FACULTY RESPONSE

TO

PROPOSED

CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL

1. What are your views on the Scottish Government's consultation and engagement process leading to the Bill?

The Faculty notes the summary of the extensive consultation process: see Charities (Regulation and Administration) Scotland Bill Policy Memorandum (hereinafter "Policy Memorandum (2022)", especially paragraphs 9-12.

It is apparent to the Faculty that the Scottish Government has engaged with government agencies, charities, social enterprises, practitioners and other stakeholders in a variety of ways.

The Policy Memorandum (2022) provides some detail of the responses received: see Policy Memorandum (2022) paras. 9-11.

The Policy Memorandum (2022) also indicates levels of support (para. 12).

Some consultees indicated that it was desirable to have a broader review of Scottish charity law: see Policy Memorandum (2022) para. 12.

In places, the Policy Memorandum (2022) notes that some of those consulted have suggested ideas which do not exactly match those of the Scottish Government proposals: see, for example, Policy Memorandum (2022) paras. 31 and following, which is concerned with consultation over a public register of charity trustees and the different reactions this prompted from consultees.

The Government has also carried out impact assessments.

In the circumstances, the Faculty considers that the consultation and engagement process was extensive, albeit not exhaustive.

The Faculty understands that the principal "strands" of law reform which were identified through the consultation process as especially important were:

- Promoting greater transparency and accountability in Scottish charities: see Analysis of Responses on Strengthening Scottish Charity Law: Final Report June 2021, heading Strand A.

- Increased regulatory powers for OSCR: see Analysis of Responses on Strengthening Scottish Charity Law: Final Report June 2021, heading Strand B.

- "Streamlining operations and introducing efficiencies": see **Scottish charity law: consultation analysis** Published **2 July 2019** ISBN **9781787819801 p. 17** and the reference to "A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005" (09.03.2018).

- "Bringing Scottish charity legislation up to date with certain key aspects of charity regulation in England, Wales and Northern Ireland.": see recent Scottish Government documents, including the Financial Memorandum accompanying the Bill para. 9.

- "… ambiguity and uncertainty linked to current legislation with regards to "reorganisation schemes": see **Scottish charity law: consultation analysis** Published **2 July 2019** ISBN **9781787819801 p. 17**

The Bill's policy objectives appear broadly in line with the aforesaid principal "strands" of law reform: see Policy Memorandum (2022) para. 13, including its most helpful table showing the proposed changes to the law, in the paragraphs in the Policy Memorandum (2022) where the matter is discussed and the proposed section / clause in the Bill.

2. How has the charity sector changed since 2005, and why is an update or strengthening of legislation needed?

Contextual Issues

The Faculty is conscious of the importance of the context in which charities operate.

Whilst not matters upon which the Faculty has particular expertise, the Faculty's *impressions* of this context include the following developments:

- There are now more charities with large turnovers than there were in 2005, that is to say turnovers in excess of £1m per year. However, there remain many small charities. One of the challenges facing the Scottish Government is to ensure a regulatory regime suitable for charities of different sizes.

- The mix of funding may have changed.

    1. Scottish Government funding of the Third Sector is important to some charities.

    https://www.gov.scot/policies/third-sector/charities/

    2. The Big Lottery Fund is also important.

    3. Sometimes big companies or supplier groups donate to charities.

- Some charities have been faced with difficulties raising funds in challenging conditions. Amongst other challenges have been general economic conditions arising from amongst other factors: the banking crisis of 2008; Covid 19; and the troubles in Ukraine.

- Some charities have struggled to obtain good returns on investments in a period of low interest rates (well below the rate of inflation) and sluggish and patchy stock market performance.

- Many charities have faced increased costs due to inflation, and factors related to Covid 19. Increases in heating costs arising from costs of energy may also have been relevant, especially to those charities with chains of shops.

- Some charities have experienced increased demands for their services. By way of non-exhaustive examples, the "cost of living crisis" facing many families appears to have increased the demands on food banks. Increased information about medical conditions may have increased demand on specialist medical charities.

- With developments in medicine and perhaps greater public appreciation of medical issues than formerly, there are perhaps more charities focused on more or less specific medical conditions than in 2005.

- The Faculty's impression is also that there have also been difficulties engaging volunteers due to Covid related issues and perhaps some service delivery issues.

- In relation to governance (by way of non-exhaustive examples, meetings of charity trustees), administration, fundraising and service delivery, there has been a move towards the digital.

- Digital opportunities have opened to charities, including:

    1. Fund raising.

    2. Identifying pockets of need.

    3. Home working.

- The move towards the digital has to some extent increased challenges for charities:

    1. costs related to new equipment and training;

    2. digital security; and

    3. data protection.

- Some charities run mail order businesses and these may have been affected by postage issues.

- Some charities, such as those in the arts arena, are having to come to terms with developments such as the growing importance of intellectual property rights, and a few such as those in the art world, Non Fungible

Tokens ("NFT"s). Some such charities are also having to deal with artists' resale rights ("ARR").

