OFFICIAL REPORT
AITHISG OIFIGEIL

Social Justice and Social Security Committee

Thursday 9 March 2023

Session 6

The Scottish Parliament
Pàrlamaid na h-Alba

Thursday 9 March 2023

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SOCIAL JUSTICE AND SOCIAL SECURITY COMMITTEE

6th Meeting 2023, Session 6

CONVENER

*Natalie Don (Renfrewshire North and West) (SNP)

DEPUTY CONVENER

*Emma Roddick (Highlands and Islands) (SNP)

COMMITTEE MEMBERS

*Jeremy Balfour (Lothian) (Con)
*Miles Briggs (Lothian) (Con)
*Foysol Choudhury (Lothian) (Lab)
James Dornan (Glasgow Cathcart) (SNP)
*Pam Duncan-Glancy (Glasgow) (Lab)
*Paul McLennan (East Lothian) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Alan Eccles (Law Society of Scotland)
Nick Holroyd (Faculty of Advocates)
Keith Macpherson (Institute of Chartered Accountants of Scotland)
John Maton (Charity Commission for England and Wales)
Gavin McEwan (Charity Law Association)
Dr John Picton (University of Liverpool)
Evelyn Tweed (Stirling) (SNP) (Committee Substitute)
Martin Tyson (Office of the Scottish Charity Regulator)

CLERK TO THE COMMITTEE

Claire Menzies

LOCATION

The Mary Fairfax Somerville Room (CR2)

Scottish Parliament

Social Justice and Social Security Committee

Thursday 9 March 2023

[The Convener opened the meeting at 09:00]

Subordinate Legislation

Council Tax Reduction and Council Tax (Discounts) (Miscellaneous Amendment) (Scotland) Regulations 2023 (SSI 2023/38)

The Convener (Natalie Don): Good morning, and welcome to the sixth meeting in 2023 of the Social Justice and Social Security Committee. We have received apologies from James Dornan. I welcome Evelyn Tweed, who will be his substitute.

Our first item of business is consideration of a negative statutory instrument—the Council Tax Reduction and Council Tax (Discounts) (Miscellaneous Amendment) (Scotland) Regulations 2023. The instrument is an annual update and amends three existing principal sets of council tax regulations. It is laid under the negative procedure, which means that its provisions will come into force unless the Parliament agrees to a motion to annul them.

No motion to annul has been lodged. If members have no comments on the instrument, does the committee wish to make no further recommendations in relation to it? Are members content to note it?

Members *indicated agreement.*

Charities (Regulation and Administration) (Scotland) Bill: Stage 1

09:01

The Convener: Our second item of business is an evidence session on the Charities (Regulation and Administration) (Scotland) Bill.

The bill was introduced in the Scottish Parliament on 15 November 2022, following two consultations by the Scottish Government, in 2019 and 2021. It aims to strengthen and update the legislative framework for charities by increasing transparency and accountability. It also aims to make improvements to the powers of the Office of the Scottish Charity Regulator and bring Scottish charity legislation up to date with certain key aspects of regulation in England, Wales and Northern Ireland.

Last week, we heard from representatives across the third sector, as well as from designated religious charities and a local authority. Today, we will hear from two more panels that span charity regulation, law, academia, accountancy and audit. All our witnesses will appear in person.

I welcome to the meeting our first panel. Martin Tyson is the head of regulation and improvement at the Office of the Scottish Charity Regulator; Alan Eccles is a solicitor and a member of the charity law sub-committee of the Law Society of Scotland; and John Maton is the assistant director of legal services at the Charity Commission for England and Wales.

I have a few points to mention about the format of the meeting before we begin. The witnesses should not feel that they all have to answer every question. If you have nothing new to add to what has already been said, that is absolutely fine. We have a lot of questions to get through, so I ask everyone to keep questions, answers and any follow-ups tight. Committee members who are in the room should indicate to me or the clerk that they wish to ask a supplementary question, and those who are online should use the chat box or WhatsApp.

We move straight to questions from members. Our first theme will be covered by Pam Duncan-Glancy.

Pam Duncan-Glancy (Glasgow) (Lab): Good morning, panel, and thank you for engaging with the committee on the bill so far. I have a couple of questions about the consultation that led to the review of the proposals that are before us. I will start with Martin Tyson, if that is all right.

What is your view of the consultation to date? I refer to the one that was done in 2019 and then repeated. Are there any areas of regulation that have not been covered as part of the review and the bill?

Martin Tyson (Office of the Scottish Charity Regulator): From our point of view, consultation has been satisfactory. There have been two consultation exercises. The second one provided an opportunity to drill down a little further into some of the issues that came up in the first one.

We have been able to engage fully with the Scottish Government on the proposals; indeed, they first came from us as part of our statutory function of advising ministers, so the process has been satisfactory. The bill covers the areas that we said need to be updated, given the age of the underlying legislation, so we are satisfied with the coverage.

The only thing that is not in the bill that we suggest should be there is the power for reorganisation of bodies that are established by statute. We understand that there are complexities around that and that discussions are on-going.

Pam Duncan-Glancy: Is there a need for a wider review?

Martin Tyson: We would entirely welcome a wider review. We would be very happy about that and would intend to be fully involved in and to inform that review. I do not think that it is, necessarily, for us to set its limitations or to say what it should cover, but we would welcome it.

Pam Duncan-Glancy: A number of organisations spoke to us last week about the importance of its being an independent review. What is your view on that?

Martin Tyson: I do not think that we have a particular view on that. We would be happy to engage with whatever format the review had.

Pam Duncan-Glancy: What is your understanding of why some of the other regulatory frameworks that charities are required to respond to are not included in the bill?

