments of it made by the Bill will also not bind the Crown.

Overview

8. The 2005 Act established OSCR as a regulator and put in place the current system for the regulation of charities in Scotland. It was supplemented in some areas by Part 9 of the Public Services Reform (Scotland) Act 2010.

9. The overall aim of the Bill as set out in the Policy Memorandum is to strengthen and update the current legislative framework for charities registered in Scotland. It does not generally seek to revisit the fundamental principles of the 2005 Act.

10. More specifically, the Bill makes provision in the following areas—

- providing for the provision of information about charity trustees (both public information and internal information for OSCR’s use),
- updating the law in relation to disqualification criteria (expanding the grounds upon which a person is, subject to a possible waiver, disqualified from acting as a charity trustee; extending this to certain senior management functions; and providing for a publicly searchable record of persons who are disqualified by reason of having been removed from office in Scotland),

¹ Accessed via <https://www.parliament.scot/bills-and-laws/bills>

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- extending the current rules allowing OSCR to appoint interim charity trustees to cases where the charity is not in a position to request OSCR's assistance,
- in relation to accounts, providing for these to be publicly available on the Register as well as allowing for the possible removal of charities which fail to submit accounts and then ignore communications from OSCR about that failure,
- requiring the recording of charity mergers in a publicly accessible record and making default provision under which legacies transfer to the successor charity,
- adjusting the rules which apply to a statutory charity which holds an endowment and wishes to use the reorganisation scheme provisions provided in the 2005 Act,
- refining the process in relation to inquiries (allowing inquiries to be held or continue despite a change in a body or person's status; refining the position as to how notices are served and notice periods apply in relation to inquiries; and giving OSCR the ability to issue positive – as opposed to interdictory – directions following an inquiry),
- requiring charities to have a connection to Scotland which makes their regulation by OSCR appropriate,
- a number of minor or technical changes which do things such as formalise existing practices, close a loophole or otherwise clarify wording in the 2005 Act, align the position for charities of different types, simplify practices, specify deadlines for existing actions, etc.

Commentary on provisions

References to the 2005 Act

Section 1 – Meaning of the “2005 Act”

11. This section defines the 2005 Act for the purposes of the Bill. The vast majority of the provisions in the Bill make modifications to the 2005 Act, so this avoids the need for it to be referred to in full each time.

Information about charity trustees etc.

Section 2 – Inclusion of names of charity trustees on the Scottish Charity Register

12. This section of the Bill modifies section 3 (Scottish Charity Register) of the 2005 Act.

13. It inserts a new paragraph (aa) into subsection (3) requiring OSCR to include, in relation to the entry for each charity in the Scottish Charity Register, the name of each

of the charity's trustees. However, this is subject to any exemption that is applied (as set out below).

14. The section also substitutes subsection (4). The existing section 3(4) requires OSCR to exclude from a charity's entry in the Register the principal office of the charity (or the name and address of one of its charity trustees if the charity does not have such an office) if, on the application of the charity, OSCR is satisfied that including that information is likely to jeopardise the safety or security of any person or premises.

15. The modifications made by this section mean that the dispensation mechanism now extends to the names of the charity trustees as well. The test remains the same: whether OSCR is satisfied that including the information would be likely to jeopardise the safety or security of any person or premises. This dispensation can be achieved as part of the application for the entry of a body in the Register, or by a later application by a charity or any of its charity trustees. The duty to exclude information need not necessarily equate to an 'all or nothing' outcome. For example, if OSCR is only satisfied that including the name of one charity trustee ("Trustee A") is likely to jeopardise the safety or security of any person or premises, but is satisfied that including the principal office of the charity or the names of the other charity trustees would not draw such risks, it is only required to exclude the name of Trustee A. It will be for OSCR to determine when the safety or security of any person or premises is likely to be jeopardised by an individual's name appearing on the Register, but this might include (for example) a case where a trustee has an abusive ex-partner who might use the trustee's affiliation to target them.

16. Whilst the modifications made by this section require things to be done which involve the processing of personal data, this operates within the framework of and is consistent with UK General Data Protection Regulations ("UK GDPR") and the Data Protection Act 2018. The provision to include the name of each charity trustee in the Register as described above creates a legal obligation for the purposes of Article 6 of the UK GDPR, which operates subject to the dispensation mechanism described above.

17. Consequential amendments are made to sections 17 (notification of other changes) and 71 (decisions) of the 2005 Act in light of these modifications—

- Section 17 contains an existing duty to notify OSCR about a change in the charity's details as set out in its Register entry (which will now cover changes in trustees). The change made to section 17(1)(b) by this section of the Bill will require OSCR to be notified of a change in trustees even where trustees' names are excluded from the Register under the rule discussed above. A minor adjustment is also made to paragraph (a) in order to avoid confusion from specific mention being made of just one trustee. However, it will continue to be the case that if a principal office is not used, changes to the name and address of the designated trustee contact need to be notified under paragraph (a) (while changes to any other trustees are notified under paragraph (b)).
- Section 71 already provides for a right of review (and ability for an onwards appeal) of any refusal to disapply the requirement that the Register contains

a charity's address. This is extended to apply equally to a refusal to disapply the requirement to include the names of charity trustees.

Section 3 – Information about charity trustees for OSCR's use

18. This section inserts a new section 66A (schedule of charity trustees) into the 2005 Act requiring OSCR to keep, in such manner as it thinks fit, a schedule of all charity trustees. The schedule will contain a separate entry for each charity trustee. It may include such information as OSCR considers appropriate and is intended to consist of the contact details of each charity trustee to provide the information needed for OSCR to carry out its regulatory duties effectively.

19. The schedule will not be public facing, so OSCR must specify and publicise the questions about charity trustees which it will require answers to for the purpose of populating the schedule. This is necessary because a consequential change is made to section 17 of the 2005 Act requiring a charity to give OSCR notice of any change which will prompt a change to the schedule, which means that the charity in turn needs to know the type of information that is included in the schedule. However, crucially, the information supplied by trustees will not be publicised.

20. The section of the Bill also applies section 22 of the 2005 Act, for the purposes of this section, so that OSCR may require, by notice, any charity to provide it with documents or information which it requires for the purpose of maintaining the schedule (unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session).

21. Finally, the section provides that OSCR may retain an entry in the schedule despite a person ceasing to be a charity trustee. However, the retention of this information must relate to the performance of OSCR's functions (for example, its ability to conduct inquiries into charities).

Disqualification from being charity trustee etc.

Section 4 – Disqualification: offences

22. Under section 69 of the 2005 Act, various persons are automatically disqualified from acting as a charity trustee (though it is possible to obtain a waiver at OSCR's discretion). The disqualification criteria currently consist broadly of the following—

- conviction for an offence of dishonesty or for an offence under the 2005 Act,
- being an undischarged bankrupt,
- having been removed (or treated as having been removed) from office under section 34 of the 2005 Act or its predecessor legislation,
- having been removed from office as a charity trustee on the grounds of misconduct under the law of England and Wales,

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- being subject to a director disqualification order or undertaking anywhere in the UK.

23. This section of the Bill expands the disqualification criteria substantially in relation to criminal offences. The first bullet point listed in the paragraph above instead becomes, essentially, conviction for an offence of dishonesty or for an offence specified in inserted section 69A. In turn, an offence under the 2005 Act is moved to the new list in inserted section 69A so there is no change to the substance in that regard. However, a number of additional offences are listed in this new section as well. Some of these might previously have been captured by dint of being an offence involving dishonesty, but some will be captured for the first time.

24. The newly listed offences cover terrorism, money laundering, bribery, perverting the course of justice and a public official being derelict in their duty. The list also covers an offence under section 77 of the Charities Act 2011 which is, broadly speaking, the offence of contravening an order which was made under section 76 of that Act for the purpose of protecting charitable property (for example, an order to a person not to part with property without the approval of the Charity Commission for England and Wales).

25. Superseded offences are captured by the list too, as is aiding, abetting, counselling, procuring or inciting the commission of any of the listed offences. Similarly, attempted offences and conspiracy to commit an offence is captured also.

26. However, as with the existing disqualification criteria, it will continue to be possible for a person to apply to OSCR for a waiver where the disqualification relates to the criteria being added by this section of the Bill in just the same way as applies under the 2005 Act at present.

27. The Scottish Ministers are given a power to amend this new section 69A by adding or removing an offence. The use of this power would be subject to parliamentary approval by affirmative procedure.

28. Finally, a minor adjustment is made to section 69(3) of the 2005 Act. That section provides that a person is not disqualified if a conviction is spent for the purposes of the Rehabilitation of Offenders Act 1974. The change made by subsection (2)(b) of this section of the Bill simply clarifies that in the case of spent convictions, the person is not disqualified by reason of the spent conviction (i.e. implicitly recognising that it is still possible that they may be disqualified separately on other grounds).

Section 5 – Disqualification: other cases

29. This section makes further modifications to the disqualification criteria, beyond the expansion relating to criminal offences already covered by section 4 of the Bill (see paragraphs 22 to 27 of these notes).

30. Section 69(1)(b) of the 2005 Act is expanded to cover not just being an undischarged bankrupt but also being subject to various other bankruptcy-related measures. Specifically, this paragraph (as read with the definitions inserted into section 70) now also covers—

- being subject to a bankruptcy restrictions order, interim order or undertaking (which is where the period for which a person is subject to restrictions is extended because of dishonest or blameworthy behaviour before or after their bankruptcy),
- being subject to a debt relief restrictions order, interim order or undertaking (which is similar but applies in the context of a debt relief order),
- being subject to a moratorium period under a debt relief order (which is a process which does not apply in Scotland but is broadly the equivalent of minimal asset bankruptcy in Scotland).

31. Section 69(1)(d) of the 2005 Act is refined to take account of changes to charity legislation in England and Wales. It continues to be the case that it covers a person who has been removed by an order made by the Charity Commission for England and Wales, but the provision is updated to take account of the location and basis of the current removal power. More substantively, it is also extended to cover removal not just as a charity trustee but also removal as an officer, agent or employee. As in the 2005 Act at present, removal under predecessor legislation also continues to be covered, but the detail of this is now moved to section 70 along with the definition of the removal order itself.

32. A new section 69(1)(da) is also inserted into the 2005 Act to cover the equivalent removal process under the law of Northern Ireland (as now defined in section 70). However, the Northern Irish process does not provide for the possibility of removal as an officer, agent or employee.

33. In addition, new section 69(1)(db) provides that a person who is subject to an order in England and Wales barring them from being a charity trustee there in respect of any charity is disqualified in Scotland as well. The circumstances in which such an order can be issued include where the person has been convicted of certain offences abroad, where HM Revenue and Customs has found the person not to be a fit and proper person, or where the person's conduct is damaging to public trust in charities. While the provision here only covers an order which applies without limitation in England and Wales, provision is made elsewhere dealing with an order which is more restrictive (see paragraph 35 of these notes).

34. The existing disqualification criteria is also extended in new paragraphs (f) to (i) to cover broadly the following—

- having been found in contempt of court in England and Wales,
- having being found by the court to have disobeyed an order or direction of the Charity Commission for England and Wales (see section 336 of the

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Charities Act 2011) or the Charity Commission for Northern Ireland (see section 174 of the Charities Act (Northern Ireland) 2008),

- being a designated person under terrorist asset freezing orders,
- being subject to notification requirements under Part 2 of the Sexual Offences Act 2009.