- Anti-Money Laundering ("AML") issues are perhaps more prominent than they were in 2005 and, similarly, there is a growing awareness of the need to look out for criminality and to pay close attention to safeguarding issues. The regulatory requirements and ongoing monitoring of such issues have increased substantially since 2005.

- Separate from the issue of AML, some charities have become ever more cautious about the source of funds and any public perception that those involved with the charity may improperly promote the interests of the donor. In a related manner, there is an awareness that fundraising tactics – such as the use of face to face fundraisers in the street – can impact the overall reputation of a charity.

Legal Landscape

General

Since 2005, the legal landscape for charities, which has long been a complex one, has grown more so: see below.

One useful development has been the publication of a book specifically on the law applicable to Scottish charities: ***A Practical Guide to Charity Law in Scotland*** **(2016) edited by James McNeill QC ("McNeill *Charity Law in Scotland*").**

A further useful source of information is the Stair Memorial Encyclopaedia ("SME"), which is updated regularly to reflect developments in the law.

Information is also available on the website of the Office of the Scottish Charity Regulator ("OSCR")

In terms of the entities used for charities, there is an impression that the availability of SCIOs since 2005 has not meant that other entities are no longer used. In particular, there is ongoing use of companies limited by guarantee and, particularly for grant-making charities, trusts.

Difficulties Facing Scots "charity trustees": General.

From charity trustees, the Faculty notes that much concern is related to three themes, which to some extent overlap:

- The demands upon charity trustees.
- Potential personal liabilities of "charity trustees": see below.
- The complexity of the legal environment: see below.

Such issues often make informed persons reluctant to become or in some cases continue as charity trustees.

Whilst many of the issues upon which the Bill currently focuses may promote public safety and mitigate abuse, there is also a danger that some of the provisions (such as a *public* register of those who are a charity's charity trustees) may be perceived to make life even more unattractive for charity trustees than it is at present and this may impact adversely on recruiting suitably qualified persons to such positions, and in turn, impact on the charity sector: see below.

3. The Government is committed to carrying out a wider review of charity law after the passage of this legislation. What are your views on a review?

The Faculty is sympathetic to such a review.

As noted above, the Faculty notes that much of the concern from charity trustees centres on the three overlapping themes: namely,

- The demands upon charity trustees.
- Potential personal liabilities of "charity trustees" (see below).
- The complexity of the legal environment (see below).

Elsewhere in this Response the Faculty has touched upon the demands the Bill may place on some charity trustees.

For the purposes of this section of the Response, the Faculty focuses on personal liability and legal complexity.

Charity Trustees and Personal Liability

Whilst the Faculty does not have data on such matters, it understands that:

- Some new Scottish charities are Scottish Charitable Incorporated Organisations ("SCIO").
- Some older charities may have reorganised and become SCIOs.
- There may be some older charities which are companies limited by guarantee.
- Many perhaps most older charities are still trusts.

Trusts may have drawbacks, including the potential for exposing trustees to the risk of personal liability, even in circumstances where there has been no culpability on the part of those who are trustees.

Given the difficulties of reorganisation, the Faculty considers that if there is to be a wider review of charity law in Scotland, it may be desirable for those reforming Scottish charity law to consider making it expressly permissible for trusts which are charities to:

- Make use of corporate trustees.

- Pay trustee insurance premiums from the trust funds even if this is not made explicit in the charity's constitution.

Charity Trustees and Complexity

One often overlooked change bearing on charity law is that the approach to ***interpreting*** **Scottish documents** in general has developed since 1995, with many ideas initially developed in the context of English commercial contracts being endorsed in a wide variety of Scottish contexts, far removed from the commercial arena, including the interpretation of testamentary instruments, which instruments sometimes set up charities and frequently make donations to existing charities.

Charity law in Scotland is complex in part due to a **mixture of mediums through which charitable goals are pursued**: so-called "public" trusts (some but not all of which are charities within the scope of the OSCR regime); limited companies; SCIOs.

The "ordinary" trust law regime is about to undergo major changes, which may:

- Prompt charities which are trusts to review their constitutions.

- Prompt professional persons to resign, given that under the new regime they may be judged by a higher standard than under the old regime.

At least one of the simplifications of general trust law to be introduced by the Trusts and Succession (Scotland) Bill does not apply to charities: periods of accumulation of income will continue to apply to charitable trusts: see Trusts and Succession (Scotland) Bill section 41(5)(b); and see also **Scottish Law Commission** ("SLC") **Report on Trusts No. 239 (2014) para. 18.43**.

There is also a poorly articulated principle somewhat different from the rules against accumulation that charities should apply their charitable assets to charitable ends and not just sit on them.

There is also a debate around whether "saving" of income and/or retention of income to meet envisaged expenses are different from accumulation and, if so, how the distinction can be policed: see **Yvonne Evans in the SME Reissue 13 on Trusts (2016) para. 47**.