Martin Tyson: Do you mean other regulators that regulate charities?

Pam Duncan-Glancy: Last week, we heard particularly from—I think—Children's Hospices Across Scotland and the Scottish Council for Voluntary Organisations that there are a number of different requirements on charities from various regulators. I seek an understanding of your view of that.

Martin Tyson: We work with a lot of other regulators—including the Care Inspectorate, the Scottish Housing Regulator and other bodies—that have dual or overlapping regulation of the charities that we regulate. We have memoranda of understanding and we have the power to share information with them. We work hard to minimise dual regulation and overlap and to minimise the burden on charities. That is how we work now. If there is a feeling that that needs to be looked at, we would clearly be happy to engage with that.

Pam Duncan-Glancy: I will put the same questions to Alan Eccles. In particular, is there any aspect of regulation that you think is missing from the bill?

Alan Eccles (Law Society of Scotland): The Law Society of Scotland welcomed the review and the opportunity to engage throughout the consultation process. Indeed, one item in the bill was not in the original consultation but was proposed by the Law Society and has made its way into the bill. We have certainly welcomed the opportunity to engage. It is an example, from the Law Society's point of view, of engagement leading to something being added to a bill.

There are areas where we think that further reform would be useful. In the society's original response to the consultation, we set out a detailed analysis of the Charities and Trustee Investment (Scotland) Act 2005 and said where we thought that technical amendments and improvements could be made. We would certainly have liked to see some of those suggestions in the bill.

Martin Tyson gave the example of charities that are established by an act of Parliament or other enactment. It would be an improvement to enable those charities to go through the OSCR reorganisation process, particularly given that OSCR has now been in place for 15-plus years and has built up experience. We think that it would have made sense for those charities to be able to go to OSCR rather than to have the expense and time of going through a parliamentary process. Although they are very interesting cases to be involved in from a legal point of view, the OSCR process would be more streamlined and, therefore, better for charities in delivering their services.

Another area that it would be good to see in the bill, without major further work being done, is around the process for unincorporated charities becoming incorporated charities or, often, Scottish charitable incorporated organisations. Usually, that happens for better governance. Sometimes that is because funders require that change, and sometimes public funding requires the change to being incorporated. That process, as it stands, is not simple. We therefore see that as being an area where there is an opportunity to improve things, perhaps through the bill.

Pam Duncan-Glancy: Does the bill need to be amended to take account of that?

Alan Eccles: The bill, as introduced, would not deal with the two particular points that I made about charities that are set up by an act of Parliament looking to reorganise, and unincorporated charities—that is, trusts—or incorporated associations looking to move to a better governance framework, particularly as a Scottish charitable incorporated organisation.

Pam Duncan-Glancy: Thank you, I appreciate that.

John Maton, are there areas in the bill that you think will link well with charities regulation in the other parts of the United Kingdom? What has your experience been of implementing similar proposals?

John Maton (Charity Commission for England and Wales): I will answer the two questions separately.

The two regimes operate quite independently; there is not a great deal of overlap or dual regulation between England and Wales and Scotland. Therefore, in a technical and operational sense, the two regimes do not need to overlap much. Where there is interoperability, such as in automatic disqualification, the bill is helpful, because it seeks to align the automatic disqualification criteria on the two sides of the border. If a trustee is disqualified automatically under the law of England and Wales, the same will be true in Scotland, and vice versa. That is helpful. Beyond that, I do not think that overlap is particularly necessary.

With regard to how the two regimes operate more broadly and how the bill seeks to amend the Scottish regime, I think that we have to look at them quite separately. I do not think that there is an inherent need for one to match the other, and I think that there are historical reasons why the two regimes have developed separately, so I am neutral on that point.

Pam Duncan-Glancy: Is there anything in particular that you can share with the committee about your experience as a regulator and about charities' experience in England and Wales of changes such as automatic disqualification? I know that members will come to questions on that issue later, but is there anything that we could learn from the process and how you supported charities to meet new obligations?

John Maton: Certainly. Although it is quite a general statement, I think that early and clear communication with the sector is important. There is quite an art to developing guidance on changes to legislation. The Charity Commission for England and Wales is going through a major process at the moment to implement the Charities Act 2022, which is delivering a number of technical reforms to our legislation. We should not underestimate the challenge of providing accurate and accessible communication of the nature of the changes to the entire sector, which is very diverse and includes large and small charities, complex and simple charities, and lots of perspectives and ranges of experience. Early and clear communication is something that I would lean on. If colleagues at OSCR would like to speak to us about how such things have been implemented, we have open channels of communication.

Pam Duncan-Glancy: Did that challenge affect the resources that you had available? Did you need more resources in order to communicate that to charities?

John Maton: We did not seek or get more resources for that communication, but we have certainly prioritised it over other things that we might have done with the same time and cost.

Pam Duncan-Glancy: I have a final question on that point for Martin Tyson. Volunteer Scotland has said:

> "we will not know the true impact of this legislation on charities, and their trustees, until it is clear how OSCR intend to communicate and implement the new measures. This is not clarified within the detail of the Bill."

The SCVO said that the administration and comms budget could be significant, and we heard from John Maton about reprioritisation in his organisation. How is OSCR preparing for the legislation? What are your plans to communicate with the third sector on that? Will you be able to do it within existing budgets?

Martin Tyson: I will take the first question first.

The Convener: I do not mean to interrupt, but those questions come under theme 3, so they will be covered later. Pam, if you have any supplementaries to those questions, I am more than happy to bring you in at that point, but I would like to keep the questions in line with where we are.