35. Finally, at new section 69(2A) of the 2005 Act, provision is made disqualifying a person from being a charity trustee in relation to a specific named charity, or type of charity, if they are barred from being a charity trustee in respect of that charity or type of charity in England and Wales. The types of reasons that such orders can be granted are set out at paragraph 33 of these notes. However, unlike the rules in section 69(2), section 69(2A) does not disqualify a person in respect of all charities; instead, the disqualification is tailored to cover only those charities covered by the order in England and Wales. Where the disqualification is in respect of a named charity only, that will be relevant in Scotland only if it is a cross-border charity.

36. Again, as with the existing disqualification criteria, it will continue to be possible for a person to apply to OSCR for a waiver where the disqualification relates to the criteria being added by this section of the Bill in just the same way as applies under the 2005 Act at present. A minor consequential amendment is made to ensure that the ability to apply for a waiver covers new subsection (2A) as well as subsection (2) as amended.

37. Further, a person who would otherwise be disqualified by reason of a contempt of court finding will not be disqualified for that reason if, had their conduct been dealt with as an offence instead, the sentence they received was such that the offence would now be considered to be spent under the Rehabilitation of Offenders Act 1974.

38. The Scottish Ministers are then given a power to amend this section 69 of the 2005 Act by adding or removing a person or description of person. This power can also be used to amend the related definitions in section 70 – either in consequence of section 69 being amended or not. The latter option would allow, for example, the definition of “undischarged bankrupt” to be updated even though that would not necessitate a change to the list in section 69. The use of this power would be subject to parliamentary approval by affirmative procedure.

Section 6 – Disqualification: senior management functions

39. At present, the disqualification criteria set out at paragraph 22 of these notes apply only to charity trustees. Charity trustees are the persons who have the general control and management of the administration of a charity. For example, in a charitable company, this will usually be the company directors, while in a charitable trust this will usually be the trustees.

40. This section of the Bill inserts a new section 69B into the 2005 Act which extends the disqualification rules to individuals holding office or employment with senior management functions. A senior management function is—

- a management function for which the person is not accountable to anyone or is accountable only directly to charity trustees (for example, the chief executive), or
- a function which involves control over money for which the person is not accountable to anyone other than another person with senior management functions but which do not relate to money (for example, a chief financial officer who is accountable in line management terms to the chief executive).

41. If a person is disqualified from acting as a charity trustee in relation to a charity (i.e. they are disqualified under section 69 and do not have a relevant waiver), they are also disqualified from having senior management functions in that charity. This disqualification applies only to the extent that trustee disqualification applies. For example, if an individual who would otherwise have been disqualified under section 69 had been granted a waiver to act as a charity trustee of any ex-offenders' charity, that would automatically flow through and they would not be disqualified from holding senior management functions in such charities without the need to seek a further waiver.

42. By the same principle, if the disqualification arises by virtue of new section 69(2)(db) or 69(2A) (as to which, see paragraphs 33 and 35 of these notes), the disqualification from holding senior management functions only applies to the extent that the person is disqualified in England and Wales. This means that where the order in England and Wales is one which does not apply to acting as an employee at all (i.e. section 181A(5)(a) of the Charities Act 2011 is used) or the jobs or types of job which it applies are limited (i.e. section 181A(5)(b) of that Act is used), that will flow through.

43. In addition, as with the provision relating to charity trustees, it will be possible for a person to apply to OSCR for a waiver. As with the rules in relation to charity trustees, a waiver in respect of senior management functions will be able to be granted in respect of all charities, in respect of a particular type of charity, or in respect of a specific named charity only. It will also be possible to limit the waiver to specific senior management jobs or senior management functions of a particular nature.

44. If a waiver is not granted, it will be possible to seek a review (and, if desired, subsequent appeal) of that decision in exactly the same way as applies in relation to waivers for charity trustees: the consequential modification made to section 71 of the 2005 Act provides for this, while the change made to section 72 ensures that the person who sought the waiver will be notified of the decision in relation to it.

45. It is currently an offence under the 2005 Act to act as a charity trustee when disqualified from doing so. This rule in section 70(1) of the 2005 Act is extended by the Bill so that it is similarly an offence for a person to hold office or employment with senior management functions when disqualified from doing so. As with charity trustees, the penalty on conviction is—

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- on summary conviction, imprisonment for a period of up to 6 months or a fine up to level 5 on the standard scale (currently £5,000 as specified by section 225 of the Criminal Procedure (Scotland) Act 1995) or both,
- on conviction on indictment, imprisonment for a period of up to 2 years or an unlimited fine or both.

46. In addition, where a person acts as a charity trustee despite being disqualified from doing so, section 70(2) of the 2005 Act makes provision to ensure that the acts carried out by the charity during the period of that person's appointment are not invalidated by reason of the disqualification. This rule is also now extended by the Bill to cover a person who carried out senior management functions despite being disqualified from doing so.

Section 7 – Record of persons removed from office

47. Under section 34(5)(e) of the 2005 Act, the Court of Session can remove a person from office as a charity trustee in certain circumstances. A person can also be removed from being concerned in the management or control of a body which is controlled by a charity, or from a body which has been misrepresenting itself as a charity. In addition, under section 34(5)(ea) of the 2005 Act, the Court of Session can make an order under which the person is treated as having been removed from a role despite not actually being so removed (for example, because the person resigned in an effort to stave off further proceedings).

48. These orders can be granted where—

- there is or has been misconduct in the administration of a charity or a body controlled by a charity,
- it is necessary or desirable to act for the purpose of protecting a charity's property or securing a proper application of that property for its purposes, or
- a body which is not a charity has been misrepresenting itself as being one.

49. Beyond the immediate impact of an order for any person who is still in office at the date of granting of the order, a key consequence is that persons who are subject to a removal order or a deemed removal order under either section 34 or the predecessor legislation are automatically disqualified from being a charity trustee (see section 69(1)(c) of the 2005 Act). Such persons can be granted a waiver but the granting of a waiver is at OSCR's discretion. Waivers can be granted so as to apply to all charities, to particular types of charity, or to a named charity only.

50. Further, under section 6 of the Bill, the disqualification rules which apply to charity trustees are extended to apply to certain senior management functions. As such, having been removed from office will become relevant to whether those persons are eligible to hold certain key employment roles in charities (although the rules about waivers are extended by the Bill in parallel with the extension of the disqualification criteria – see paragraph 43 of these notes).

51. Section 7 of the Bill therefore introduces a requirement for OSCR to keep and maintain a record of persons who have been removed from office in the way described above. As a result of the change made to section 34 of the 2005 Act by this section of the Bill, this will equally cover those who are deemed to have been removed from office.

52. Inserted section 70ZA(2) of the 2005 Act sets out the information that the record must contain. Again, when read with section 34(5)(ea) of the 2005 Act as amended by the Bill, references to removal should be read (where applicable) as references to deemed removal. The information to be held on this record is otherwise self-explanatory and includes details of any partial waiver that has been granted (i.e. a waiver in respect of a particular type of charity, for a named charity only, or a waiver which relates only to holding senior management functions). In contrast, where a waiver has been granted in unrestricted terms for acting as a charity trustee of any charity, the person's details will instead be removed from the record by virtue of inserted section 70ZA(3). OSCR will also be able to remove a record where the person has died.

53. Inserted section 70ZB of the 2005 Act provides that OSCR is not only to keep this record but is to make it publicly searchable. This will assist charities in their efforts to check whether individuals they wish to invite to become charity trustees or senior staff members are eligible to act. However, it will only provide information in relation to one aspect of the disqualification test – namely, section 69(1)(c). Other matters continue to be capable of verification by other means (including searching the Companies House register of disqualified directors, a Disclosure Scotland check relating to convictions, and searching the record of removed charity trustees provided by the Charity Commission for England and Wales).

54. The record will be searchable but will not be provided as a document which can be browsed. As such, charities will be able to carry out a search where they have a specific person whose eligibility they want to check, but it will not be possible to simply generate a list of all removed persons without already knowing their details. Provision is also made for certain information to be redacted or capable of being redacted in the interests of privacy. This includes the ability to redact the existence of an entry altogether where OSCR is satisfied (on an application made to it) that having that entry appear in search results is likely to jeopardise the safety or security of any person or premises.

55. Where such an application to redact the existence of an entry is made, changes made by this section of the Bill to sections 71 and 72 of the 2005 Act mean that the decision on that application can be the subject of a request for a review (and onwards appeal). It also means that the effect of the decision is suspended pending the outcome of the review/appeal process.

56. Whilst the modifications made by this section require things to be done which involve the processing of personal data, this operates within the framework of and is consistent with UK GDPR and the Data Protection Act 2018. The provision to keep and maintain a record of persons removed from office and to make that record publicly searchable as described above creates a legal obligation for the purposes of Article 6 of

the UK GDPR, which operates subject to the constraints and dispensation mechanism described above.

Appointment of interim charity trustees

Section 8 – Appointment of interim trustees by OSCR

57. Section 70A of the 2005 Act currently allows charity trustees to apply to OSCR for the appointment of an “acting charity trustee” as an interim measure where there is an insufficient number of charity trustees for the charity to be able to make an appointment itself and its constitution provides no mechanism for making an appointment in those circumstances. An application can be made by the majority of the current charity trustees or, if there are only two, either of them. However, if there are no charity trustees, or if the only charity trustees who are appointed are unable or unwilling to act, OSCR has no power to assist under this section.

58. This section of the Bill changes that. It introduces a new power allowing OSCR to also appoint what is now badged as “interim” charity trustees as a short-term measure. This applies where OSCR is satisfied that a charity has no charity trustees, or the existing charity trustees cannot be found/are not acting and are not expected to resume acting, or where the number of existing charity trustees who fall into that category means that it is not possible for the charity to make a request itself. It applies only where the charity would not be able to make a request itself under the existing mechanism. For example, that might be because in a charity with two trustees, one has moved away to an unknown address and the other has lost capacity (i.e. the existing charity trustees could fall into paragraph (b) of new section 70A(2) for different reasons). It would also apply in, for example, a charity with three trustees where two of them were not acting, meaning that the sole remaining trustee was not able on their own to make an application to OSCR.

59. As with the existing appointment provision, any appointment of an interim charity trustee under this new power is a temporary measure only and is made subject to various restrictions. Specifically—

- OSCR can appoint only as many interim charity trustees as is necessary for the charity to be able to appoint charity trustees itself under its constitution. Under the changes made by the Bill, charity trustees who cannot be found or are not acting would not count for the purpose of determining whether the charity is able to appoint charity trustees itself.
- An interim charity trustee can be appointed initially only for a maximum period of 12 months.
- This appointment can be extended once by a period of up to 3 months but only if, at the end of the appointment period—
 - (a) the charity would not, without the interim charity trustee, be able to appoint a charity trustee itself (again, this is extended by the Bill to provide that charity trustees who cannot be found or are not acting

would not count for the purpose of determining whether this test is met), and

- (b) OSCR, the majority of the charity trustees (or, if two, either of them) and the interim charity trustee all agree – but any trustees who cannot be found or are not continuing to act are not factored into any calculations of numbers/majorities for this purpose.
- While an interim charity trustee is permitted to be appointed as a normal, non-temporary charity trustee, the interim charity trustee cannot vote on their own appointment.