There are also statutory regulatory regimes for charities and a specific registration system with a charity regulator, and **various taxation issues**, including the possibility of another registration with HMRC. By way of non-exhaustive example, a charity requires to register with HMRC if it wishes to claim Gift Aid.

Charitable trusts (in the OSCR sense) enjoy great privileges: see **Scottish charity law: consultation analysis** Published **2 July 2019** ISBN **9781787819801 p. 22**. However, these privileges are embedded in a complex series of overlapping regimes.

A further complication for charities in Scotland is that to benefit from Westminster tax law concessions meeting the OSCR registration criteria are not enough, the Scottish charity must also be a charity as that term is defined for the law of England and Wales: see **Finance Act ("FA") 2010 s. 30** and then **Schedule 6** and then **Charity Act 2011 s. 2 and then s.3** (charitable purposes) and then **s. 4** (public benefit).

In short, the Faculty notes that the tests for being a charity differ between (a) Scotland and (b) England but for Scottish trusts wishing to obtain UK tax breaks, the charity also has to satisfy the English test.

In respect of Scotland, regard may be had to the **Charities and Trustee Investment (Scotland) Act 2005 (the "2005 Act"), sections 7 (the charity test) and 8 (public benefit), and see also s. 9**.

In relation to England , there is a convenient analysis of charitable purposes found at:

https://www.gov.uk/government/publications/charitable-purposes/charitable-purposes

In relation to England and its public benefit test, there is a convenient analysis found at **https://www.gov.uk/guidance/public-benefit-rules-for-charities**

In the event of a wider review of Scottish charity law than the present one, it would be desirable to ensure so far as possible that charity law is suitable for contemporary circumstances. It is suggested that other issues, perhaps worthy of consideration, might include the following:

- The Scottish charity test and public benefit test;

- Whether constitutional documents should be more readily available than at present, such as a requirement to be on a public register. The current law on making constitutional documents available is found in the 2005 Act at s. 23; and

- Issues of cross border recognition of charities.

There are **terminological confusions** within Scots law. For example, the main legislation denotes those who govern charities as "charity trustees" irrespective of whether the medium used is a trust or incorporated body.

Where a charity with multiple or wide charitable purposes receives new money for a specific purpose, there can be an accounting/ administrative complexity involved in ring-fencing the funds as "restricted funds".

Consideration might be given to Designated Religious Charities ("DRCs"): see below.

Consideration might also be given to the growing importance of crowdfunding and the manner in which it is regulated.

Under the current law, there are many difficulties related to *ex officio* trustees.

The phrase *ex officio* trustee is used to describe the situation "where the truster has provided for the holder of a certain office to be a trustee, the holder of that particular office (as may change from time to time) who acts as trustee during

the period in which they hold office.": see, for example, Trusts and Succession (Scotland) Bill Explanatory Notes SP Bill 21–EN p. 2

https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/trusts-and-succession-scotland-bill/introduced/explanatory-notes-accessible.pdf

These difficulties may bear on, amongst other trustees, trustees of charities constituted by deed of trust.

The Trusts and Succession (Scotland) Bill is concerned with trusts in the ordinary sense of that term: for example, where there is a trust deed.

Some such trusts may give rise to charities and potential for registration with OSCR registration.

However, by no means all trusts with *ex officio* trustees will do so. Many trusts are not charitable and there is no aspiration that they should be registered with OSCR. Some trusts constituted by deed may, for example, be private family ones.

Moreover, there are many charities registered with OSCR which are not trusts in the ordinary sense of trust but rather constituted in the form of a limited company or SCIO. However, those governing OSCR registered trusts are called "charity trustees".

The Faculty considers that a wide review of Scottish charity law should have regard to the provisions in the Trusts and Succession (Scotland) Bill or the Act if it has come to be enacted. Amongst other issues which might be addressed in relation to such matters are:

- Are there any further reforms beyond those contemplated by the Trusts and Succession (Scotland) Bill / Act needed in relation to OSCR registered charities constituted by deed of trust?

- How can changes in the law contemplated by the Trusts and Succession (Scotland) Bill / enacted by the Act related to *ex officio* trustees be communicated and explained to "charity trustees" who are trustees under trust deeds which are OSCR registered charities?

- In respect of OSCR regulated charities which are not constituted by deed of trust (but are companies or SCIOs) is there anything to be learnt from the reform of the law pertaining to *ex officio* trustees?

The difficulties with current Scottish trust law are partly conceptual and partly difficulties of application. The Scottish Law Commission ("SLC") considered the current law and made proposals for reform: see below.

For the SLC's proposals for reform regard may be made to Report on Trust Law SLC 239 especially paragraphs 2.2.5 subparagraph 5; and 4.33 and following.