Pam Duncan-Glancy: Okay. I think that we have a different understanding of the thematic organisation of the questions, but that is absolutely fine. We can get the answers to those questions later, if you wish.

The Convener: That would be great. Thank you.

We move to questions from Paul McLennan on theme 2, which is on the general principles of the bill.

Paul McLennan (East Lothian) (SNP): Good morning, panel. I have a question for Martin Tyson about OSCR. Do the provisions in the bill accurately reflect the proposals that OSCR put forward in your 2018 paper? Looking beyond that, do the proposals support OSCR's regulatory role?

How effective is that role at present? Are the proposed extensions to OSCR's powers appropriate and proportionate? After Martin has answered, the question is open to the rest of the panel.

09:15

Martin Tyson: Yes, the provisions reflect our proposals. We can think about why we made the proposals. The original legislation dates back to 2005, when the Charities and Trustee Investment (Scotland) Bill was passed, so we now have quite a few years of experience of regulating the sector. The proposals that we made very much reflect that experience.

The proposals give a sense of what has changed in the sector and more generally. Back when the 2005 legislation was drafted, there were not the possibilities relating to publishing information online and providing transparency in that way, so the 2005 act reflects an older perception. At that time, it was not possible to put all of a charity's accounts online fairly easily, so we need now to reflect the fact that there are opportunities to do that. We need to take all the opportunities that are available to increase transparency in charities' activities and regulation in order to increase public trust and confidence in charities.

Paul McLennan: We have had a few evidence sessions, including an informal one, on the bill. Charities have talked about transparency and accountability, and I think that the proposals in that regard have been broadly welcomed. Have you had any feedback from charities on that?

Martin Tyson: From the surveys that we carry out and from our day-to-day contact with charities, we know that most of them accept the need for, and welcome, transparency. Nowadays, many charities are open about what they do and are very proactive in providing information, including their constitution and accounts, online. That is helpful in attracting funding and maintaining trust.

Charities certainly accept in principle the need for transparency, but that is sometimes more difficult for some charities than it is for others—

Paul McLennan: It is harder for smaller charities, for example.

Martin Tyson: Yes—we understand that. Under the 2005 act, we are required to act proportionately and to take targeted action. We think about that all the time, and we will, as we do in everything that we do, bear it very much in mind when we implement the bill's provisions.

Paul McLennan: Do Alan Eccles and John Maton want to comment on the points relating to OSCR and accountability and transparency? Those issues have obviously been really important in driving forward the work.

Alan Eccles: From the Law Society's point of view, the general principles of the bill, which include a package of measures that are aimed at providing transparency and accountability, are fair and proper. The bill builds on the 2005 act, which provided something very new at the time. In broad-brush terms I note that, prior to the 2005 act, there really was not any proactive Scottish charity law. The bill provides an opportunity to build on the 2005 act, given that we now have a number of years of experience of a proper regulatory regime in Scotland.

People have raised some issues about the publication of names, but, on the whole, we think that the bill will be workable and that it strikes the right balance. We can compare the provisions with other systems, such as the one that is used by Companies House—many charities are companies—and with what the Charity Commission produces and the information that charities need to capture relating to their trustees and so on. We do not think that the bill will result in a significant new burden for charities.

John Maton: It is not really for my organisation to make value judgments on the effectiveness of the legislation or the proposals, but transparency and accountability are certainly very important principles. The Charity Commission for England and Wales pursues those principles—indeed, one of our statutory objectives is to enhance accountability. In relation to policy, we can see that the Scottish legislation is following the same direction of travel that the England and Wales legislation has followed. That involves, first, enhancing transparency and accountability and, secondly, providing the regulator with more graduated and refined powers so that it can enforce compliance when necessary.

Paul McLennan: Thank you, John. That is very helpful.

The Convener: We now move to theme 3, which is on information about charity trustees. Evelyn Tweed has the next questions.

Evelyn Tweed (Stirling) (SNP) (Committee Substitute): Good morning to the witnesses—it is good to see you.

Martin Tyson, can OSCR give some insight into how the register might operate from the public's perspective? Is there an expectation that it will be fully digitised?

Martin Tyson: Yes, absolutely. The Scottish charity register is a fully online register. If you go to our website, the first thing that comes up is a register search. You can search by the name of

the charity, keywords or the charity number, and the entry for the charity will come up.

If the bill is passed and we collect charity trustee information, charity trustee names—only the names—will come up as a result of a search on a charity. You will get the entry for the charity and the trustee names will come up as part of that entry. It will not be searchable by trustee name—they will appear only as part of the charity's information.

Evelyn Tweed: In evidence, we have heard concerns about digital exclusion. What do you say to that?

Martin Tyson: As I said, we have a fully online register. Almost all charities communicate with us online now. Through our OSCR online system, they provide us with an annual return, which is completed almost entirely online. Where charities are unable to do that, we accommodate them, and we would do that with the current proposals in relation to supplying us with trustee details, but it would be done primarily online.

Evelyn Tweed: I will move on to John Maton. Can the Charity Commission make any comment on how such a register operates in England and Wales?

John Maton: Yes, certainly. You might be aware that we display the names of charity trustees on our public register as part of the record of each registered charity. That is subject to a dispensation policy in relation to physical security. OSCR will have similar provisions in place with regard to its public register. We see it as central to transparency and accountability of charities and charity trustees. Within our framework and in our sector, it is not a matter of any difficulty at all. I do not think that there is any concern about it, and it is not something that we have been told is contentious in any way. It is simply part of the process—much like registering a company and publishing company directors' details—and it is a key part of what we publish.