60. There are also some other rules in section 70A of the 2005 Act already which are not restrictions but which will apply equally to interim charity trustees appointed under this new power. Firstly, an interim charity trustee is given the same functions (for the duration of their appointment) as a charity trustee appointed under the charity's constitution. Secondly, where an interim charity trustee is later appointed as a non-temporary charity trustee, their appointment as an interim charity trustee comes to an end on the date of their subsequent appointment.

61. The existing rule about appointment on the application of a charity, which is currently spread across the first two subsections of section 70A, is consolidated by the Bill into a new subsection (1) (supplemented by a new definition in subsection (9)). However, no changes are made to the substance.

62. The term “acting charity trustee” is also replaced by the term “interim charity trustee” to avoid any confusion given the various references to whether a charity trustee is “acting” or not (which is intended to refer to whether a charity trustee is continuing to fulfil their role as such).

Section 8A – Review of proposed appointment of interim trustee

63. This section of the Bill provides a review/appeal mechanism which will apply where OSCR intends to make an interim trustee appointment (either at the charity's request or of its own initiative) in a case where the appointment is made on the basis that there continue to be trustees who are acting but that number is such that it is still necessary for OSCR to step in and appoint interim trustees. The review mechanism is that provided for under Chapter 10 of the 2005 Act for any reviewable decisions. As such—

- OSCR must give notice of its decision to appoint an interim trustee,
- In this case, the decision to make the appointment is suspended until the end of the review/appeal window,
- If the outcome of OSCR's review is to uphold the decision, the person who requested the review can appeal to the First-tier Tribunal.

64. This section also provides that notice must be given to all charity trustees of the charity. However, the modifications made to section 100 of the 2005 Act by paragraph

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16 of the schedule allows the notice to be served by publicising it generally if OSCR cannot contact the trustees. The section also makes it clear that any charity trustee can request a review (and then subsequently an appeal); they do not need to act collectively.

Charity accounts

Section 9 – Preservation of and access to charity accounts and independent reports on accounts

65. Section 44(1)(b) of the 2005 Act requires all charities to prepare a statement of account for each financial year, and section 44(1)(d) requires a copy of the statement to be sent to OSCR. While there is a requirement under section 44(1)(c) for that statement to be independently examined or audited, the rules about submitting the statement of account to OSCR do not extend to the report on that statement that is prepared by the independent examiner or auditor under (as applicable) regulation 10(4) or 11(3) of the Charities Accounts (Scotland) Regulations 2006 (SSI 2006/218) (the “2006 Regulations”).

66. Subsection (2)(a)(i) of the Bill moves the requirement to obtain a report into the 2005 Act itself. The details of what the report must cover will continue to be specified in regulations as they are currently. Subsection (2)(a)(ii) of the Bill then expands the rule about submitting the statement of account to OSCR so that it also now covers this report.

67. Section 23(1)(b) of the 2005 Act provides that a charity must provide a copy of its latest statement of account to anyone who reasonably requests it. This is expanded by section 10(3) of the Bill to also cover the independent report. However, there is no requirement for OSCR to retain the statements of account currently submitted to it under section 44 or to make them publicly available.

68. Subsection (3) of this section of the Bill changes that by inserting a new section 45B (public access to charity accounts kept by OSCR). It imposes a duty on OSCR to keep any copy of a statement of account and independent report sent to it under section 44(1)(d) for at least 5 years from the end of the financial year to which the document relates. It further requires OSCR to make such statements of account and independent reports available for public inspection. It is expected that OSCR will make such statements publicly available in the same manner as it does in relation to the Scottish Charity Register, by using its website to make the accounts widely and freely available and that it will publicise those arrangements as it does in relation to the Register. However, the accounts and independent reports will also be available, free, at OSCR’s offices and might also be made available otherwise as OSCR thinks fit.

69. Subsection (2)(b) of this section also inserts a new subsection (4A) into section 44 of the 2005 Act which provides that any regulations made under section 44(4) must be framed so that a charity is not required to include any information in its statement of account that is excluded from its entry in the Register under section 3(4). This is

intended to work in harmony with the dispensation mechanism under that section as amended by section 2 (see paragraphs 14 and 15 for further explanation). The existing rules about a charity's preparation of accounts are contained in the 2006 Regulations, which are made in exercise of the powers conferred by section 44(4). The 2006 Regulations already provide that certain information is not required to be included if the charity is entitled to have that same information excluded from its entry in the Scottish Charity Register. However, some consequential changes and minor adjustments may be needed in order for those regulations to comply fully with the new section 44(4A). This can be achieved under the existing power in section 44(4).

Section 10 – Independent reports: minor and consequential modifications

70. This section of the Bill makes a number of consequential changes to the 2005 Act as a result of the change made by section 9(2)(a)(i) of the Bill under which the core requirement for an independent examiner's or auditor's report is now moved into primary legislation (see paragraph 66 above).

71. Specifically—

- Section 4 is adjusted to clarify that any accounts submitted by an applicant wishing to become a charity should also be accompanied (where relevant) by any associated report. This will not be an “independent report on accounts” as defined in the Bill because that is relevant only to charities, but would cover (for example) an audited report which a company has had to submit to Companies House under section 441 of the Companies Act 2006 but which does not form part of its statement of account.
- Section 23 is adjusted so that the existing right to a copy of a charity's latest statement of account (where that request is reasonable) now also extends to the independent report.
- Section 44(4) is adjusted to confirm that the ability to make further provision by regulations under that section includes the ability to make further provision about the independent report. While this was already within the breadth of the power, now that the core requirement for the report is included within the section itself, it is considered appropriate to include mention of it for clarity.
- Section 106 is adjusted to include an Act-wide definition of the term “independent report on accounts”.

Section 11 – Removal of non-responsive charities for failure to submit accounts

72. Under section 44(1)(d) of the 2005 Act, all charities on the Register are under an obligation to provide a statement of account to OSCR each year. This must first be independently examined or audited. A deadline for submission of charity accounts has been imposed by the 2006 Regulations and, other than in the case of charities that are

removed from the Register, is set at 9 months after the end of the charity's financial year end.

73. Where a charity fails to provide accounts as required, there is a power under section 45 of the 2005 Act for OSCR to appoint a suitably qualified person to prepare the accounts on the charity's behalf. However, the appointed person would need access to the charity's records to be able to prepare meaningful accounts, and therefore this power cannot be used where OSCR is unable to make contact with the charity.

74. This section of the Bill therefore introduces a new power for OSCR. It applies where a charity has not submitted its accounts, the deadline for submission has passed, the charity has not responded to communications from OSCR in respect of the failure, and accounts have not been prepared (and are not in the process of being prepared) by a suitably qualified person under section 45. In such a case, OSCR can decide that the charity should be removed from the Register. If OSCR concludes that this is appropriate, OSCR must give the charity notice of this intention to remove it.

75. Once a charity is given notice of OSCR's intended removal, the charity is given 3 months to act. If it makes contact with OSCR in that period, no further action can proceed under this section. There is no stipulation as to the form that the contact must take or what it must include. As such, a phone call would serve to prevent further proceedings just as much as a letter or email would.

76. Where no contact from the charity is forthcoming, OSCR may decide to proceed with removal of the charity from the Register. This is a power rather than something that will happen automatically though: as such, if the charity fails to get in touch but OSCR receives information from a third party which prompts it to reconsider the appropriateness of proceeding, the process can be halted.

77. Under section 71 of the 2005 Act, any decision to proceed with the removal of a charity is one against which there will be review and appeal rights in line with the normal process of the 2005 Act. Further, under section 73(2) of the 2005 Act, the effect of the decision to remove the charity will be automatically suspended until the notice has been served and either the period within which OSCR can be required to carry out a review (i.e. within 21 days of the notice being given) has expired without a review being requested or, if a review is requested, the appeal process has been exhausted.

78. This section of the Bill also makes provision for a number of points of detail about how information regarding potential removals is communicated—

- Firstly, any notice of intention to remove a charity must set out certain things: specifically, that the criteria in subsection (1) of this section have been met and that the charity risks being removed from the Register unless it makes contact with OSCR within the specified 3 month period.
- Secondly, OSCR is required to publish on its website a list of charities which are subject to the risk of removal following the issuing of a notice of intended removal. If, for example, it was determined on appeal that it would be

inappropriate to proceed with the removal, that notice would no longer remain in effect and the charity would cease to appear on that list.

- Finally, OSCR is also empowered to take any further steps it considers appropriate to draw the notice to the attention of those likely to be affected by it.

79. For most charities, removal from the Register means that the body ceases to be a charity, but it does not cease to exist as an organisation (for example, as a company, a trust or an unincorporated association). The assets that it held as a charity would continue to be protected under section 19 of the 2005 Act, but the organisation itself could otherwise operate as a non-charity. However, in the case of a charity which takes the legal form of a SCIO, section 55(7) of the 2005 Act provides that upon ceasing to be a charity, it ceases to be a SCIO. As such, it cannot simply be struck off the Register without its assets first being dealt with appropriately. Accordingly, in the application of this section of the Bill to SCIOs, the power to remove is, instead, a power to take steps to first secure the SCIO's dissolution and only once that has occurred is there a power to remove it from the Register.

Charity mergers

Section 12 – Recording of charity mergers and treatment of legacies

80. When a charity winds up, this can currently sometimes result in legacies to that charity failing. Sometimes, a professionally prepared will provides that if a charity winds up in favour of another charity before the testator's death, the legacy is to go to the successor charity instead. However, not all wills include such provision (and sometimes the drafter of the will fails to do so unknowingly rather than intentionally). Where no such provision is included, legacies can sometimes end up being distributed in accordance with the laws of intestacy despite the testator having left a will. As a result, when one charity merges with another, a "shell" charity is often kept in existence to receive and pass on any legacies which might otherwise be lost.

81. This section of the Bill inserts a new Chapter 7A into the 2005 Act which will negate the need for such shell charities to be kept in existence following a merger.

82. New section 64A sets out various definitions which apply for the purpose of the chapter. The term "merger" covers an amalgamation where two or more charities wind up in favour of a newly established charity as well as situations which might more typically be thought of as a "takeover" whereby one charity is subsumed into another existing charity. The term will also cover things which fit within this criteria but which might not typically be thought of as a merger – most notably changes in legal form where a charity winds up in favour of a new entity it has set up in order to benefit from a different legal form but where, to the outside world, the charity might continue its activities with no discernible change.

83. New section 64B requires OSCR to be given notification of any merger. This notice may be given by the transferee charity (i.e. the charity which receives the transfer

of assets) at any time after the merger is complete (i.e. the transfer of all the property, rights and liabilities is complete). In the case of heritable property, this will usually mean once it is transferred in accordance with sections 37(2) and 50(2) of the Land Registration etc. (Scotland) Act 2012. Although there are already notification requirements which can apply to mergers under section 17 of the 2005 Act, this notification provision is separate. The Scottish Ministers may by regulations (subject to the negative procedure) make provision to clarify when notice will be treated as having been given.

