

CHARITIES (REGULATION AND ADMINISTRATION) (SCOTLAND) BILL [AS AMENDED AT STAGE 2]

SUPPLEMENTARY DELEGATED POWERS MEMORANDUM

INTRODUCTION

1. This supplementary Delegated Powers Memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament’s Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Charities (Regulation and Administration) (Scotland) Bill (“the Bill”). This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.
2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

PROVISIONS CONFERRING POWER TO MAKE SUBORDINATE LEGISLATION INTRODUCED OR AMENDED AT STAGE 2

3. The amended or new delegated powers in the Bill are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

DELEGATED POWERS

Section 12: Power to make provision regarding when a notification is treated as given

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Negative

Provision

4. Section 12 of the Bill inserts new sections 64A – 64E into the Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”). Section 64B sets out the process for notifying OSCR of a charity merger and section 64B(4) provides the Scottish Ministers with the power to

make provision about the circumstances in which, and the time at which, notice of the merger is to be treated as having been given.

Reason for taking power

5. In most cases the giving of a notice of a charity merger will be instantaneous, with the charity using either email or OSCR's online system to notify OSCR of a merger. However, where notification is sent by post, there may be a need to make specific rules around when that notification should be treated as having been given (for example to deal with cases of delay due to postal strikes, etc.). At present, the rules which will apply are found in paragraph 4 of schedule 1 of the Scotland Act 1998 (Transitory and Transitional Provisions) (Publication and Interpretation etc. of Acts of the Scottish Parliament) Order 1999 and section 100(6) of the 2005 Act. In both cases, there are presumptions as to when something will be received but where the actual time of delivery is proved, it is that time at which notice is given.

6. The timing of a notification is significant in the context of the merger provisions overall, as the effect of other amendments made to section 12 of the Bill at Stage 2 is that it is now the notification to OSCR of a charity merger that triggers the rules redirecting a legacy in favour of the transferor under the merger to the transferee under section 64D. For that section to apply, notice of the merger needs to be given before the date on which the transferor charity acquires or (as the case may be) would, but for it winding up or dissolving in connection with the merger, have acquired the vested right in the legacy.

7. It is likely that charities will, where possible, delay their winding up until they know that the notice of the merger has been received and recorded, which means that there is no possibility of the legacy being lost. However, there may be some charities which wind up straight away, in which case how quickly the notice is received will be important (particularly if they are unable to use an instantaneous method of notification). It is considered appropriate to be able to ensure that any unforeseen issues relating to notification that arise in practice can be swiftly addressed.

Choice of procedure

8. The power in section 64B(4) is subject to the negative procedure as this is considered to be appropriate given the administrative nature of the matters the power deals with. It is also considered to be appropriate given that the number of charities affected by any provision made under this power is likely to be very small and given that the question of whether they are affected is something within their own control. As noted above, it is open to charities to use instantaneous methods of notification rather than relying on post, and they may also be able to postpone winding up until the notice has been received if they are concerned about the period during which the notice is in transit. Finally, any changes made under this provision would not be made by textual modification of primary legislation, which is another reason it is considered that the negative procedure is appropriate.

Section 12A: Power to modify the definition of “endowment”

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

9. Section 12A inserts a new section 42(10)(a) into the 2005 Act regarding the reorganisation of charitable endowments. The main purpose of the new provision is to clarify the circumstances in which the reorganisation process set out in Chapter 5 of Part 1 of the 2005 Act applies to an endowment where it is held by a charity established under a Royal warrant, a Royal charter, or by virtue of an enactment (“statutory charities”). The 2005 Act currently permits the reorganisation of an endowment held by such a charity, but only where the governing body of the endowment is itself a charity. The meaning and extent of this provision is considered to be unclear, and it has caused confusion for the small number of charities it affects.