Evelyn Tweed: I will make this my final question as Pam Duncan-Glancy might want to come in at this point. Do you have any general concerns about the proposals for OSCR to gather and maintain up-to-date information on charity trustees and to include the names of trustees? Again, we have heard from some that that is a worry.

Alan Eccles: From the Law Society's point of view, the provisions do not seem overly burdensome for charities. In many ways, how it works in practice will come down to operational matters. John Maton mentioned what happens in England and what is proposed for Scotland. There will be provisions whereby, if there are names and details that should not be made public, it will be possible to take those out of the system.

Martin Tyson: As John Maton said, there is a process whereby charities or individuals can ask for a dispensation from having a trustee's name published. That is similar to provisions that we have for excluding information from the register for certain charities where there are issues of security in relation to people or places. Part of the communication with charities that will happen in the run-up to implementation will be about ensuring that people are aware of how that will work, and we might do some targeted work with some charities that we know that that is an issue for, such as Women's Aid charities.

The Convener: Pam Duncan-Glancy has a supplementary question.

Pam Duncan-Glancy: Thank you, convener, and apologies for the earlier preview of this question. I will repeat it, because we have moved on slightly. Volunteer Scotland, which gave evidence last week, told us:

> "we will not know the true impact of this legislation on charities, and their trustees, until it is clear how OSCR intend to communicate and implement the new measures. This is not clarified within the detail of the Bill."

Further, the SCVO said that the administration and communications budget may be significant.

My question is for Martin Tyson. How are you preparing for the bill? Will you be able to do that within existing budgets, and how will you communicate the changes?

Martin Tyson: One general point is that many of the measures in the bill are expansions or augmentations of things that we already do or things that charities and charity trustees are already used to, such as submitting an annual return or asking for information to be excluded from the register. Therefore, we are not starting from a zero base.

However, we absolutely recognise that, for us, a big part of the implementation will be about communications. We are thinking hard about a communications campaign and strategy. That will depend on commencement dates, a phased introduction and when particular provisions will come in. In the run-up to the implementation of specific measures, we will have a phase in which we will look at what those measures mean for charity trustees generally. We will have specific targeted communications where we think that there might be particular factors or issues for particular sub-sectors to ensure that they know what is involved and that we know in detail what they think the issues might be.

There will be intensive communications during implementation. We have a lot of channels to

communicate with charity trustees that people are used to referring to, and we have the ability to connect directly with charities. We will use those channels.

After implementation, there will be a phase while people need support. We will look at what we need in relation to on-going support for the implementation of specific provisions.

Pam Duncan-Glancy: In developing that approach, what engagement will you have with smaller charities?

Martin Tyson: We will look to work in a targeted way with smaller charities. We work a lot with the likes of Girlguiding Scotland and Scouts Scotland, and many smaller charities will fall into those kinds of generic categories. That also applies to churches and designated religious charities, and to umbrella bodies such as the third sector interfaces in local council areas.

With a lot of the engagement and sector improvement work that we do, the most effective approach is often to go through other people, as we are not the sole purveyors of wisdom. Organisations such as Girlguiding Scotland and Early Years Scotland know their sectors, what the issues are likely to be and how best to help people to implement and get used to specific measures in their sectors. We need to be cognisant of that and take advantage of it.

Pam Duncan-Glancy: That is helpful. Will you commit to working with those organisations on the communication and implementation?

Martin Tyson: Absolutely. We do that already, and it is part and parcel of what we want to do in relation to the bill.

Pam Duncan-Glancy: Thank you.

The Convener: We will move to questions from Foysol Choudhury, who joins us online.

Foysol Choudhury (Lothian) (Lab): Good morning, panel. Before I ask my question, I declare an interest as the chair of a charitable organisation. I apologise, convener, because I should have done that previously.

My question is probably for Martin Tyson, but, if any of the other witnesses wants to get involved, that is fine. Do you have any concerns that the bill will disproportionately affect smaller charities, particularly ethnic minority charities, that are already struggling to stay in business, given the cost of living crisis?

09:30

Martin Tyson: We need to thoroughly bear in mind the need to be proportionate in how we implement the bill. As I said in my previous answer, a lot of that will be around our working with umbrella bodies—there are umbrella bodies specifically for ethnic minority charities—to identify where there are issues or factors that might make it more difficult for them to implement specific provisions. We want to be targeted and proactive, and we want to do a lot of that up front rather than wait for issues to appear.

Foysol Choudhury: Do you have any concerns about the provisions for charities to redact certain information from published accounts where there might be safety or security concerns? That is probably a question for Alan Eccles.

Alan Eccles: As I said previously, we do not see the new rules on publishing names and providing such information as being overly burdensome or causing significant problems for charities. There are protections in relation to sensitive information or where there are reasons for not making that information public.

I return to the impact on smaller charities. We would not see the provisions that are in the bill as causing significant issues for them. They could be helped by including in the bill the additional points that we have mentioned, particularly around unincorporated charities converting into SCIOs.

The provisions for charities that are established by an act of Parliament sometimes affect very small charities. The way in which some charities have become established by an act of Parliament is quite unusual. In the past, there have been times when it was en vogue for people who have left assets to charities under their will for that then to be turned into an act of Parliament. In such cases, a small charity became magically governed by legislation. Provisions could be added to the bill—they are not in it currently—that could help smaller charities to use their funds in a better, more effective way for their charitable purposes.

Foysol Choudhury: My last question is probably for John Maton. I have been involved in smaller organisations. The majority of the trustees are volunteers and work elsewhere. Is any support provided to smaller organisations if they are struggling? What kind of support could be provided?