84. New section 64C then requires OSCR to keep a record of all charity mergers which are so notified to it. The record must contain a separate entry for each charity merger. That entry must contain the date notice of the merger was given to OSCR (as section 64D only applies if the merger has been notified). It is also to contain any other information OSCR considers appropriate. OSCR is given the same information-gathering powers in relation to the record of mergers as it has in relation to the Register. It is the giving of notice by the transferee to OSCR, and *not* the recording of the merger in the record, that triggers the rules in section 64D. However, the record of charity mergers will provide a reference point for executors as to what mergers have completed and been properly notified to OSCR. Entries in the record will also set out the date notice of the merger was given. There is a possibility of a small time lag between the date the merger was notified and the date that it is recorded on the record. However, this is unlikely to cause any issues in practice since executors do not distribute the estate immediately after the testator's death. Therefore, if executors check the record at the point at which they start to pay out legacies, the record should accurately reflect the mergers which have been completed and properly notified.

85. New section 64D provides for the effect of a merger being notified to OSCR in accordance with section 64B. The rules apply where a person has left a legacy to a charity but that charity has been involved in a charity merger and the charity either (i) acquires a vested right in the legacy after the merger is complete (i.e. the transfer of all the property, rights and liabilities is complete) but before it has formally wound up or dissolved in connection with that merger or (ii) the charity does not acquire a vested right to the legacy (by reason only of it having wound up or dissolved as part of the merger). In such cases, as long as the merger was notified to OSCR in accordance with section 64B and that notification happens before the date on which the charity acquires (or would but for it winding up or dissolving, have acquired a vested right in the legacy), the legacy is to be treated as having vested in the charity which benefited from or resulted from the merger (the transferee) under section 64D(2) – unless the will made clear that the testator did not intend for that to happen.

86. The date on which a legacy vests in a charity will normally be the date of the testator's death (although it is possible, for example, that vesting might be postponed by a condition in the testator's Will).

87. For the purpose of assessing what the testator did or did not intend, section 64D(3) sets out some rules that are to be applied (although there may also be other means by which the intention is made clear in the will). A general statement that a

legacy is given “to Charity A, which failing to Charity B” will not be enough to oust the rule about the charity merger (as that provision may have been written with a view to ensuring that if Charity A expended all its assets and wound up, the legacy did not fail). However, it will be possible to oust the default statutory rule and the clearest route for doing so will be to specify that the legacy is not to be paid to a transferee in the event of a charity merger.

88. These rules about a legacy transferring on a charity merger apply equally where the original legacy is to a share of something (for example, a percentage of the residue of the testator’s estate).

89. Where there is more than one merger (for example, A and B merge to become C, but there is then later a merger of C with D to become E), new section 64D also provides that the rule applies to further mergers too. As such, a legacy that has vested (or would have vested) in Charity A would be treated as having vested in Charity E.

90. New section 64E provides for a right of public access to the record of charity mergers. This is made available on broadly the same basis as the Register is made available under section 21 of the 2005 Act.

91. This section of the Bill also provides that for the purpose of this change in the law, it does not matter if the Will which gave rise to the legacy pre-dates the date of the change. It is possible that further transitional provision could be made by regulations in conjunction with the commencement of this section.

Reorganisation of charities

Section 12A – Endowments

92. A reorganisation scheme under Chapter 5 of Part 1 of the 2005 Act is a means by which a charity may act with OSCR’s consent to vary the charity’s constitution, transfer its property to another charity or amalgamate with another charity in a case where the charity’s constitution would not allow it to take such an action. However, charities constituted under Royal charter or warrant or an enactment (referred to in these notes as “statutory charities”) cannot generally use this mechanism. That rule is subject to an exception which applies to an endowment if its governing body is a charity. An endowment is property where the capital has to be preserved; only the income is spent on the fund’s charitable purposes.

93. However, the extent of the current exception is considered to be somewhat unclear: the provisions in the 2005 Act are written for the paradigm case of reorganising a charity so they do not quite make sense when applied only to endowments within charities. In addition, the restriction that the governing body has to be a charity is considered to be unduly restrictive. There have been cases where there was an endowment held by a statutory charity but because the trustees themselves were not also a charity, it did not qualify (despite the fact that it would be unusual for the trustees themselves to be a charity).

94. Section 12A of the Bill therefore adjusts the existing reorganisation provisions in order to allow OSCR to reorganise an endowment held by a statutory charity or, where such a charity's property consists only of an endowment(s), to reorganise the statutory charity regardless of the status of the charity trustees.

95. Specifically, section 12A of the Bill—

- allows the reorganisation of endowments held by statutory charities regardless of the status of the charity trustees (see inserted section 42(6)(a) of the 2005 Act),
- allows the reorganisation of a statutory charity where its assets consist of only endowment(s) (see inserted section 42(6)(b) of the 2005 Act),
- ensures that the rules about reorganisation schemes can be applied in a way that makes sense when what is being reorganised is an endowment within a charity rather than the whole charity (see inserted section 42(7) and (8) of the 2005 Act),
- retains the current definition of “endowment” but takes a power (subject to the affirmative procedure) to modify this definition – for example, if that is needed as case law on the definition develops (see inserted section 42(9) and (10)(a) of the 2005 Act),
- grants Ministers a power (subject to the affirmative procedure) to disapply this exemption for particular charities or types of charity – for example, in the event that it is considered more appropriate for particular charities to still have to obtain an Act of Parliament due to, say, the nature of their activities, the precise way they are established within the broad category of statutory charity, or the document by which the endowment was created (see inserted section 42(10)(b) of the 2005 Act),
- adjusts the Education (Scotland) Act 1980 which allows for the reorganisation of non-charitable endowments, to ensure that there is no gap or overlap in the coverage between the two regimes as adjusted by section 12A (see subsections (4) and (5) of section 12A).

Inquiries

Section 13 – Inquiries about former charities etc.

96. Section 28 of the 2005 Act gives powers to OSCR to make inquiries, for either general or particular purposes, about a charity, body or person falling within a paragraph of subsection (1). However, OSCR is not able to make inquiries with regard to a charity, body or person who previously met the criteria in section 28(1) but who, at the time of making the inquiry, no longer does so. For example, where a charity has been removed from the Register and an allegation of misconduct by one of the former charity trustees comes to light, OSCR is not currently able to make inquiries with regard to the body which was formerly a charity, in order to determine whether an application should be made to the Court of Session for an order under section 34(5)(ea) in respect of the former charity trustee. Similarly, if the charity has not just been removed from the

Register but has been wound up and has ceased to exist as a body, OSCR cannot make inquiries with regard to the time when the charity was operating.

97. This section of the Bill changes that by inserting a new subsection (2A) into section 28, providing that it does not matter whether a charity, body or person continues to fall within a paragraph of subsection (1) – or continues to exist – for OSCR to make inquiries under that subsection. It also inserts a new subsection (4A) which provides in paragraph (a) that such inquiries must still relate to the period or periods in which the subject of the inquiry did fall within one or more of those paragraphs of subsection (1). The only exception to that is in relation to an inquiry concerning the protection of assets held by bodies which have been removed from the Register. Similarly, paragraph (b) of new subsection (4A) provides that a direction may not be given under section 28(3) of the 2005 Act unless it relates to the protection of assets held by bodies which have been removed from the Register. The ability to direct someone not to do something will not normally be relevant where the person is no longer involved with the charity or body concerned, but may still be relevant in a case where the change in status relates to the body itself and the body continues to hold protected charitable assets.

Section 14 – Notice and obtaining information

98. Under section 29 of the 2005 Act, OSCR may by notice require any person to provide it with, amongst other things, documents and information which it considers necessary for the purposes of inquiries under section 28. The notice must specify a date, which must be at least 14 days after the date on which the notice is given, by which the person is to comply with that requirement. However, section 72 of the 2005 Act also requires OSCR to give notice to the charity in respect of which the decision is made (being the requirement to provide information under section 29). That presupposes that the haver of the information will be a charity and could also be read as suggesting that the haver is the subject of the inquiry. But that may not necessarily be the case, as the power in section 29(1) is quite wide and the haver of the information could be a third party. Further, the inquiry could be in relation to a body which is not a charity (see section 28(1) of the 2005 Act). In addition, the charity or body may have ceased to exist and so serving notice on that charity or body is no longer possible. Section 73 of the 2005 Act provides that the decision to require information is of no effect unless and until the notice required by section 72 is given and 21 days has lapsed without the charity requesting a review of the decision, or where such a request is made, the date on which OSCR gives its final decision.

99. The interaction of these provisions has created some uncertainty as to when the haver of the information is required to comply with the requirement, despite the notice specifying a date of 14 days or more in terms of section 29(2)(b), given the decision is of no effect by dint of section 73. Further, it is not necessarily clear to whom notices of the decision should be given in terms of section 72. Finally, where the charity or body which is the subject of the inquiry under section 28 no longer exists, it is not possible for OSCR to fulfil the requirement to serve a notice on that charity or body, meaning the decision is of no effect (also by dint of section 73).

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100. This section of the Bill modifies section 29 of the 2005 Act so that ‘the decision’ to require information is separated from ‘the notice’ given to the haver of the information. Subsection (1) of that section will refer to the decision, whereas subsection (2) will refer to the notice. The inserted subsection (2A) provides that OSCR must not give notice unless and until “the decision” has effect (in terms of section 73(3)).

101. Further, this section of the Bill inserts a new paragraph (ba) into section 72(2) of the 2005 Act to make it clear that, in the case of the decision to make a requirement to provide information under section 29(1), a notice must be given to the charity, body or person with regard to which OSCR is making inquiries under section 28.

102. The effect of these changes is that OSCR must notify the charity, body or other person to which OSCR is making inquiries under section 28 about its decision to require information under section 29(1) in relation to that inquiry. In some cases, the person receiving notice (i.e. the person subject to the inquiry) will be the same person as the haver of the information, but in other cases they will be different persons. The person receiving the notice of the decision also does not need to be a charity. Only after that decision becomes effective, in terms of section 73(3) (following the usual review processes under the 2005 Act), can OSCR serve notice on the haver of the information. The haver of the information will have at least 14 days to comply with the requirement. This will be the actual date of compliance, since the other notice and review provisions will have been satisfied at the point notice under section 29(2) is given. It does not matter if the haver of the information and the charity or body to which the notice of the decision was given is the same person – they will still have at least 14 days or more to comply with the notice under section 29(2).

103. This section of the Bill also inserts a new subsection (4) into section 72 of the 2005 Act which makes provision for cases where inquiries relate to a charity or body which no longer exists. In the case of former charities which no longer exist, a notice must be given to each person who was a charity trustee immediately before it ceased to exist. In the case of a body which has ceased to exist, a notice must be given to the person who in OSCR’s opinion appears to have been concerned in the management or control of the body immediately before it ceased to exist. These notices are only required if and to the extent that it is reasonably practicable to give them. This means that inquiries should no longer be frustrated by the requirement to serve notices on charities or bodies which do not exist. Subsection (4)(a) also restates the rule in section 72(2) where inquiries relate to a body which still exists but without charitable status in relation to a period in which the body was a charity. In such cases a notice must simply be given to the body which was the charity as required by subsection (2)(ba) and the rule in subsection (4)(b) does not apply.

104. This section also makes changes to section 72(2)(a) of the 2005 Act to make it clear that, in relation to the decisions referred to in that section, notices must be sent to the charity, body or person in respect of whom the decision was made.