10. The amendment makes clear that the reorganisation of endowments held by statutory, charities using the process in Chapter 5 of Part 1 of the 2005 Act is permissible in two specific situations. Firstly, where a charity is seeking reorganisation of an endowment it holds in addition to other property, the endowment itself may be reorganised. Secondly, where a charity only holds endowment funds (whether a single fund or multiple) the charity itself may reorganise. Currently, section 42 of the 2005 Act relies on the definition of “endowment” set out in Part 6 of the Education (Scotland) Act 1980. This will continue to be the case following the modifications made to that section, by section 12A of this Bill once the provisions come into force. However, section 42(10)(a) gives the Scottish Ministers the power to modify the definition of “endowment” in the 2005 Act by regulations.

Reason for taking power

11. This power is included to build in suitable flexibility to be able to respond should experience of the new provisions regarding the reorganisation of endowments give rise in practice to any issues about the understanding of what is meant by “endowment”. It is acknowledged that this is a complex area of the law and that, as such, there may be a need to fine-tune the provisions, particularly around this key definition, once they take effect and are applied in practice. The power also provides an element of future-proofing for the provisions, given the reliance currently placed on the definition of “endowment” in the 1980 Act. This means that if the 1980 Act definition is changed in a way that does not fit with the purposes of the 2005 Act, the definition in the 2005 Act can in turn be adjusted.

Choice of procedure

12. As this power permits the modification of the definition of “endowment” as set out in primary legislation, the affirmative procedure is generally considered appropriate. In addition, any modification of the definition of “endowment” may broaden or narrow the application of section 42 of the 2005 Act. Given the impact this may have on charities’ ability to reorganise via OSCR (which should be a much more cost-efficient process), it is considered that the affirmative procedure would provide the appropriate level of scrutiny over changes of that nature.

Section 12A: Power to disapply provisions for particular charities or types of charity

Power conferred on:	Scottish Ministers
Power exercisable by:	Regulations made by Scottish statutory instrument
Parliamentary procedure:	Affirmative

Provision

13. Section 12A inserts a new section 42(10)(b) into the 2005 Act in connection with the amendments made to the Bill regarding the reorganisation of charitable endowments, described above. Section 42(10)(b) gives the Scottish Ministers the power to disapply section 42(6) in relation to any charity or endowment, or type of charity or endowment, specified in the regulations.

Reason for taking power

14. It is considered necessary to introduce this power in order to ensure that, where there are specific policy reasons for restricting the reorganisation of particular charities or endowments, this can be achieved. Certain charities may, for example, have special governance requirements or they may operate in specific circumstances which would make reorganisation using the process in Chapter 5 of Part 1 of the 2005 Act inappropriate. It is recognised that there is potentially a broad range of charities and endowments that may be affected by these provisions and it has not been possible to make an individual assessment of the impact of the changes on each of them. For example, it may be considered appropriate to confine the reorganisation of endowments to those endowments that are not detailed within the charity's constitution. It is therefore considered sensible for Ministers to have power to adjust the application of the provisions by disapplying them in respect of particular charities/endowments, or types of charity/endowment, should it prove necessary to do so. This is also in line with the approach taken by the 2005 Act more broadly – for example, section 7(5) of the 2005 Act allows elements of the charity test to be disappplied in relation to particular bodies or types of body, and section 19(8) of the 2005 Act allows particular property to be exempted from the rules about protection of assets where that is considered appropriate.

Choice of procedure

15. As with the power to amend section 42(10)(a) discussed above, the power at section 42(10)(b) would be exercised by amending primary legislation and it is therefore generally considered appropriate for the affirmative procedure to apply. In addition, the disapplication of section 42(6) of the 2005 Act in relation to any charity or endowment (or type of charity or endowment) could have a significant impact on charities' ability to reorganise via OSCR. It is considered that the affirmative procedure would provide the appropriate level of scrutiny over changes of that nature.

This document relates to the Charities (Regulation and Administration) (Scotland) Bill (SP Bill 20A) as amended at stage 2

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(SCOTLAND) BILL
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