Paragraph 2.25 subparagraph 5 identifies some of the big issues and the context in which they arise:

"Major changes

2.25 Perhaps the most significant change that we propose is that the trust legislation should be contained within a single, coherent statute, drafted in modern form and with regard to modern conditions. For that reason the draft Bill appended to this Report bears little relationship to older legislation in its form and structure, although obviously it covers similar ground to the earlier legislation. In some areas, however, we have made proposals that are quite novel so far as Scots law is concerned. In most cases these have been based to a greater or lesser extent on the trust law of other jurisdictions; in this way we are confident that there is a proven need for the measures that we propose and that we have adopted practical means of addressing such need. The major changes are as follows:

….

5. New provisions are recommended to deal with practical problems that frequently arise in the administration of trusts which have **ex officio trustees**

In the course of the project we became aware, initially through the experience of Ms Dunlop, one of the Commissioners, as Procurator to the General Assembly of the Church of Scotland, that the use of *ex officio* trustees gives rise to very frequent practical problems, for example in a case where an *ex officio* trustee (such as the minister of a particular church, or the principal of one of the Scottish universities) is unable to attend properly to the duties of a trustee.

Further **problems may arise if the office supplying the trustee is abolished. We propose a simple procedure to enable the courts to deal with such cases in a quick and inexpensive manner**."

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Emphasis and break in subparagraph 5 added.

In SLC Report 239 at paragraph 4.38 it is noted that:

"4.38 The great majority of respondents also agreed that problems with *ex officio* trustees were common in practice and that the law governing them would benefit from clarification. They gave examples of a number of practical problems. These included the following:

• Offices which are historic and are not filled.

• Offices which are vacant.

• Reorganisation of the constitution of the relevant body, resulting in one or more offices' no longer existing or being subsumed into another office.

• The absence of formal evidence of appointment of the office bearers (such as minutes of the meeting appointing an *ex officio* trustee).

• Reluctance of an *ex officio* trustee to become involved in the trust, leading to poor governance.

• Alternatively, an *ex officio* trustee who feels a sense of duty to become closely involved, even when this is not useful to the trust.

• Incompetence of *ex officio* trustees, as they are not selected for their abilities.

• Inability to attend meetings because of the pressure of the office held by the *ex officio* trustee, with the result that other trustees become demotivated.

• Sometimes *ex officio* trustees can dominate a body of trustees, thus skewing decision-making away from the trustees selected for their interest and ability.

• The appointment of an *ex officio* trustee lapses but no successor is put in post, with the result that the body of trustees becomes inquorate.

On the basis of these responses, we are quite satisfied that *ex officio* trustees do give rise to frequent problems in practice, which can often be serious. One respondent noted that in practice common sense solutions are often adopted to avoid such difficulties, but these could include risks for both the trustees and the trust. All respondents were agreed that a statutory scheme for handling such problems would be preferable."

Regard may also be made to the Trusts and Succession (Scotland) Bill and the explanatory notes: see especially Explanatory Notes to Trusts and Succession (Scotland) Bill pages 7-8 paragraph 19 relating to section 4(3) and s. 62 of the Trusts (Scotland) Bill; page 32 relating to Section 61(15) of the Bill; and pages 32 and following paragraphs 109 and following relating to section 62 of the Bill.

The provisions for reorganising charities are complex: see **2005 Act, Sections 39** and following.

Part of the complexity arises from many, often older charity constitutions that do not include express powers of amendment within the deed. Consideration might be given to amending charity law such as to imply such powers of amendment into deeds unless expressly excluded.

The existing landscape makes life very difficult for smaller charities.

Summary

In a wider law reform exercise, the Faculty considers that there is a need to address many issues including but not limited to: the (i) personal liability of "charity trustees" especially where the charity is constituted by means of trust deed; (ii) the legal complexity pertaining to charity law; and (iii) the demands that (i) and (ii) place on charity trustees.

One of several areas where there may be scope for simplification is reorganisation of charities.

4. What are your views on the Bill's Financial Memorandum and the various impact assessments published by the Scottish Government?

The Faculty notes that the Bill's Financial Memorandum extends to some thirty pages and considers costs to "… the Scottish Administration, Local Authorities, other bodies, individuals, businesses and third sector organisations.": see, for example, para. 6.

The Faculty notes the contention in the Bill's Financial Memorandum that:

> "12. The Bill is not anticipated to require significant additional activity by charities, other bodies, individuals or businesses and any new costs are considered to be negligible."

The Faculty also notes that part of the reason why the Bill's Financial Memorandum expresses such a view is that most of the additional matters which the Bill would require charities to do would be done in the same way, and at the same time as things they would be doing even if the Bill was not enacted: see, for example, Bill's Financial Memorandum paragraphs 30 and 40:

> Paragraph 30:
>
> "Costs on other bodies, individuals, businesses or third sector organisations. Charities already submit their statement of account through OSCR's 'OSCR Online' system, and this would continue in the same manner. Should they apply for a dispensation (or subsequent review of OSCR's decision), this would involve a small addition to their time in order to complete this process."
>
> Paragraph 40:
>
> "Costs on other bodies, individuals, businesses or third sector organisations
>
> The process for providing charity trustee details to OSCR would take place at the same time as completing the annual return, as well as routinely throughout the year, as and when trustee details change. Charity trustees, employees or other designated individuals that manage charities or the submission of their accounts would notice an addition to their time in order to complete this process. This would vary hugely depending on the number of trustees a charity has and how frequently trustee details change, and therefore it is not possible to estimate the time involved.