John Maton: If you are thinking about support in terms of dealing with the shift to the implementation of new legislation, the support that we provide to charities in our jurisdiction is mostly in the form of guidance and outreach activities to explain the provisions. We work quite hard to ensure that our guidance is accessible. We are very aware that the majority of trustees are volunteers and that they are doing that work in their spare time, and that most charities do not have the resources to pay for professional advice on new legislation and the like. We are conscious

of that. We also rely on sector bodies and the like to be knowledge hubs in relation to the changes.

I suspect that, from my experience, the changes that will be made as a result of the bill are not ones that would impose enormous administrative burdens on charities. Some of the measures, particularly those around the register of trustee names, relate to information that charities will already hold. I would imagine that that would be a fairly simple filing requirement. I do not think that there should be too much concern in that regard.

The Convener: On that theme, do the witnesses have any concerns about the proposal to publish unredacted accounts for all charities, regardless of size? Witnesses last week suggested that there could be a threshold to ensure that charities with smaller incomes were exempt. Would you support such a measure? I will go to Alan Eccles first.

Alan Eccles: The idea of making information available is something that the Law Society would support with regard to the bill's general principles. Again, as long as none of the information causes any risk to anyone, we see the provision of information as a good thing. As far as reassuring the public is concerned, the ability to get easy access to information about charities would, we think, support the sector and those fundraising or otherwise getting involved in it instead of its being a hindrance. However, as I have said, there need to be protections around certain pieces of information.

The Convener: Do you agree, then, that removing charitable status from organisations that fail to submit accounts is an appropriate measure?

Alan Eccles: Yes. We would support provisions that allow OSCR to deal more easily with charities that are not doing such a key, fundamental and basic thing.

Martin Tyson: On a point of clarification, what is proposed is not the power to remove charitable status simply because a charity has failed to submit its accounts; it has to fail to submit and then not engage with us. That is a safeguard for charities that, for whatever reason, are genuinely struggling to get their accounts finalised—as some did, during the pandemic. We can have that dialogue with them and it will not result in removal.

The Convener: Actually, my next question is on routes to appeal. What routes to appeal will be in place for charities that fail to publish their accounts on time? You have just talked about communication, but can you expand on that?

Martin Tyson: There are quite a lot of hurdles that we have to go over before we remove a charity. There would have to be a pattern of attempts to engage with it, and then we would need to publish the fact that we were going to remove it for a time to allow it to come back and say, "Wait a minute—you can't do that. We'll have our accounts ready by Tuesday." If we do remove it, that decision can be subject to the statutory review procedure in the 2005 act, and if the charity does not like the result of that review, which is carried out internally by us, there can be an appeal to the Charity tribunal.

The Convener: My last question is, again, for Martin Tyson. Can you give us any further detail on the criteria for what constitutes a safety or security concern, and how would a review of OSCR decisions work in practice?

Martin Tyson: This, again, is a factor in the law and in our practice at the moment. When charities ask to be registered, they can say, "We don't want our address to be published on the register." These are decisions that we make at the moment. Given the wording in the 2005 act, which is replicated in the bill, we would be looking for evidence of a specific and clear reason why publishing such information would jeopardise the safety and security of individuals or the premises. The example that I would highlight would be Women's Aid and women's refuges, where it is very clear that publishing that information would make individual people vulnerable.

At the moment, something like 69 charities on the register have information excluded on that basis. Where we have excluded that information, the charity will be able to exclude it from its accounts, too.

The Convener: Thank you. That was very helpful. I call the deputy convener, Emma Roddick, who is joining us online.

Emma Roddick (Highlands and Islands) (SNP): Good morning. My first question is for Martin Tyson. I know that the Law Society has addressed this issue in its response, but I am keen to hear whether Mr Tyson thinks that it is sensible to have the same disqualification criteria in place across the United Kingdom. Are there any areas where Scotland could go further?

Martin Tyson: We believe very strongly that it is sensible to have the same disqualification criteria across the UK.

The new criteria that the bill will bring in are for matters that any member of the public would think are serious—that is, matters that would prevent someone from acting properly as a charity trustee. At the moment, theoretically, someone could act as a charity trustee in Scotland when they could not do so in England and Wales, because they had been found to have done something serious. For public trust and confidence, we think that having the same disqualification criteria is right. We do not have any desire at present or in

prospect to go beyond the disqualification criteria in England and Wales.

Emma Roddick: Do you agree with the proposal to extend the disqualification criteria to senior management positions, and do you anticipate that having any implications for recruitment?

Martin Tyson: We agree with that proposal. Again, there is an issue of public trust and confidence. Given the kind of decision making that charity trustees sometimes delegate to senior members of staff on charities' operation and decision making, where people would be disqualified if they were a charity trustee, we think that there is a need to guard against that sort of vulnerability in order to meet legitimate public expectations and maintain public confidence.

On recruitment, a lot of what is in the disqualifications would probably be part of the due diligence that most employers would do for new recruits anyway. I am not sure that the numbers involved would have a big impact on recruitment.

Emma Roddick: I have a final question for Martin Tyson, and then I have questions for the other witnesses. Is it appropriate for OSCR to maintain a publicly searchable record of trustees who have been disqualified, and does that present any issues around the handling of sensitive personal data?

Martin Tyson: It would be good to start with the reason for that. At the moment, it is hard for charity trustees who are recruiting new charity trustees to do their due diligence in respect of people whom the regulator has decided cannot be charity trustees. There is a gap in the due diligence that charity trustees can do, which is what that measure tries to address.

On the information and data issues around that, we are keen to guard against any sense that the wrong people are being identified from a register search, so the register will set out enough detail, reflecting the original court decision, to disqualify the person. There will be enough personal detail to distinguish them, but, if there is any uncertainty, charity trustees should contact us to make sure of whom they are dealing with.