Section 15 – Ability to issue positive directions

105. Following an inquiry under section 28 of the 2005 Act, a report often needs to be published under section 33 of the 2005 Act. In addition, where the conclusion of the inquiry is that there is a problem which requires to be addressed, there are currently a number of remedies available to OSCR (some of which require an inquiry to be held first, and others which do not)—

- where a charity no longer meets the charity test, OSCR must either ensure that the charity takes steps to remedy that or must remove the charity from the Register (see section 30 of the 2005 Act),
- OSCR is empowered to take a number of temporary measures where there has been misconduct by a charity/charity-controlled body, where it is necessary or desirable to act to protect charitable property, where a body is misrepresented as being a charity or as being a Scottish controlled charity, or where there has been misconduct in an activity carried out by a person misrepresenting themselves as acting for a charity; the steps that may be taken can include suspending a charity trustee, restricting the transactions which can be entered into without OSCR's consent, or directing a financial institution not to part with property without OSCR's consent (see section 31 of the 2005 Act),
- OSCR may opt to apply to the Court of Session for one of the remedies set out in section 34(5) of the 2005 Act or for a transfer scheme under section 35 of the 2005 Act; the remedies available include an interdict preventing specified action from being taken, the removal of a charity trustee, or the appointment of a judicial factor.

106. The measures which can be taken under section 31 of the 2005 Act are almost exclusively directions that something is not to be done. Under section 32 of the 2005 Act, the effect of such a direction is limited to a maximum period of 6 months.

107. This section of the Bill introduces a new power for OSCR to issue a direction requiring a positive action to be taken. Similar to certain aspects of the existing interdictory power, the exercise of this new power is limited to cases where, following inquiries, OSCR concludes that there has been misconduct in the administration of a charity or a body controlled by a charity, or that it is necessary or desirable to act to protect charitable property. Where this applies, OSCR will be able to direct the charity or body to take such steps as OSCR specifies in the direction which OSCR considers expedient in the interests of the charity.

108. Examples of directions which might be given under this section could include a direction to appoint additional trustees in order to form a quorum, a direction to take an action required by the charity's governing document (such as the holding of an annual general meeting), or a direction to take action to remove a charity trustee following misconduct by that person.

109. OSCR is given the ability to revoke a direction or to vary it by allowing more time for compliance or by reducing the required steps. Clarification is also provided that OSCR is able to give more than one direction in respect of the same inquiries. This could mean giving more than one direction requiring positive action to be taken, or it could mean giving one direction requiring positive action to be taken and another direction preventing something else from happening.

110. A positive direction can require the charity to do something that its constitution does not contemplate or which it would not otherwise have express powers to do, but it may not require the charity/body to do something which is prohibited by an enactment or expressly prohibited by the charity's/body's constitution or, in the case of a charity, inconsistent with its purposes. Anything done by the charity or body under the authority of a positive direction is treated as having been properly done in the exercise of its powers, although the contractual and other rights of third parties are preserved in respect of anything so done.

111. A number of consequential amendments are made to the 2005 Act in light of this new power—

- provision is made in section 3 for the issuing of a positive direction to appear on a charity's Register entry until it is complied with,
- the headings of sections 31 and 32 are adjusted to reflect the fact that section 31 is no longer the only section focusing on the powers of OSCR following inquiries,
- section 32 is clarified so that the existing reference to being able to give more than one direction under section 31 in respect of an inquiry also refers to the fact that directions under section 31 can be combined with directions under new section 30B,
- section 33 is adjusted to ensure that a report is prepared and published on an inquiry which results in a positive direction being given,
- section 65 is amended so that, just as some of the interdictory direction powers do not apply to designated religious charities, nor does the power to issue positive directions apply to such charities (see paragraphs 49 and 50 of the Policy Memorandum for the rationale behind this and explanation of when a religious charity can be designated),
- section 71 is modified to ensure that a review and appeal can be sought in respect of any decision by OSCR to issue a positive direction; any review or appeal would be in line with the 2005 Act's usual procedures,
- section 72 is modified to ensure that any notice of a decision to issue a positive direction is served on the person in respect of whom the decision is made (i.e. the charity concerned or, as the case may be, the body controlled by a charity),
- provision is made in section 73 so that the effect of any such direction is suspended until it is no longer amenable to review (either because the 21 day period in which OSCR can be required to review it has expired without a

review being requested, or because the review/appeal process has been exhausted).

Connection to Scotland

Section 16 – Charities which it is not appropriate for OSCR to regulate

112. There is currently no requirement that a charity has to have a particular link with Scotland in order to be entered on the Register. Section 5 of the 2005 Act sets out when a body must, and must not, be entered in the Register. In short—

- an applicant body can be entered in the Register only if it meets the charity test,
- some less fundamental requirements must also be met: the body cannot be entered in the Register if its name is objectionable or if regulations under section 6 of the 2005 Act require the application to be rejected,
- otherwise, OSCR is required to enter an applicant in the Register and does not have the discretion to refuse an application.

113. This section of the Bill adjusts this rule. It provides that OSCR must also reject an applicant where OSCR considers that it would not be appropriate for it to regulate the applicant because the applicant has or will have no, or only negligible, connection to Scotland.

114. There are various factors to which OSCR is required to have regard when deciding what connection there is or will be with Scotland (if any), but this list is not exhaustive and neither is any one factor on it determinative. For example, if a charity which otherwise had no connection to Scotland were to hold one short charity trustee meeting in Gretna Green but then return to England then that might not be considered to carry much weight. It should be noted though that, while carrying out charitable activities in Scotland can be relevant, this is not a pre-requisite and other factors can establish the necessary Scottish connection. Under section 7 of the 2005 Act, there is no requirement that the public benefit that a charity provides is provided in Scotland. As such, it would continue to be possible for Scottish charity trustees, or a charity which otherwise has links to Scotland, to run an overseas aid charity from Scotland. The assessment which OSCR carries out will be one that looks at all factors in the round and takes account of individual facts and circumstances.

115. There is a power for the Scottish Ministers to modify this section by regulations (subject to the affirmative procedure) in order to make further (or different) provision about the factors to which OSCR is, or is not, to have regard.

116. This section of the Bill also makes provision in relation to bodies which have been entered onto the Register and gained charity status. Where circumstances later change and the charity's connection with Scotland is lost or becomes negligible, such

that it becomes inappropriate for OSCR to regulate the charity, OSCR is given the ability to remedy this. However, this can only be done as part of the inquiry process which is already provided for in the 2005 Act.

117. Where OSCR concludes, following an inquiry, that it is not appropriate for OSCR to continue to regulate the charity because the charity has no or only negligible connection to Scotland, OSCR can direct the charity to take steps to establish the necessary connection. Just as with a decision under section 5 of the 2005 Act, the list of factors to which OSCR must have regard applies but these are not exhaustive and nor are any of them determinative (and there is the same ability for the factors which OSCR is, or is not, to consider to be adjusted by regulations subject to the affirmative procedure).

118. As with other comparable direction-making powers in the 2005 Act, any such direction can be varied but only by relaxing either what is required under it or the deadline by which it is required. It can also be revoked. The content and deadline set in a direction will be informed by OSCR's general duty under section 1(9) of the 2005 Act to be (among other things) proportionate, consistent and target its regulatory activities only at cases in which action is needed. If a charity fails to comply with a direction, OSCR must remove it from the Register.

119. However, changes made to sections 71 and 73 of the 2005 Act mean that any decision to issue a direction or decision to remove a charity for failure to comply with a direction can be appealed. Further, the effect of such a decision is suspended until the period for making such an appeal has expired and, if an appeal is brought during that time, the appeal is finally determined.

120. Any decision to issue a direction under this new power will be noted on the charity's Register entry under changes made to section 3 of the 2005 Act. In addition, where the result of an inquiry is a decision to take action, a report on the inquiry must be published under changes made to section 33 of the 2005 Act.

Further modifications of the 2005 Act

Section 17 – Minor or technical amendments

121. This section introduces the schedule, which makes further modifications to the 2005 Act. The changes which are made in the schedule are explained at paragraphs 127 to 209 below.

Final provisions

Section 18 – Ancillary provision

122. This section provides the Scottish Ministers with the power to make any ancillary provision which they consider appropriate for the purposes of, in connection with, or for

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giving full effect to the Act. Regulations made under this section may modify any legislation.

123. This power is exercisable by regulations. Where the regulations amend primary legislation, they are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010). Otherwise, they are subject to the negative procedure (see section 28 of that Act).

Section 19 – Commencement

124. This section sets out when the provisions of the Bill will come into force (i.e. begin to have effect). Some of the final sections of the Bill, including this section, will come into force automatically on the day after Royal Assent is granted. However, for the most part, commencement will take place on the date or dates specified by the Scottish Ministers in regulations. These regulations will be laid before the Scottish Parliament but will not otherwise be subject to any parliamentary procedure (see section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010).

125. In addition, this section provides that commencement regulations may include transitional, transitory or saving provision and may make different provision for different purposes. In particular, this allows different sections of the Bill to be commenced on different days.

Section 20 – Short title

126. This section provides for the short title of the resulting Act to be the Charities (Regulation and Administration) (Scotland) Act 2023.

Further modification of the 2005 Act

The schedule

Paragraph 1 – Duty to review Register

127. Section 3(6) of the 2005 Act currently places a duty on OSCR to review each entry in the Register from time to time. In addition, if (whether as a result of such a review or otherwise) OSCR considers any information set out in a charity's entry to be inaccurate, it must amend the entry and notify the charity accordingly.

128. There are presently in excess of 25,000 charities on the Register. This paragraph of the Bill's schedule amends section 3(6) so that OSCR is permitted, but no longer required, to review every entry in the Register from time to time. This will allow OSCR, in line with its duty under section 1(9) of the 2005 Act, to focus the checks that it carries out so as to ensure that they are proportionate, targeted at cases in which action is needed, and in line with best regulatory practice. However, where OSCR considers any information in a charity's entry in the Register to be inaccurate, OSCR will continue to be under a duty to amend it.

Paragraph 2 – Removal of former bodies

129. There are a number of bespoke ways in the 2005 Act that charities can currently be removed from the Register—

- at the charity’s request (see section 18 of the 2005 Act),
- by OSCR where, following an inquiry, it concludes that the charity no longer meets the charity test (see section 30 of the 2005 Act),
- by OSCR where the charity fails to comply with a direction to change its name (see section 12 of the 2005 Act), and
- in relation to SCIOs, there is provision—
 - (a) where a charity converts to a SCIO, for the predecessor charity to be removed (see section 58 of the 2005 Act),
 - (b) where SCIOs amalgamate, for the predecessor SCIO to be removed (see section 60 of the 2005 Act),
 - (c) where a SCIO transfers all its assets and liabilities to another SCIO, for the transferor SCIO to be removed (see section 61 of the 2005 Act),
 - (d) for a SCIO to be removed from the Register following its solvent or insolvent dissolution (see the Scottish Charitable Incorporated Organisations (Removal from Register and Dissolution) Regulations 2011 (SSI 2011/237)).

130. Where a charity wishes to wind up, it is required to apply to OSCR for permission to do so (see section 16 of the 2005 Act). However, to provide for the scenario whereby a charity fails to seek permission but winds itself up nonetheless, this section of the Bill amends the 2005 Act to provide a clear statutory basis for OSCR to remove an entry for a charity from the Register in such a case. In light of the significance of removal from the Register, this power may only be exercised where the entry is in respect of a body which no longer exists.

Paragraph 3 – Ability to allow duplicate charity names as part of merger

131. When an application for charitable status is made, the key assessment is whether the applicant meets the charity test. However, under section 5 of the 2005 Act, there are also some less substantive matters which have to be satisfied in order for OSCR to be able to enter the body on the Register. Specifically, the body’s name needs to be unobjectionable and the application needs to comply with any regulations made by the Scottish Ministers about the procedure for applications.

