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The Charities (Regulation and Administration) (Scotland) Act 2023

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Introduction

The Charities (Regulation and Administration) (Scotland) Act 2023 (the 2023 Act) was unanimously passed by the Scottish Parliament on 28 June. Likely to be brought into force in the first half of 2024, it will make a number of meaningful changes to charity law and the related regulatory regime. It will do so by amending the central piece of legislation in the area: the Charities and Trustee Investment (Scotland) Act 2005 (2005 Act). The 2005 Act itself made significant changes to the law that governed Scottish charities. That Act, like the current reforms, resulted from a series of consultations prompted by a general consensus that the then-existing system of charity regulation under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 was deficient.

Leading to the 2023 Act was an Office of the Scottish Charity Regulator (OSCR) paper to Scottish Ministers in 2018, titled [A Proposal for Modernisation of the Charities and Trustee Investment \(Scotland\) Act 2005](#), a 12-week [Consultation on Scottish Charity Law](#) in 2019 and a further consultation, [Strengthening Scottish Charity Law](#), in 2021. These reports and consultations culminated in the 2023 Act. It was largely designed to strengthen and update the existing legislative framework of charities registered in Scotland without altering the fundamental principles underpinning the 2005 Act.

The 2023 Act's Policy Memorandum and the Explanatory Notes provide that its objectives are to modernise Scottish charity legislation, enhance the openness and accountability of charitable organisations, strengthen the regulatory authority of OSCR, and align Scottish charity law with certain aspects of charity regulation in England and Wales and Northern Ireland. More generally, the new legislation aims to ensure that Scottish charity law aligns with the specific needs of charitable organisations in Scotland and to enable OSCR to regulate optimally and effectively. In sum, the changes seek to make Scotland's charity framework more transparent and rigorous.

The Changes

Transparency is affected through new requirements on OSCR, under s.2 and s.7 of the 2023 Act, to include the names of charity trustees on the Scottish Charity Register and to create a publicly searchable record of removed charity trustees. Previously, under s.3 of the 2005 Act, only the name of the charity, its principal office and charitable purposes were included in the Register. OSCR will be responsible for managing both an internal database containing trustee contact information as well as maintaining a publicly accessible register. The latter, under s.7(3), will include individuals that the Court of Session has disqualified from participating in the management or control of any organisation. There are limited exceptions to this, based upon safety or security considerations for individuals and/or properties.

Also enhancing transparency is a new requirement on OSCR to make available to the public the statements of account for all charities included within the Scottish Charity Register, under s.10. Presently, only copies of the statements of account for charities that have an annual income of more than £25,000 and those of Scottish Charitable Incorporated Organisations (SCIOs) are published, pursuant to paragraph 7(2) of OSCR's Guide to Charity Accounting 2019. The approach taken in the amended legislation will ensure that the statements of account sent to OSCR are easily accessible in the Register by anyone wishing to access them. The law allows applications for dispensation from including the names of charity trustees in the statements of account. This attempts to balance the need to safeguard individuals with the overarching public interest in charity accounts being accessible.

Related to the rigour of charity law in Scotland are changes to the recording of charity mergers and the treatment of legacies. Under the 2005 Act legacies bequeathed to a particular charity could be lost when it was wound up. This could arise where a will did not include a provision stipulating that if a charitable organisation ceases to exist before the testator's death the legacy shall be redirected to a successor charitable organisation. To prevent losses it has been common practice to maintain a shell charity with the purpose of preserving and transferring potential legacies. The new legislation eliminates this need. Section 64D(2) of the 2005 Act allows for the inclusion of the impact of a merger in the record of charitable mergers. Accordingly, where a merger is documented prior to the charity having obtained a vested right in the legacy the transferee charity

resulting from the merger is entitled to receive the legacy unless the testator explicitly expressed their intention to prevent such an outcome.

Also enhancing the rigour of the law are the provisions relating to the removal of charities from the Register. Section 45A of the 2005 Act expands the grounds upon which OSCR can remove charities. The existing grounds were, under s.18 of the 2005 Act, where the charity has applied to be removed and, under s.30, where it appears to OSCR that the charity no longer meets the charity test. Added are the grounds of non-compliance with the submission of annual reports and the failure to acknowledge correspondence from, or general non-engagement with, OSCR. This enhanced power may have a notable effect. As the Policy Memorandum to the 2023 Act notes, there are charitable organisations listed on the Register that lack current financial statements, with some having never filed. It states that as of 29 September 2022, 2,849 charities, or 11% of the overall 25,445 charities, have been identified as defaulting. If exercised, this process will undoubtedly improve the accuracy and reliability of the Register.