Emma Roddick: I will move on to Alan Eccles. I have read your submission, but what are your thoughts on the comments that have been made by previous witnesses that measures for disqualification are too punitive and restrictive on those wishing to act as trustees?

Alan Eccles: We take the view that the extension of the disqualification rules seems sensible. That is one area where alignment with neighbouring jurisdictions makes sense. The idea of extending it to senior management is reasonable. That is perhaps an example of building on the 2005 act on the basis of the experience of 15-plus years of seeing what happens. The idea that people who have very important roles in charities are subject to that regime would not be much of a surprise to the public and would probably give them further reassurance about how charities are being operated.

09:45

Emma Roddick: Are there any concerns that the disqualification criteria might disproportionately impact certain demographics and not others? I am thinking, in particular, of charities that work among particular demographics, which might be looking for people with lived experience.

Alan Eccles: What is important on that sort of issue, and more generally in relation to how the regulatory system works, is that OSCR is statutorily required to be a proportionate regulator. Certainly, in my experience, OSCR is a proportionate and reasonable regulator to deal with and it will, therefore, deal with matters properly. I do not think that particular groups will be affected in different ways. There should be a proper system for dealing with any issues that arise, including an issue as serious as someone potentially being disqualified as a trustee.

Emma Roddick: Okay—

The Convener: I am sorry, Emma—before you continue, Martin Tyson would like to comment.

Martin Tyson: Some of the previous discussion on the issue has concentrated on people being disqualified from acting as a trustee by reason of personal bankruptcy. That is an existing disqualification criterion, and it has been since 2005. It is not a new provision that the bill is bringing in. The anxieties arise because of the current situation with the cost of living crisis and the pressures that that is putting on people.

Bankruptcy or having a protected trust deed tends to be a relatively short-term thing. The average personal bankruptcy will last for 12 months, after which the person will be free to act as a charity trustee. Such disqualifications are probably a lot more temporary than the other disqualifications.

The Convener: Thank you, Martin.

If you have further questions, Emma, on you go.

Emma Roddick: I have a few—I am sorry about that, convener.

Martin Tyson's point was important, because a lot of our witnesses seemed to believe that bankruptcy is not an existing ground for disqualification. Is there an issue with awareness,

or maybe with implementation, of that at the moment that is causing that discrepancy?

Martin Tyson: I wonder whether there might be. We are reflecting on that in the context of our communication. The communication around the implementation of the bill probably gives us an opportunity to do a bit of a reset and communicate clearly about how things are at the moment.

Alan Eccles: This is not a Law Society view, but I know from cases on which I have had to give advice on the matter that people might think that, if someone has been bankrupt, that affects their ability to take on such a role forever, rather than covering the period for which the bankruptcy arrangements are in place. I have had that question asked of me. The relatively speedy answer, which should give reassurance to individuals and charities, is that disqualification from acting as a charity trustee does not apply after the bankruptcy arrangements have ended.

Emma Roddick: My next question is for John Maton. Is the Charity Commission for England and Wales able to offer insight into how the disqualification criteria process works in England and Wales and how it aligns with the process in Scotland? How does your register of disqualified individuals operate?

John Maton: Certainly. There are two separate things. First, there is our power of discretionary disqualification, the introduction of which is not being proposed in Scotland. Our proactively maintained register relates to people who have been actively disqualified. I believe that, in Scotland, the equivalent power would be for the court rather than for the regulator.

Separate from that, there is automatic disqualification. We maintain a register of people who have been disqualified by court order, and we work on automatic disqualification through advice and guidance to trustees and through searches of other public registers such as the insolvency register and the register of disqualified company directors. There is a crossover—in the same terms as the bill, in effect—in that, if someone is subject to one of those provisions, they are automatically disqualified.

When the current list of automatic disqualification criteria was introduced in England and Wales through the Charities (Protection and Social Investment) Act 2016, there was concern about the scope and scale of how far automatic disqualification would go. However, the post-implementation review that was carried out by the Westminster Government's Department for Digital, Culture, Media and Sport showed that the concern about the burden that might be placed on the sector was not borne out by the impact in practice. That might be helpful.

We embed the automatic disqualification criteria in things such as the trustee declaration that we require people to complete on registration, and, in our guidance for trustees on appointing new trustees, we advise them to work through the criteria as part of their due diligence.

The Convener: There are some supplementary questions on that line of questioning.

Pam Duncan-Glancy: A couple of questions have come up from the answers that we have been given. John Maton made a point about discretionary versus automatic disqualification. Will you explain that a bit and say what we would need to do here to apply discretionary disqualification instead of automatic disqualification?

John Maton: I defer to Martin Tyson on the conversations that have happened during the development of the bill, but I believe that discretionary disqualification is outside the bill's scope. In Scotland, discretionary disqualification is currently a power of the Court of Session with which it can remove trustees. The Charity Commission for England and Wales has a power of discretionary disqualification in cases of misconduct and mismanagement or where there is a need to protect charitable resources, but it is a separate part of our framework.

Automatic disqualification happens by the operation of law. If a certain circumstance, such as bankruptcy, applies to someone, they are simply disqualified by the provisions of the 2016 act, and that is what the bill proposes to introduce in Scotland.

Pam Duncan-Glancy: Martin, is there a reason why a discretionary disqualification approach could not be used in Scotland? The reason that I ask is that, as some of my colleague Emma Roddick's questions have suggested, some organisations have said that it could be a little punitive to automatically disqualify people. I take the point about public interest, but some people who want to become a trustee for a charity might be doing so because they want to rebuild their life. For example, they might have a conviction but, under the bill, that will mean that they are automatically disqualified. Is there scope for it to be discretionary? How would you address that?