132. The application process is of course relevant to all proposed charities. However, one subset of applications relates to charities which wish to change their legal form. The 2005 Act provides a bespoke conversion process only for charitable companies or charitable registered societies which wish to become SCIOs (see section 56 of the 2005 Act). Accordingly, if, for example, an unincorporated association or a trust decides that it wishes to benefit from the protection of limited liability status and therefore opts to

become a SCIO or a charitable company, this can only be achieved by the setting up of a new charity. The existing charity then winds up in favour of that new entity.

133. When this occurs, the charity will often wish to retain the same name. Its charitable purposes and activities will usually be largely unchanged, and the outside world may not notice any difference in their dealings with the new incorporated charity. However, as noted above, section 5 of the 2005 Act prevents a charity from being registered if its name is objectionable. There are a number of different reasons which can cause a name to be considered objectionable (see paragraph 138) but the one that causes problems for charities changing legal form is that the name cannot be the same as, or too like, the name of another charity. As such, either the existing or the new charity needs to temporarily adopt a different name until the other is removed from the Register. For example, a new charitable company has to be set up with a different name and then, once the transfer of assets to it is complete and the old charity has wound up, change its name to the name of the old unincorporated body. This would require the name to be changed, with permission sought accordingly, with both OSCR and Companies House.

134. To better accommodate this process, this paragraph of the Bill's schedule makes a change to section 5 of the 2005 Act so that OSCR does not have to refuse an applicant entry to the Register on account of its name being the same as, or too close to, another charity's name – provided that the application is being made in connection with a proposed merger with the charity concerned. This would cover the paradigm case, which is a straightforward change in legal form where an unincorporated charity winds up in favour of a new incorporated charity run by the same or mostly the same people. However, it would also cover a more complicated "true" merger situation where, for example, there is an amalgamation by two unincorporated charities which is being effected by the setting up of a new incorporated body.

135. The change being made will allow OSCR discretion as to how a similarity in names is dealt with and whether it should preclude registration of the applicant or not. This allows OSCR to consider the individual facts and circumstances of each case.

136. The 2005 Act (section 12) also allows a charity to ask OSCR to review another charity's name on the basis that the names are too alike. As this is just a power, it is not removed – although a charity which is changing legal form would not of course in practice voice any objection to the name of the other body. However, OSCR's duty to act where it becomes aware (otherwise than via an objection from the charity concerned) of an objectionable name is moderated so that it is not required to act where the name is one that it allowed (despite being the same as, or too like, another charity) because the charity concerned was merging with the other charity. But while the duty is removed, the changes made to section 12 mean that OSCR remains entitled to act provided it is satisfied that it is no longer appropriate for the names to be the same or so alike (for example, because the planned merger has been abandoned).

Paragraph 4 – Change of name: delaying decision or granting or refusing consent

137. Section 11 of the 2005 Act requires charities to obtain consent from OSCR to any proposed change of name. This applies both where the charity wishes to change its name of its own accord and where it has been directed under section 12 of the 2005 Act to change its name because it is too similar to another charity's name or because its name has become objectionable for other reasons.

138. Currently, OSCR's only options on receiving an application for a change of name are to consent or refuse. Unless OSCR refuses the application within 28 days, it is deemed to have consented. However, OSCR may refuse an application only where it considers that the proposed new name is objectionable under section 10 of the 2005 Act. That is, OSCR may refuse only where it considers that a name is—

- the same as or too similar to another charity's name²,
- likely to mislead the public as to what the charity does,
- incorrectly gives the impression that the charity is connected to a government body or any person, or
- offensive.

139. It is not always possible for OSCR to make an informed decision as to whether a proposed charity name is objectionable within 28 days, as often further information about the charity's activities or connections is required. This paragraph of the Bill's schedule therefore gives OSCR a new option, mirroring the options OSCR has where consent is sought for certain changes under section 16 of the 2005 Act.

140. As a result of the changes made to section 11 of the 2005 Act by sub-paragraphs (2)(a) and (b) of this paragraph, OSCR will be able to issue a direction which prevents the charity from changing its name to the proposed new name for a specified period of up to 6 months (during which time, OSCR will hope to be able to satisfy itself as to whether the name is objectionable or not). The direction will be capable of being revoked or varied, but may not be varied so as to extend beyond the 6 month limit. OSCR will remain under a duty to give a substantive answer to the application. As with section 16, consent may be given unconditionally or subject to conditions. Typical conditions might be a requirement to make the change in accordance with the charity's constitution or a requirement for a charitable company to comply with any company law obligations relating to the name change.

141. A decision to refuse permission to change name is already challengeable under section 71 of the 2005 Act. This will remain the case under section 11 as amended. Where consent is refused under section 11(3)(a) or (3B)(b) (i.e. whether it is refused immediately or whether it is refused after a temporary preventative direction), that refusal will be reviewable at the charity's instance. However, since it is not a final

² This will be extended by paragraph 5 of the schedule to also cover the name being the same as or too similar to another charity's working name.

decision on the matter, the issuing of a temporary direction preventing a change of name from proceeding for up to 6 months will not be reviewable.

142. Sub-paragraph (2)(c) of this section also makes a related change to when OSCR is entitled to refuse an application. As noted above, where the appropriateness of a proposed new name requires more in-depth consideration, OSCR will hope to be able to satisfy itself on that during the period which will apply under the new direction mechanism that is being introduced. However, OSCR will not always be able to satisfy itself on this point without input from the charity. For example, the question of whether an incorrect impression is given about the charity's connections to someone will depend on information that may not be in the public domain. If a charity does not cooperate and provide OSCR with the necessary evidence, OSCR will still require to come to a conclusion at the end of the period of the direction. At present, OSCR only has the ability to refuse consent if satisfied that the proposed name is objectionable. The ability to refuse consent is therefore extended to cover cases where, despite making reasonable inquiries, OSCR is unable to satisfy itself that the proposed new name is not objectionable.

143. Finally, sub-paragraph (2)(d) recognises that in reality a charity may apply to use a particular name but then decide to opt for something else (either because the charity trustees change their minds themselves, or because OSCR indicates that consent is likely to be refused but that a slight variant on the proposed name would be acceptable). A new subsection is therefore inserted into section 11 of the 2005 Act which allows OSCR, at the request of a charity, to grant consent to a different proposed name.

Paragraph 5 – Oversight in relation to working names

144. A charity's official name is subject to oversight in a number of ways—

- its name is considered as part of the process of applying for charitable status and an application must be refused if the name is objectionable (section 5(2)(a) of the 2005 Act),
- if OSCR later concludes that the charity's name is objectionable, it must direct the charity to change the name (section 12 of the 2005 Act),
- where a charity wishes to change its name, either voluntarily or following a direction, OSCR's permission must be obtained and can be refused where the name is objectionable (section 11 of the 2005 Act).

145. In all cases, the test as to what is objectionable is the same (see paragraph 138).

146. In addition to an official name, some charities also have one or more working names by which they are known. For example, the Earl Haig Fund (Scotland) (charity number SC014096) is known as Poppyscotland, while Charity Projects (charity numbers 326568 and SC039730) is known as Comic Relief. This differs from the situation where a specific project run by a charity is known by a particular name (for example, Sport Relief is an event run by Comic Relief).

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147. The 2005 Act does not currently regulate working names (although, under the Charities References in Documents (Scotland) Regulations 2007 (SSI 2007/203), charities other than SCIOs are required to include on various documents both their name and any other name by which they are commonly known).

148. This paragraph of the Bill introduces the ability for OSCR to exercise a degree of oversight of working names. This applies in two different ways.

149. First, the existing rule in section 10 of the 2005 Act on what is objectionable as an official name is extended so that it also covers a charity's official name being the same as, or too similar to, another charity's working name. This would mean that, for example, if a prospective charity applied to use the name Poppyscotland, that could be denied on the basis of the existing use of that as a working name for a charity. However, the onus is not put on OSCR to investigate working names. For example, if OSCR is processing an application for charitable status, it is not expected to spend time searching for charities which might have that working name already without OSCR being aware of that use. There is no obligation on charities to register their working names and OSCR cannot check these in the same way as it can check official names.

150. In consequence of this extension, the existing ability which a charity has under section 12 of the 2005 Act to complain about another charity's name is extended to cover another charity's working name being the same as, or too like, that charity's official name. Further, this right of objection is also expanded to allow a charity to complain about a clash between its own and another charity's working names.

151. The outcomes available to OSCR on such a complaint being made are extended accordingly to accommodate the fact that the outcome could be to direct that the charity's working name stop being used. The position is as follows—

- Where the complaint relates to a clash between two official names, the position is unchanged. If the objection is upheld then OSCR must act and either one or both charities will be directed to change name.
- Where the complaint relates to a clash between two working names, if the objection is upheld then OSCR may (but does not have to) act. If it does act, either one or both charities could be directed to stop using that working name.
- Where the complaint relates to a clash between an official name and a working name, if the objection is upheld then OSCR may (but does not have to) act. If it does act, it could act by directing that the official name be changed or that the working name stops being used (or both).

152. Second, a new standalone power is granted to OSCR to issue a direction to a charity in relation to its use of a working name. This power (found at inserted section 12(3)(b)) is similar to the existing power in relation to official names (restated at inserted section 12(3)(a)). However, in contrast with section 5 of the 2005 Act, this power to take action in response to a charity's working name does not apply at the application stage, so a proposed charity's application for charitable status will not be affected by any

working name it intends to use. But, once registered, OSCR will be empowered to direct the charity to stop using a working name if that working name is objectionable. For these purposes, the test of what is objectionable is the same as it is for official names.

153. A direction to stop using a working name must specify a period within which it is to be implemented. A direction to a charity to stop using a working name could be implemented by the charity changing to a different working name or ceasing to use a working name altogether. If the charity opts to change to a different working name, there is no approval process in respect of the new working name but if the replacement is also objectionable then it could be the subject of a separate direction.

154. As a result of these changes, section 12 will now deal with directions to stop using a working name as well as directions to change an official name. Provision is therefore made under which any direction under section 12 can be revoked or varied by extending the period specified in it. In the case of a direction to stop using a working name, that means the period within which the charity is to stop using it. In the case of a direction to change name, that means the period referred to in section 12(4) of the 2005 Act – i.e. the period within which the charity must give notice of its proposed new name.

155. Changes are also made by the Bill to sections 12(4) and 12(5) of the 2005 Act in order to confine those provisions to directions to change name (i.e. directions under section 12(2), (2A)(a) or (3)(a)). Section 12(4) is not relevant to a direction to stop using a working name because, as noted at paragraph 153, there is no approval process in relation to the adoption of a new working name. Section 12(5) is not relevant to a direction to stop using a working name because just as a charity's working name is not a bar to it being entered onto the Register, nor will it put a charity at risk of removal from the Register. However, failure to comply with a direction to stop using a working name would, as with failure to comply with any other direction, be misconduct in the administration of the charity under section 66(4) of the 2005 Act. It could lead to OSCR initiating an inquiry into the charity under section 28 of the 2005 Act.