For example, a grant-giving trust where the trustees are a family would be unlikely to see changes other than to contact details (such as a change of address) throughout the charity's lifetime. On the other hand, a playgroup where the trustees are the parents of children attending the playgroup would see a higher turnover of trustees annually and subsequently more time would need to be spent on submitting trustee details. Should a charity or trustee apply for a dispensation (or subsequent review of OSCR's decision), this would involve a small addition to their time in order to complete this process."

The Faculty is not in a position to comment on these matters in detail but notes that:

- Almost any legislation bearing on charities may require charities and charity trustees to consider how (if at all) the legislation bears on them, and if it does bear on them, how it so impacts. Such consideration may involve substantial initial costs and some costs arising from time to time.

- The cost of the regulatory burden may also depend in part upon the sensitivity and "proportionality" with which the new regime is policed by OSCR and others. The Faculty's impression is that OSCR is likely to adopt a sensible and proportionate approach.

5. Will the Bill lead to the Scottish public being better protected, and will charity regulation become more transparent?

General

Broadly speaking, the Faculty considers that the Bill will lead to charity regulation being more transparent than at present, and the public being better protected than at present.

The Faculty understands the word "transparent" is used in the sense of: openness as to the important characteristics pertaining to the "entity" in issue, what it is doing, how it is doing it, and whether it is sticking to the rules.

The Faculty considers that there are connections between transparency, accountability and better public protection. The Faculty also considers that accountability can on the one hand bring costs, but on the other also promote good practice and efficiency to the benefit of a charity.

The Faculty also considers that in addition to "protection" from deliberate wrongdoing, the provision of information (such as annual accounts) may encourage good practice and lead to greater efficiency.

The Faculty further considers that providing information may bring costs (indirect as well as direct) to some charities – especially the provision of information to the public on charity trustees' identities: see below.

A register of charity mergers

A register of charity mergers of the kind contemplated in section 12 provides a good example. In addition to providing any benefits in the form of mitigating against dishonest or other bad behaviour, it allows the public to know what is going on and the current state of affairs.

To take a simplistic example, someone donates to charity C. That person may find it convenient to discover what has become of charity C, after it has merged with charity D to become charity E.

Such a register of mergers, may also be a point of contact for other charities wishing to acquire knowhow. For example, if charities X and Y can be identified as the new charity Z, subject to any conflict of interest issues, charities A and B might approach Z for a steer on their (A and B's) proposed merger.

Publication of Accounts

The **publication of accounts** may be a spur to some charities / charity trustees to take additional care with the preparation of accounts: Bill s. 9.

To a limited extent, the publication of accounts may provide an opportunity for those considering the accounts to obtain a picture of the charity's financial wellbeing and possibly spot anomalies prompting further enquiries.

Failure to submit accounts may be a red flag, and the Faculty is sympathetic to the proposal to allow removal of the charity from the Register if the charity fails to so do. However, the Faculty considers that removal should take place after enquiry by OSCR. Many charities are modest affairs and a failure may not be indicative of turpitude or incompetence but down to explicable and excusable combinations of circumstances, such as the ill health of more than one charity trustee.

The Faculty notes in passing that the accounts may, but do not have to, contain information about one or more of the charity trustees; and the accounts, instead of naming a charity trustee may use a different contact, such as an employee, accountant or lawyer. See Policy Memorandum (2022) para. 28.

Charity Trustees Being Identified on a Public Register

The Faculty notes the justifications offered for this proposed reform: see Policy Memorandum (2022) para. 23 and following:

> "23. The overall policy intention is twofold.
>
> The **first** intention is to **increase transparency and accountability for charities by imposing duties on OSCR to publish the names of trustees on the Register and to maintain a separate, publicly searchable record of individuals that have been removed from being concerned in the management or control of any body by the Court of Session** (and are therefore permanently disqualified from acting as a charity trustee, unless OSCR grants them a waiver).
>
> The **second** intention is to **introduce efficiencies to OSCR's operations in relation to compliance, inquiries and engagement work to better support its regulation of charities and their trustees, by imposing a duty on OSCR to create and maintain an internal database of trustees containing their personal information and contact details and providing OSCR with a power to gather information for that purpose**."
>
> (Emphasis added.)

The Faculty has reservations about charity trustees being identified on a *publicly accessible* register.

The reservations are of both a jurisprudential and practical sort, and to some extent overlapping:

- Concerns about privacy.