The rules governing the disqualification of trustees and key management personnel have also been amended by the 2023 Act. Again, this strengthens the law. Under s.69 of the 2005 Act automatic disqualification was limited to persons being convicted of an offence involving dishonesty and an offence under the 2005 Act, an undischarged bankrupt, or a person who has been removed by the Charity Commission or the courts in England on the grounds of misconduct or has been removed as a director under the Company Directors Disqualification Act 1986. Section 4 of the 2023 Act adds s.69A to the 2005 Act. It includes bribery and proceeds of crime offences and certain terrorism offences. The 2005 Act also now disqualifies from being a trustee, *inter alia*, individuals subject to the notification requirements of Part 2 of the Sexual Offences Act 2003. The amended s.69 also prevents persons barred from serving as a charity trustee from undertaking any other senior management roles within the charity.

An amendment to the 2005 Act of a different nature but also affecting the rigour of the law is the new s.30A, which requires that charities regulated by OSCR be linked to Scotland. This requires all such charities to have a sufficient connection to Scotland, with the consequence of the regulatory regime being more immediate. Previously, registered charity status in Scotland only required that an

organisation possess exclusively charitable objectives and demonstrate public benefit. However, with the exception of Scottish Charitable Incorporated Organisations (SCIOs), there was no requirement for an affiliation or connection with Scotland. With the changes, OSCR is required to ensure that all charities listed in the Register possess and maintain a connection to Scotland. Amended s.30A(2) of the 2005 Act requires OSCR to instruct a charity with no connection to Scotland to undertake specific actions within a designated timeframe such that a meaningful connection to Scotland is established. Failure to do so may result in removal from the Register. It is important to note the connection to Scotland requirement will not necessarily affect the geographic location of a charity's operations. This is because the relevant factors determining a sufficient connection, under s.30A(5), include the situs of its principal office, its occupation of land or premises, the carrying out of activity in any location in Scotland, its establishment under the law of Scotland and the residence of persons concerned with its management or control.

There are a number of other amendments to the 2005 Act that should positively change charity law in Scotland. These include empowering OSCR to select trustees to assume temporary positions in certain circumstances and to issue positive directions. As to the latter, a new s.30B gives OSCR the power to provide directions to charity trustees for specific activities under predefined circumstances. This is distinct from the pre-existing power granted to OSCR under s.31(5), conferring the ability to issue negative directives.

It is noteworthy to mention that certain anticipated changes to the law were not included in the 2023 Act. These include clarification of the criteria that determine charitable status, the streamlining of the process of converting unincorporated charities into Scottish Charitable Incorporated Organisations, and the implementation of a statutory regime for reporting notifiable events (viz. occurrences that exert a substantial impact on the charity, such as a substantial financial loss). It is likely that these issues will be subject to consultation in the future, with amendments to the law thereafter.

Changes in England and Wales

In contrast to Scotland, where the 2023 Act will increase transparency and rigour, England and Wales' Charities Act 2022 (2022 Act) moves in the direction of

deregulation and the enhancement of the power of charities. For example, the 2022 Act gives charities more scope to revise their governing documents. It also gives them more leeway in deciding how to procure goods and services and empowers charities to make ex gratia payments. The 2022 Act further introduces a streamlined framework for the acquisition, transfer, rental, and encumbrance of land by charitable organisations, with the goal of reducing administrative complexities and burdens. As a result, charitable organisations south of the border can function more independently, in certain cases relying on internal governance mechanisms rather than an external regulatory framework.

The changes in England and Wales have the potential to reduce administrative burdens on charitable organisations. Smaller charities, in particular, stand to benefit as they may lack the resources to effectively adhere to a complex regulatory framework. As a result, they may be able to devote a greater amount of time and effort to their primary charitable activities. Further, fewer regulatory constraints may also pave the way for more individuals to volunteer as trustees. Overall, the changes made by the Charities Act 2022 could have a positive impact on the sector's effectiveness in England and Wales.

Conclusion

The amendments to the 2005 Act are set to enhance the transparency of charitable organisations and the rigour of their regulation. They will ensure that the financial position of charities is public and that they are held accountable for their actions. This is important in the maintenance of public trust in the sector. It comes with a cost, however, for both charities and the regulator. An ideal approach strikes a balance between making the activities of charitable organisations transparent and holding them accountable on the one hand and granting them the autonomy and adaptability needed to fulfil their objectives effectively and efficiently on the other. Only time will tell whether the amendments affected by the 2023 Act deliver such a system of charity regulation or whether the approach taken in England and Wales strikes a preferable balance.