156. By dint of the changes made to section 71 of the 2005 Act, the decision to issue a direction under new subsection (2A) will be subject to the 2005 Act's normal review processes. The issuing of a direction under subsection (3) is already subject to those review processes and this will cover the expansion of that provision. In the event of the issuing of a direction of any kind under section 12, the charity will be given notice of the decision to issue a direction and the decision will be suspended until both the notice has been given and either any appeal process has been exhausted or the period during which OSCR can be required to carry out a review passes without a review being requested.

157. Finally, a consequential modification is made to section 3 of the 2005 Act so that the issuing of any direction under section 12 continues to be flagged on a charity's Register entry.

Paragraph 5A – Giving notice to OSCR: removal of 42 day rule

158. Currently, charities cannot change name or take certain other actions without OSCR's consent (either deemed or actual). They must also give notice of their wish to take such an action 42 days in advance.

159. This paragraph of the Bill changes that by removing the need for that notice to be given to OSCR 42 days in advance. It will still be the case that the charity will be unable to proceed until consent is granted. However, once consent is granted, the charity will be able to act on that straight away if it wishes to rather than having to wait till the end of the 42 day period.

Paragraph 6 – Consent to and notification of changes

160. Section 16 of the 2005 Act sets out various actions which may be taken by charities only with OSCR's consent. This includes, for example, a charity amending its charitable purposes under its constitution or winding itself up (in each case, where its constitution permits this and a reorganisation scheme is not required).

161. Section 16(3) provides that the requirement to obtain OSCR's consent does not apply where an action is taken in pursuance of a reorganisation scheme which OSCR has already approved or where OSCR's consent is already required under another enactment. This avoids a charity being required to obtain OSCR's consent twice.

162. However, section 16(4) sets out that notice must be given before the action is taken. Although the notice is essentially the application for consent, no exception to this notice requirement is currently made for charities which do not actually need to seek consent on the basis that they are already suitably covered by another consent rule.

163. Sub-paragraph (2) of this paragraph of the Bill's schedule therefore adjusts section 16(4) to state that notice does not need to be given if OSCR's consent is not required under subsection (1) (that is, because OSCR's consent is secured under another rule).

164. Meanwhile, in addition to the requirement to obtain consent under section 16, section 17 of the 2005 Act sets out various changes which must be notified to OSCR. This includes, for example, a change in the charity's principal office or in any of its other details in the Register, a change of any nature to its constitution, or the charity winding itself up.

165. Currently, the interaction between sections 16 and 17 is not clear. Where a charity has obtained consent to take an action under section 16 and then subsequently takes it, sections 17(1)(c) and (d) provide that OSCR is to be given notice of that happening. However, section 17(2) states that section 17(1) does not apply in relation to any action which requires OSCR's consent. This would seem to negate the inclusion of section 17(1)(d) in particular.

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166. Sub-paragraph (3) of this paragraph of the Bill's schedule resolves this clash by inserting a new section 17(2) which no longer purports to disapply section 17(1) but instead clarifies that, in the case of paragraphs (c) and (d), the notification rule remains subject to section 16. As such, a charity which, for example, wishes to wind itself up will need to obtain consent to do so under section 16 and then, once it has acted on the consent, notify OSCR under section 17 that it proceeded with that course of action.

167. Sub-paragraph (4) adjusts the heading of section 17 of the 2005 Act so that this becomes "Notification of changes" to make the current position clearer, which is that changes made in implement of consent granted under section 16 still have to be notified to OSCR under section 17 when made.

Paragraph 7 – Removal from register: protection of assets

168. Section 19 (removal from register: protection of assets) of the 2005 Act provides that even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively "locked" for charitable uses. It has widely been taken as read that the assets must also be used for public benefit, in order to meet both pillars of the charity test (see section 7(1) of the 2005 Act). In practice, former charities are likely to continue to apply their pre-removal assets in a way which does provide such public benefit since, on the face of it, they are under a continuing obligation to apply such assets in the same way as if it were still a charity. However, section 19(1) refers only to assets being applied "in accordance with [the charity's] purposes as set out in its entry in the Register immediately before its removal" so does not in terms restrict their use of the assets to charitable purposes which give rise to the provision of public as opposed to private gain. It is assumed that permitting former charities to use their assets in this way was not an intended policy intention of the 2005 Act.

169. This paragraph of the Bill's schedule makes technical changes to section 19 in order to remove any ambiguity about what former charities are able to do with their assets, so that it aligns with the charity test. Subsection (1) is substituted by 2 new subsections ((1) and (1A)), which reworks the provision to provide, in addition to existing the requirements, that former charities must apply those assets for public benefit in Scotland or elsewhere. Subsections (1B) to (1D) make provision about what is meant by public benefit for the purposes of this section, by essentially replicating section 8(1) (public benefit) of the 2005 Act in subsection (1B) and applying section 8(2) for the purpose of determining whether a body is applying its protected charitable assets for public benefit in subsections (1C) and (1D). No changes are made to what is meant by "public benefit" in either the context of registered charities or former charities.

Paragraph 8 – Provision of documents: period for compliance

170. Section 23 of the 2005 Act imposes an obligation on charities to provide a copy of their constitution and latest statement of account to any person who reasonably requests it, and the documents must be supplied in such form as the person reasonably requests. Charities can charge a fee for complying with this obligation, but that fee is capped at the cost of supplying the document or, if lower, any maximum fee set by the

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Scottish Ministers by order. This obligation to supply these documents when reasonably requested is subject to a possible exception: the Scottish Ministers can under subsection (3) make an order exempting charities which meet particular criteria. However, to date no such order has been made.

171. There is currently no provision as to how quickly a request under section 23 of the 2005 Act has to be dealt with. This paragraph of the Bill changes that, specifying that if someone has a right to receive the document, they have the right to be given it within 28 days of the date on which the charity receives the request. As such, it does not change who is entitled to request a document or when a request might be unreasonable; it simply imposes a timescale. The existing right to be given the documents in the form that the person reasonably requests is moved and restated as part of the new subsection, but is unchanged.

Paragraph 8A – Disclosure of information by and to OSCR: a designated religious charity

172. Section 65 of the 2005 Act allows OSCR to designate a charity that meets certain criteria as a designated religious charity (“DRC”). DRCs are exempt from some of the provisions in the 2005 Act in recognition of the fact that many religious bodies operate effective self-regulatory mechanisms by having an internal organisation with supervisory and disciplinary functions and therefore should not be over-regulated. As such, DRCs hold some regulatory responsibilities that are usually held by OSCR, and certain of OSCR’s regulatory functions do not apply in relation to DRCs, or to any component element of a DRC which is itself a charity. For example, the Church of Scotland is the DRC, and each congregation within the Church of Scotland that is registered as a standalone charity is a ‘component’ part or element of the DRC.

173. This paragraph inserts a new section 24A into the 2005 Act, which would assist both OSCR in the exercise of its functions and DRCs in relation to the exercise of the supervisory and disciplinary functions which exist in respect of their component parts. It does this by enabling OSCR and DRCs to share information with each other for these purposes.

174. This new information-sharing power could be used where OSCR holds information in relation to a component part of a DRC that should be shared with the DRC (for example, information received from an auditor or independent examiner in their report on a charity’s accounts). At present, OSCR is unable to disclose this information to the relevant DRC, which in turn is then unable to fulfil its regulatory functions. This modification would rectify this.

175. Paragraph 8A also modifies section 25(1) of the 2005 Act which further ensures that any restrictions on disclosure of information (such as the restriction in section 29(4) of the 2005 Act preventing OSCR from disclosing information obtained in the course of its inquiries) do not prevent OSCR or DRCs from sharing information with each other for these purposes.

Paragraph 9 – Retention of accounting records

176. Section 44 of the 2005 Act requires charities to keep proper accounting records.

177. At present, these records must be kept for 6 years from the end of the financial year in which they are made. However, it is possible that the preparation of records could span two financial years (for example, where preparation of the records begins during the financial year to which they relate, but is completed after the end of that financial year). In such a case, it may become difficult to establish the period for which those records are to be kept. Even where the preparation of the records did not span more than one financial year, information to this effect would need to be retained so that it was clear when the records could be disposed of.

178. In addition, the present requirement to keep financial records for the specified period applies only to charities. No provision is made about former charities – for example, bodies which have ceased to be charities or those which have wound up altogether.

179. Sub-paragraph (2) of this paragraph of the Bill's schedule therefore adjusts the rule found in section 44(2) of the 2005 Act so that financial records will now instead have to be kept for 6 years from the end of the financial year to which they relate (regardless of when the records themselves were prepared).

180. In addition, sub-paragraph (3) of this paragraph of the Bill's schedule inserts a new rule which provides that where the charity ceases to be a charity before the end of the retention period, the records must be held for the remainder of that period by someone else. This obligation is imposed as follows—

- Where the body continues to exist without charitable status, it will be the body itself which must retain the records.
- Where the body no longer exists, the records must be retained (where applicable) by someone who is notified to OSCR and who was its charity trustee immediately prior to the body ceasing to exist. This means that the body will need to notify OSCR of who this person is (and update OSCR if that changes). This will only apply in a situation where the charity was removed from the Register as a result of being wound up or dissolved etc. If the body continued to exist as a non-charitable body, nobody will have been a charity trustee of it immediately before it ceased to exist.
- Where the body no longer exists and was not on the Register at the point of ceasing to exist, the records must be retained by someone notified to OSCR who was concerned in its management or control immediately prior to it ceasing to exist (for example, in the case of a company, one of its directors). Again, there is an implicit duty on the body to notify OSCR as to who is nominated to hold the accounts.

Paragraph 10 – Ability to appoint person to prepare statement of account

181. Section 45 of the 2005 Act provides a mechanism designed to ensure the preparation of charity accounts in a situation where a charity has failed to prepare these itself as required. In such cases, OSCR is permitted to appoint a suitably qualified person to prepare the accounts at the expense of the charity's charity trustees.

182. This paragraph of the Bill's schedule makes a minor, technical change to subsection (1), which sets out when the ability to use this power applies. At present, this subsection states that the section applies where a charity fails to send a copy of its accounts to OSCR by the deadline for doing so. This would theoretically cover a scenario where accounts had been submitted, but had been submitted late. While there would be no reason for OSCR to instruct the preparation of accounts where they had already been submitted, this paragraph narrows the language to match new section 45A(1) (inserted by section 11). This provides instead that the section applies where the charity has failed to submit its accounts and the deadline for doing so has passed.

Paragraph 11 – Reports from auditors etc.

183. Charities are required under section 44(1)(c) of the 2005 Act to have their annual statements of account independently examined or audited.

184. Section 46 of the 2005 Act deals with the position where the person appointed as independent examiner or auditor becomes aware of certain things in the course of that examination or audit. The person must immediately report to OSCR on any matter relating to the affairs of the charity or a connected body which the person has reasonable cause to believe is likely to be of material significance for the purposes of OSCR's exercise of its inquiry-related powers. Where that threshold is not met but the person has reasonable cause to believe that the matter is likely to be relevant for the exercise of any of OSCR's functions, there is a power (but no duty) to report on the matter to OSCR.

185. This paragraph of the Bill's schedule modifies the duty which exists under section 46(2) – i.e. where the matter which arisen is thought to be of material significance for the purposes of OSCR's inquiry-related powers. It ensures that the independent examiner or auditor is not just obliged to report immediately to OSCR on the matter, but obliged to do so in writing.