- Concerns that the naming charity trustees on a public register may deter some good candidates for the office of charity trustee from going forward for it and/or discourage some good charity trustees from remaining in office, and the prejudice this may occasion to the charity sector in general and some charities in particular: see below.

- Reservations over the attractiveness of the exemption procedures related to appearances on the public register: see below.

- Complexities.

- The initial financial costs of getting names on the register and ensuring the identities are updated, and costs associated with applications to be exempted from entry on the public register. Whilst a real concern, it is a relatively modest one.

- Proportionality: see below and the possibility that a different less burdensome regime might be implemented. For example, in relation to the second justification offered by the Scottish Government, the Faculty considers that many of these could be achieved by there being an up-to-date register of names of trustees, but one which is not open to the public.

Privacy

The Faculty has concerns that the privacy of charity trustees and potential charity trustees may without cogent justification be prejudiced by the proposals.

Whilst conscious that the United Kingdom has left the European Union, the Faculty notes that the Court of Justice of the European Union ("CJEU") has somewhat moved away from the idea that there ought to be publicly accessible registers of the *owners* of companies and other entities. The CJEU's shift of position is based on its concerns about a significant likelihood of interference with a person's right to privacy.

On 22 November 2022, the CJEU issued its decision in case C-37/20 *WM v Luxembourg Business Registers*. As part of the context within which the case was set, anti-money laundering directives require a register of the ultimate beneficial ownership of companies. However, the CJEU decided that a publicly-accessible register, which enabled the public to look behind companies to see who owned them, risked infringing the personal and privacy rights of those individuals. Whilst, ultimately, the findings were in relation to the Charter of Fundamental Rights (particularly Articles 7 (respect for private and family life) and 8 (protection of personal data)), the principle of disproportionate interferences with rights of privacy clearly extends beyond the limits of the Charter. There are clear and material parallels with Article 8 of the

European Convention on Human Rights ("ECHR"), for example, which will require careful consideration in light of the limits of the Scottish Parliament's legislative competence by way of section 29 of the Scotland Act 1998.

Proportionality and Alternatives to the Proposals

The Faculty is conscious that registered charities tend to enjoy certain privileges, for example in relation to taxation. However, if these are available, they benefit the charity not typically the charity trustee.

The Faculty is unpersuaded that the Scottish Government has offered a justification for impinging on the privacy of charity trustees and prospective charity trustees. In particular, it is not clear that the pursuit of any legitimate aim requires such interference with the privacy rights of the individuals concerned.

For example, in relation to the first justification offered by the Scottish Government (efficiency), the Faculty considers that many of these perceived benefits could be achieved by a register (fully up-to-date) of trustees, held by OSCR but not open to the public.

In relation to the second justification offered by the Scottish Government (transparency and accountability to the public), substantial protection for the public would be afforded by access to the accounts.

There might also be a requirement for a declaration in the accounts that no charity trustee or senior manager was a disqualified person. This declaration might also extend to there being no disqualified managers.

One (new) approach would be to give charities the option of making the names of their trustees public. If having names publicly available is widely perceived to bring benefits to governance, one might expect the marketplace to reward those charities who did make the names publicly available and punish those which did not.

Recruitment and Retention of Charity Trustees

From a practical perspective, the Faculty notes that charity trustees are usually volunteers and unremunerated. Charity trustees already have a great many responsibilities. Many charities already struggle to "recruit" charity trustees

with the requisite skills. Requiring their names on the OSCR register may deter some suitable persons who would otherwise be prepared to volunteer. Limiting the pool of candidates may make "succession planning" problematic and prejudice the already challenged charity sector.

By "succession planning" is meant the planning for the future beyond the time frame of one or more of the current charity trustees occupying office, and includes the process of finding replacement to assume / be put for election to charity trustee positions.

Faculty's Secondary Position

If there is to be a public register of charity trustees, care must be taken over the exemption procedure and reviews pertaining thereto.

The possibility of a charity's trustees applying to OSCR to preserve their anonymity to the public (not to OSCR) and an appeal process does not entirely allay the Faculty's concerns.

A person may be willing to serve as a trustee, provided their name does not appear on a public register. That person may not be prepared to serve, if their anonymity depends on the uncertainty of such an appeal process.

In turn, for potential new trustees the procedure should provide for clearance in advance of assuming office / being appointed as a charity trustee of a particular charity.

There would also need to be a transitional period to address the situation where current trustees who are only willing to continue in office if their names are not public, have an opportunity to obtain clearance from having their name disclosed.

Separately, in respect of the review procedure proposed in the Bill, the Faculty is left in doubt as to what (if any) public scrutiny it will receive.

Disqualifying Inappropriate Persons

The Faculty considers that disqualifying inappropriate persons from the office of charity trustee and from holding senior management positions is likely to offer some protection to the public.

In turn, it considers that the **criteria for disqualification** should be updated and **extended from charity trustees** to also apply **to senior managers**.

The Faculty is sympathetic to this list being in the public domain for the period covered by the disqualification.