Martin Tyson: The first thing to say is that automatic disqualifications on the grounds of bankruptcy or having an unspent conviction for dishonesty are in the 2005 act and have been operating for the past 17 years, and those disqualifications are very close to the spine of charity trustee duties. For instance, on disqualification on the grounds of bankruptcy, if someone is bankrupt or has a protected trust deed, that takes away their ability to control their

own affairs. In performing their duties, charity trustees must act to the same standard of care that they would exercise in looking after the affairs of another person, and there is something very problematic about someone doing that if they are not fully able to look after their own affairs. That is getting into a quite fundamental issue. I do not think that there would be scope in the bill for what you suggest, and we would not necessarily support it.

On your point about people wanting to rebuild their lives, someone being disqualified as a charity trustee does not prevent them from volunteering for a charity. Under the new bill, disqualification as a charity trustee might disqualify someone from working as a senior member of staff of a charity, but it would not necessarily prevent them from working in another role, provided that the charity trustees were happy for them to do so.

Pam Duncan-Glancy: What kind of process do you imagine would be in place to waive or challenge that decision?

Martin Tyson: Again, that process is in the current legislation and we currently operate it.

When we look at a waiver application, we concentrate on where the request to waive a disqualification for an individual reflects the purposes and activities of the charity, and at whether something about the skills or life experience of that person means that it is necessary for them to be a trustee of the charity, and that therefore it is a job that only that person—or someone like them—can do. We look primarily from the point of view of the needs of the charity, and we consider how the charity would manage any risks that come from appointing the person.

Pam Duncan-Glancy: Where would the administrative burden of proof fall?

Martin Tyson: It is for the person who has applied and, to an extent, the other charity trustees to make a case for an exception. Automatic disqualification means just that, so they would, in effect, be requesting that OSCR make an exception to that, and they would need to make a case as to why that exception should be applied.

Paul McLennan: Pam Duncan-Glancy has touched on the issue of the rehabilitation of prisoners, which came up during one of our informal sessions. Prisoners obviously have certain experience. That is an example where you could consider the approach that you explained. That example was raised by a couple of charities that deal with rehabilitation—obviously, lived experience is vital in that case.

Martin Tyson: It would be. If someone had an unspent conviction for dishonesty, and if the trustees put forward a case that that person, by reason of their lived experience, was uniquely fitted to be a trustee of the charity—that would depend on the charity's purpose and what it did—we would look at that seriously. We would also ask what that person would be doing and how the other trustees would exercise their duties in respect of that.

The Convener: I have one final point on that. The bill would give OSCR the power to create a database of people who have been removed from being involved in the administration of a charity by the courts. The consequences for individuals who are mistakenly thought to be in that position could be significant—for example, they might not be able to work in the charity sector. Can OSCR explain how the risk of mistaken identity will be minimised in relation to public searches of the database?

Martin Tyson: A person who is on the database will already have gone through a court process, and the register will fully reflect their identity and the details of that process. We will try very hard to ensure that there is sufficient information to enable people to be distinguished easily. However, if charity trustees have concerns or doubts, they will be invited to get in touch with us so that the person can be verified.

The Convener: Do any of the other witnesses have ideas on how that should be approached? Alan, I saw you making eye contact during that answer.

Alan Eccles: No—I have nothing further on that one.

Miles Briggs (Lothian) (Con): Good morning, panel. I want to ask some questions about how the bill will impact on the number of charities in Scotland. Do you think that it will result in fewer charities in Scotland if it passes?

Martin Tyson: I suspect that it will. The power to remove charities that have not submitted accounts to us and that have not engaged with us about that will enable us to remove some charities from the register. That could happen when—possibly as a result of the cessation of the activity of a lot of charities since the pandemic—things have fallen down and trustees have walked away and have not wound up the charity formally. It will enable us to take out a bulge of charities that are sitting on the register that we do not currently have the ability to deal with, so it will adjust the number downwards a bit.

10:00

Miles Briggs: Have you done any work to quantify what that will look like and how many charities we are talking about?

Martin Tyson: That is a bit of a known unknown. Currently, there is quite a high level of

non-submission of accounts. That level is much higher than it has been historically, and we think that that is a result of the pandemic. Around 11 per cent of charities have failed to submit accounts on time, which is a bit higher than the historical level. We think that a proportion of the additional number will be charities that are in that situation. However, that is very hard to quantify, because they are not engaging. Things are much easier when we deal with charities that are engaging but are simply having problems with submission.

Miles Briggs: Has any research been undertaken into what impact there will be on accessing funds for organisations in Scotland that are currently not registered as charities and whether that might result in more people thinking that they should register in Scotland under the new legislation?

Martin Tyson: Over the past few years, there has been quite a lot of thinking about community bodies and social enterprises. Some social enterprises are charities, some charities undertake social enterprise activities, and the work of some social enterprises is a bit more towards the trading end of things and they would never want to be a charity. There is a degree of interest in, and fluidity about, the boundaries between those categories and charity.

Some of the things that drive people and organisations to seek charitable status are interesting—Alan Eccles has already alluded to some of those. It will be about funding. It will be about the tax or the local taxation advantages. When those things change, we see fluctuations in the number of registration applications that we receive. For instance, back in the twenty-teens, there was a tax change that affected community sports clubs. That change made it more advantageous to be a charity, and we got a lot of applications from the likes of bowling clubs and tennis clubs.