Paragraph 12 – Annual returns

186. Currently, all charities in Scotland are asked to complete an annual return. This is used by OSCR to monitor charities' activities and to provide up-to-date information for the public via the Register. However, there is no statutory requirement to complete an annual return: it is done voluntarily or on the understanding that otherwise a notice will be issued under section 22 of the 2005 Act requiring the information requested in the return.

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187. This paragraph of the Bill's schedule introduces a statutory requirement for all charities on the Register to complete an annual return. Under section 66(4) of the 2005 Act, failure to do so will be treated as misconduct in the administration of the charity. It could lead to OSCR making inquiries into the suitability of the charity trustees under section 28 of the 2005 Act.

188. It will be for OSCR to determine the form and content of the annual return. At present, the level of detail required depends on a charity's gross income: additional questions are asked for charities where this is £25,000 or above, and further questions still are asked for charities where this is £250,000 or above. There are also extra questions which are asked of cross-border charities or registered social landlords. OSCR will continue to be able to vary the form and content for different types of charities in the same way it does at present. However, OSCR will have to publicise the requirements that it imposes so that charities know what is required of them.

189. Charities will be required to submit the annual return to OSCR by the date its statement of account for the financial year is due each year. At present, the deadline for the submission of accounts is set in regulation 5 of the Charities Accounts (Scotland) Regulations 2006 (SSI 218/2006). This is currently set at 9 months after the end of the charity's financial year in most cases. Where a charity is removed from the Register, this is set as 9 months from the date of that removal, but that will not be relevant for the purpose of this provision as former charities are not charities and so will not be required to submit an annual return under this provision.

Paragraph 13 – SCIO documents

190. Section 15 of the 2005 Act allows the Scottish Ministers to make regulations imposing requirements on Scottish charities about the information that they must disclose on such documents as are specified in the regulations. This power has been used to impose requirements under the Charities References in Documents (Scotland) Regulations 2007 (SSI 2007/203). Under these, a charity is required to state its charity number, official name, any other name by which it is commonly known and, where its name does not include "charity" or "charitable", to state that it is a charity using one of a number of designated terms. This rule applies to a whole host of documents issued or signed on the charity's behalf – including business letters and emails, adverts, any document soliciting donations for the charity, contracts, and the home page of the charity's website.

191. However, under section 52(4) of the 2005 Act, these rules do not apply to SCIOs. Instead, SCIOs are subject to their own rules. Under section 52 of the 2005 Act, a SCIO is required to state its name and, if it is not already clear from its name, the fact that it is a SCIO. This must be done on such documents as are specified in regulations. Regulation 9 of the Scottish Charitable Incorporated Organisations Regulations 2011 (SSI 2011/44) currently specifies the same list of documents as applies under section 15 of the 2005 Act. There is, though, presently no ability to expand the information which must be included.

192. This paragraph of the Bill's schedule expands the regulation-making power which relates to SCIOs. This expansion means that, like other charities, they can be required to provide further information (beyond just their name and their SCIO status) on any specified documents. This would allow, for example, SCIOs to be required to provide their charity numbers (or any working name they use) in the same way as any other charities. As with section 15 of the 2005 Act, there is also an ability to create exemptions or to allow certain things to be stated in a language other than English where the documents in question are otherwise wholly or mainly in another language.

193. Breach of the current requirement that a SCIO states its name and SCIO status on specified documents can be a criminal offence (see section 53(1) of the 2005 Act). This is because it is important for those dealing with a SCIO to know what legal form it takes, since its limited liability status may have implications for those dealing with it. Since the additional information which may be required under regulations is not of the same nature, the offence is not extended to it. However, failure to comply with the new requirements will, as with a failure to comply with requirements imposed on other charities under section 15, constitute misconduct in the administration of the charity under section 66(4) of the 2005 Act.

Paragraph 13A – Conversion of charity which is a company or registered society

194. This paragraph makes a minor modification to section 56 of the 2005 Act. It modifies the heading of section 56 of the 2005 Act to remove an erroneous reference to a registered friendly society, instead of just a registered society, and removes an incorrect reference number for the legislation referred to in that section.

Paragraph 14 – Existing powers to make secondary legislation

195. There are a number of existing powers to make secondary legislation in the 2005 Act.

196. Sub-paragraph (2) of this paragraph of the Bill's schedule ensures that the existing power to make regulations about SCIOs under section 64 of the 2005 Act can be exercised by textually amending the 2005 Act itself. This will allow signposting to regulations, similar to inserted section 45A(6) (inserted by section 11 of the Bill), to be added at other places in the 2005 Act where it might otherwise appear from the face of the 2005 Act that a rule applies to all charities when in fact, because of their unique nature, rules are sometimes applied with slight modifications for SCIOs. Sub-paragraph (3)(c) provides that where the power is exercised in a way that textually amends the 2005 Act, it will be subject to the affirmative procedure.

197. Sub-paragraphs (3) and (4)(a) of this paragraph of the Bill's schedule extend slightly the existing ability to make ancillary provision which is found in section 102 of the 2005 Act. It is extended to ensure that the power can be exercised not just for the purposes of or in consequence of this Act, but also any orders or regulations made

under it. Clarification is also added that the power to modify any enactment includes the 2005 Act itself.

198. Sub-paragraph (4)(b) of this paragraph of the Bill's schedule tidies up the existing provision that is made in the 2005 Act about whether regulations and orders are subject to the affirmative or the negative procedure. It does not make any change to the split of powers and procedure which is currently provided for in the 2005 Act. It simply avoids the need to restate the list of powers each time when saying that those powers that are not subject to the affirmative procedure are instead subject to the negative procedure (other than commencement orders which continue, as standard, to be subject only to a laying requirement).

Paragraph 15 – Trustee remuneration

199. Sections 67 and 68 of the 2005 Act deal with remuneration (i.e. payment) of charity trustees. In general, section 67 provides that where a charity trustee provides services or might benefit from remuneration paid to a connected person (such as the trustee's spouse) for their services, remuneration can only be paid from the charity's funds if various conditions are met.

200. Sub-paragraph (2)(a) of this paragraph of the Bill's schedule makes an initial adjustment to when the remuneration rules apply. Instead of applying where a charity trustee provides services or might benefit from remuneration paid to a connected person, the rules will apply where a charity trustee provides services or is connected with a person who provides services. That is, the concept of whether the charity trustee might benefit from the remuneration paid to the connected person is removed and is replaced instead with a straightforward test based on whether or not there is a connection. This mirrors the approach taken in section 69(4)(c) of the 2005 Act where the question is simply the existence of the connection without needing to second-guess whether the person "might" benefit as a result. In practice, the concept of when someone "might benefit" has been construed so widely that it is not expected that this will result in any different conclusions being reached.

201. Sub-paragraph (2)(b) of this paragraph of the Bill's schedule then makes an adjustment to section 67(4)(c) of the 2005 Act. As noted above, where the remuneration rules apply, remuneration can only be paid from the charity's funds if various conditions are met. One of these conditions is that immediately after entering into an agreement about the provision of those services, fewer than half of the charity trustees are—

- party to such a service agreement,
- otherwise entitled to receive remuneration from the charity, or
- connected with another charity trustee who falls within either of the bullet points above.

202. As such, the overarching rules apply where a charity trustee is connected to someone who is receiving remuneration but is not themselves a charity trustee (for example, where a trustee's spouse is paid for providing advertising services to the

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charity). However, the condition set out above would not be concerned with such a payment because the spouse is not themselves a charity trustee of the charity.

203. Sub-paragraph (2)(b) of this paragraph of the Bill's schedule addresses this by changing the final bullet point to instead cover a charity trustee who is connected with anyone (whether another trustee or not) who is party to a service agreement or otherwise entitled to receive remuneration from the charity. In the example above, this would mean that the charity trustee whose spouse received remuneration would be counted as a remunerated trustee for the purposes of the rule requiring fewer than half of the trustees to have a financial interest in the charity's affairs, despite the spouse not being a trustee themselves. As such, if the charity had only three charity trustees, no other charity trustees could be remunerated or connected with remunerated persons (as if two of the three trustees fell into that category then that would constitute 67% of the charity trustees and the line is set at needing to be below 50%).

204. Separately, sub-paragraph (3) of this paragraph of the Bill's schedule makes a minor change to correct a missed consequential during the passage of the 2005 Act. Section 68(2) of the 2005 Act defines who counts as a "connected person" for the purpose of the trustee remuneration rules. Under paragraph (b), this includes certain relatives of a charity trustee, as well as any spouse of such a relative. This is now adjusted to also include the civil partner of such a relative.

Paragraph 16 – Notices

205. Section 100 of the 2005 Act deals with the service of formal communications. This primarily covers certain communications which OSCR and a charity it regulates will have with each other. Subsection (4) provides for a number of ways by which a formal communication can be given. However, in relation to service by post on a charity, it is limited to service at the address set out for the charity in its Register entry.

206. This paragraph of the Bill's schedule expands what is allowed. Where OSCR has cause to believe that using this address will not cause the formal communication to be received (for example, because a previous formal communication has been returned as undeliverable), subsection (5B) provides that the communication may also be sent to a different address which OSCR considers is likely to cause the communication to be received by the charity or a charity trustee. That is, OSCR continues to have the option of using, for example, email communication instead under subsection (4)(c), and subsection (5B) is simply providing an additional option which OSCR may also use. However, where subsection (5B) is used, that is sufficient on its own to effect service – it does not need to be done in addition to a method set out in subsection (4).

207. In practice, it is likely that the schedule of trustees provided for by section 3 of the Bill will include charity trustees' addresses and this will probably be the first port of call for OSCR when OSCR has reason to believe that the charity has moved principal office without giving notice of this as required under section 17 of the 2005 Act. However, it would also be open to OSCR to use, for example, an address which appears from internet searches or other investigations to be the address from which the charity is now

opening. It remains the case though that registered or recorded delivery mail has to be used though.

208. The means of serving a notice by OSCR are further expanded for certain notices. This applies where OSCR has reason to believe that service by post will not work (for example, because OSCR has previously tried to post things to the address on the Register/its internal schedule of trustees and things have been returned as undeliverable), and OSCR considers that, based on the contact details it has, it is not reasonably practicable to serve the notice in person or by some other means such as email (for example, because OSCR does not hold an email address for the charity/trustees at all or because any emails sent are returned as undeliverable). In such cases, OSCR will be able to serve specified notices by such means as it considers appropriate. This could be done by publishing the notice on OSCR's website or by publishing it in a newspaper. This applies to the following notices—

- notice to a charity under section 45A(2) that OSCR intends to remove it from the Register for failure to submit accounts and failing to respond to OSCR's communications about that failure,
- notice to a charity that, having had no response from it in 3 months following the notice above, OSCR intends to proceed with removing the charity from the Register under section 45A(3),
- notice to a charity/body that a third party must provide information under section 29(1) for an inquiry into the charity/body,
- notice to a charity/body that a financial institution etc. is being directed not to part with the organisation's property under section 31(7) or (9) without OSCR's consent,
- notice to charity trustees that OSCR intends to appoint an interim trustee under section 70A(1) or (2)(c).

209. All of these notices concern cases where the action being taken is one which it would still be appropriate to take even if the charity/body itself cannot be contacted directly. The provision is aimed at ensuring that OSCR is not prevented from taking action (for example to protect charitable property) in such circumstances. The provision ensures that efforts are made to bring it to the attention of the charity/ body to the extent possible.

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Revised Explanatory Notes

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