As mentioned elsewhere in this Response, there could be a requirement to declare that none of the charity trustees and/or managers was a disqualified person.

It is not clear to the Faculty how the disqualifications provisions in the proposed changes to Scottish charity law are intended to mesh with removal of charity trustees under charity law and, where the charity is a trust, the provisions applicable to trustees in general.

Registration of Charities Without a Connection to Scotland

The Faculty has mixed views on the requirements for all charities in the Scottish Charity register to have and retain a connection with Scotland: see Bill s. 16.

One of the purposes of reforming Scottish *trust* law is to retain and attract trust business: see the announcement of the Scottish Law Commission on 7 September 2022:

"Trust law reform comes a step closer

7 Sep 2022

We welcome the announcement in the Scottish Government's Programme for Government of an intention to introduce a trusts and succession bill in 2022-23. This is designed to implement the recommendations in our 2014 Report on Trust Law and will modernise the law of trusts so that it is fit for contemporary conditions. **This will be of benefit to individuals and commerce, and will keep Scotland competitive in retaining and attracting trust business."**

https://www.scotlawcom.gov.uk/news/trust-law-reform-comes-a-step-closer/#:~:text=We%20welcome%20the%20announcement%20in,is%20fit%20for%20contemporary%20conditions.

The Faculty considers that if there is to be a wider review of **charity** law in Scotland, those considering law reform should ask themselves whether reform goals should include measures aimed at retaining and attracting charities and growing the Scottish charity sector, including but not limited to that part of it where the charities are constituted by deed of trust.

However, policing charities with no connection to Scotland other than registration could be problematic.

On balance, the Faculty considers the requirement of a connection to Scotland additional to registration itself is desirable.

Continuing Role for OSCR After A Charity Leaves the Register

The Faculty acknowledges that a charity's / its charity trustees' responsibilities may not be extinguished when the charity ends or the charity trustee ceases to hold office.

The question then is which body or bodies is / are best placed to investigate matters?

The Faculty considers that OSCR should have a continuing role.

Devolution of De-registered charity's assets

There is an ambiguity in the idea of a deregistered trust's assets continuing to provide public benefit. Public benefit is a necessary requirement of a Scottish or English charity, but it is not sufficient to justify charitable status in either jurisdiction. The point may be one of much importance in respect of tax.

As a general rule, a gain is not chargeable if it accrues to a charity and is applicable and applied for charitable purposes: see Taxation of Chargeable Gains Act 1992, s. 256(1).

There is a danger that when a charity is wound up, assets cease to be subject to charitable purposes and may be liable for CGT: see TCGA s. 256(2).

The issue of whether a de-registered charity's assets ought always to continue to be used to provide public benefit is one of some nicety.

By way of non-exhaustive example, there may be an issue related to the actual characteristics of the asset. A title might contain a provision that the asset is only to be used for a specific charitable purpose and contain some species of reversion where the asset ceases to be used for that purpose. The asset might be an immoveable asset and situated abroad.

Miscellaneous

The Faculty sees value in OSCR having powers to gather information and for these powers to be clarified with a power to increasing the speed and efficacy with which the powers can be utilised: see Bill s. 14.

The Faculty sees value in OSCR being able to move quickly and appoint an interim trustee: see Bill s. 8.

The Faculty sees value in OSCR having powers not only to give negative directions but also positive ones: see Bill s. 15.

The Faculty is mindful that DRCs have received exemptions from certain provisions of charity law under the existing charity law: see 2005 Act s. 65 especially subsections 65(3) and (4). The Faculty considers such special treatment should be reviewed under a wider review of charity law than the one currently being conducted.

In the meantime, the Faculty has reservations about the extension of the special treatment of DRCs by the Bill, **excluding** DRCs from OSCR directions: see Bill section 15 and proposed amendment to the 2005 Act s. 63(4) and by this amendment excluding DRCs from the new 30B(2).

https://www.parliament.scot/-/media/files/legislation/bills/s6-bills/charities-regulation-and-administration-scotland-bill/introduced/keeling-schedule.pdf

The new section 30B(2) provides:

> "OSCR may direct the charity or body to take, within such period as may be specified in the direction, such steps (specified in the direction) as OSCR considers to be expedient in the interests of the charity."

The Faculty sees force in the view that if the new section 30B(2) is desirable in respect of most charities and for public protection, why should that not extend to DRCs?

However, the Faculty is conscious of religious and possibly even constitutional sensitivities and, in the meantime, is content for this new exclusion to apply to DRCs but with a view to special treatment of DRCs in general being considered at a later date.

6. What are your views on the extent to which the Bill matches OSCR's original proposals, as set out in 2018?

The Faculty understand that the reference is to the publication by the Office of the Scottish Charity Regulator of "A proposal for Modernisation of the Charities and Trustee Investment (Scotland) Act 2005", published 09.03.2018.

https://www.oscr.org.uk/media/3451/2018-03-09-modernisation-of-the-2005-act-proposal-paper.pdf

In that document, there was a "Summary of new measures": see p.p. 1-2.

The first goal of OSCR is identified as "**Promoting greater transparency and accountability**".

In the Faculty's view, the Bill does much to promote this goal: see above. As noted above, the Faculty is sympathetic to the proposed provision on most matters (e.g., accounts, register of disqualified persons) but has reservations about publicly disclosing trustees' identities.

The second goal of OSCR is identified as "**Enhancing trust through stronger enforcement powers**".

In the Faculty's view, the Bill does much to promote this goal: see the Bill's provisions on the automatic disqualification of charity trustees and extension to those in senior management positions: see Bill s.4-6; and see also Policy Memorandum paragraphs 35 and following.

Moreover, the Bill provides positive powers to issue positive directions: see Bill s.15; and see also Policy Memorandum paragraphs 44 and following.

Moreover, the Bill makes it easier than at present for OSCR to remove from the Register charities that are persistently failing to submit annual reports and accounts: see Bill section 11; and see also Policy Memorandum paragraphs 55 and following.

The Bill also addresses the issue of the need for all charities in the OSCR register to have and retain a connection to Scotland: see Bill section 16; and see also Policy Memorandum paragraphs 63 and following. This is something which on balance the Faculty favours.

The Bill provides for conducting enquiries into former charities and their charity trustees: see section 13 and see also Policy Memorandum paragraphs 69 and following.

The Bill also provides for the assets of de-registered charities to provide public benefit: see Bill, Schedule para. 7; and Policy Memorandum paragraphs 77 and following.

As noted above, in the Faculty's view there may be a need for further thought on this matter.

7. Do you think the Bill makes it easier or more difficult to start and run a charity?

Putting to one side the issue of a public register of names of charity trustees, the Faculty considers that the Bill will add to the demands on charities (especially in the period when the Act comes into effect and especially for smaller or more "cash strapped" charities) but that the benefits warrant the changes.

For jurisprudential and practical reasons, the Faculty has reservations about the proposals to introduce a public register of charity trustees. Such a register raises substantial privacy issues and may in practice lead to problems of recruitment and retention of high quality charity trustees and this, in turn, may prejudice particular charities and the sector as a whole.

Even though the Bill has provisions allowing applications for exemption of a particular charity trustee or even a charity and all its charity trustees, this does not wholly allay the Faculty's jurisprudential and practical concerns but some variants of this exemption regime may go further to allay such concerns than others.

8. Will additional administrative burden be placed on charities? Would this be disproportionate for smaller charities?

The Bill does impose additional administrative burdens on charities. Some of these will be felt more in the short run than the long run. How many (if any) otherwise sound charities will be tipped over the edge into failure or substantially compromised in their ability to fund charitable purposes is difficult to predict.

Some of the proposals, such as the provision of accounts, may prompt increased discipline and in turn efficiencies: see above.

Many of the provisions (*e.g.*, investigatory powers and powers to issue positive directions) may create greater discipline in the sector, as well as salvaging the best of problematic situations.

To an extent that is difficult to quantify, (i) the weight or burden of the proposals and (ii) whether they will be disproportionate on smaller charities, will be affected by the sensitivity and proportionality with which OSCR operates.

9. Does the Bill bring the Scottish regulatory system into line with other parts of the UK? Why is this important?

The Faculty considers that Scots law should aim to be the best it can be having regard to the practicalities of life and not allowing the quest for the perfect to become the enemy of the good.

The fulfilment of such an aspiration involves amongst other factors, learning from the successes and failures of other legal systems, including, but not limited to, the legal systems in other parts of the United Kingdom.

The Faculty does not, however, regard it as an end in itself to "bring the Scottish regulatory system *into line* with other parts of the UK". (Emphasis added)

So far as the Faculty is aware, there is no suggestion that Scots law should adopt wholesale all of English charity law.

There are already challenges for Scots charities in the context of fiscal law. As noted above, to benefit from certain Westminster tax concessions, Scottish charities also have to satisfy the English tests.

The Faculty is live to the possibility of unscrupulous persons attempting to evade charity regulation in both Scotland and England. It is also conceivable that an entity or donor might "jurisdiction shop".

The Faculty also appreciates that the regulatory regime is important to protecting the public and for the flourishing of the charity sector.

It appreciates that for some charitable givers, the quality of the regulatory regime in which the charity is situated may be an important factor, amongst other factors, in deciding whether to site or give to one charity rather than another.

The pool of quality of charity trustee may be another factor relevant to donors and this may be prejudiced by a public register of charity trustees.

Even absent a public register of charity trustees, it is still open to the charity to be open about identities of charity trustees or for a donor to seek to do due diligence on the charity trustees. If the charity is not open and/or will not cooperate that may or may not be a "red flag" to the potential donor.

10. Do you have any other comments or concerns about specific sections of the Bill, or about the Bill

No.