Miles Briggs: That is one of the points that we have had concerns about. There is sometimes pressure on smaller charities—for example, village hall charities—to submit accounts. Do you think that there is a need for some flexibility—potentially around income—on the proposal on unredacted accounts for all charities, regardless of their size, being published?

Martin Tyson: To go back to first principles, I think that everyone would expect a charity to prepare accounts and to keep looking at what the trustee duties are. Everyone would expect charity trustees to be able to keep control and to keep a sense of their charity's financial situation. Preparing accounts is almost a given.

The requirement to submit accounts to us is a long-standing one. I have said that there has been a dip in compliance with that requirement, but the levels of compliance have, historically, been pretty high. I am not sure that the publication of accounts adds to the burden or necessarily becomes more burdensome.

Our regulatory experience is that people really care about small charities. People care about what is happening in their village hall. A lack of clarity or trust there can have surprisingly big consequences in small communities.

Miles Briggs: Do you think that removing charitable status from organisations that have failed to submit their accounts is an appropriate measure? Is that the very last resort in trying to work with them to get that information?

Martin Tyson: Absolutely—it is a last resort. As I said, we will not be able to remove the status simply because an organisation has failed to submit; it will be because an organisation has failed to engage as well. If an organisation is engaging, we can work with it; if it is not engaging, we cannot do that.

Miles Briggs: Does anyone have anything to add on those questions?

Alan Eccles: On whether the bill will affect the number of charities, we do not see the bill leading to fewer people wanting to set up charities. The register of mergers, which is to do with legacies, might result in a very small number of charities that probably should not be there—well, that do not need to be there—coming off the register.

What the bill does not do, but which we think it could usefully do, relates to smaller unincorporated charities that probably want to be, and should be, incorporated. The bill does not help them. Miles Briggs mentioned village hall charities. For a smaller charity that is asset heavy, the process of moving to a better governance structure that encourages new trustees to come on board—that is sometimes the reason why charities want to become incorporated—is quite difficult. However, the bill will not smooth that process for them.

The Convener: I have some questions before we move on. Is it appropriate for OSCR to be able to issue positive directions following inquiry work, and is it appropriate for designated religious charities to be exempt from that provision?

Martin Tyson: We think that it is appropriate. That provision very much comes from our regulatory experience. The power for us to issue positive directions would be circumscribed. There would be hurdles that we would have to get over—we would have to show that there was misconduct in the administration of the charity or that there were assets that needed to be protected. That could come only as a result of an inquiry by us and

after considerable engagement with the charity. There are situations in which we need to make specific, measured and timed directions. That would usually be to get charity trustees to do something that they are not doing but that falls within their duties or what the constitution says that they have to do.

John Maton: To draw a comparison with England and Wales, we have that power and we use it fairly regularly. In effect, it is part of a toolkit of powers. Our power of positive direction is more often used in a slightly different context, because it is often used to issue things such as action plans and plans for improved governance in relation to a charity. The effect of issuing something by order makes it a legal obligation, which can then be enforced using our other powers. The power is part of a suite of compliance powers that we have, and we use it regularly.

The Convener: For my supplementary question, I will go back to Martin Tyson. Can you outline the procedures that are in place when a smaller charity that is overseen by a larger organisation is under investigation? What level of engagement does the parent charity currently have in the process? Does that present any challenges?

Martin Tyson: Unless the parent charity is a designated religious charity, there is no formal provision for parent charities to be involved. Parent charities can be quite varied, as can the links between small charities and parent charities. We work a lot with parent charities. For instance, we do that when smaller charities do not submit their accounts. That is a public fact—we publish that information—which means that we can engage with the parent charity. However, we do not have specific powers to share information with parent charities in the way that we can share it with other regulators or statutory bodies.

Therefore, with inquiries, we have to work on a case-by-case basis. Sometimes, the parent charity will have come to us with an issue, and we will be able to engage with it to a degree. Sometimes, the issue will be a dispute between a smaller charity and the parent charity, so we have to step very carefully.

The Convener: Thank you. That is, again, very helpful. We will move to questions from Jeremy Balfour.

Jeremy Balfour (Lothian) (Con): Good morning, and thank you for coming. My first question is for Alan Eccles. Concerns have been raised in the written evidence about the data protection implications of the bill. In the Law Society's view, have those been adequately addressed in the data protection impact assessment and the legislative proposals, or does the issue need to be looked at further?

Alan Eccles: The first thing that I would say is that my knowledge of data protection law is not very good. I know—I hope—about charity law, but I do not know that much about data protection, although, of course, the society does. Therefore, my commenting on that might not be the most helpful thing for me to do.

However, the society is very keen that, when the proposals in the bill are put in place, there is security of information, the right information is publicly available and the data protection regime that is in place is followed. Between the legislation and what OSCR is doing in practice, we expect that ensuring that data is protected and is looked after properly will be central to that. Transparency and accountability are important, but public reassurance on that would be eroded if the data was not being looked after in a proper fashion.

Jeremy Balfour: Martin, from a regulator's perspective, are you happy with how the bill deals with that area?

Martin Tyson: We are considering that extremely carefully. We are looking to ensure that the way in which we build the implementation, particularly around the trustee database, builds in compliance with data protection requirements.

The fact that we will have a duty to collect the information puts us in a particular position with regard to data and data protection. There will be specific safeguards in relation to how we collect information from charities, which will relate to the privacy notices that we issue to charity trustees. We will ask them to confirm the information that has been submitted on their behalf. Through the annual return mechanism that charities are used to submitting to us, we will ask them to provide early confirmation of their charity trustees so that we can make sure that the data is accurate. There will also be an easy online mechanism to enable charities to update trustee details after the annual general meeting when they elect new trustees.

Jeremy Balfour: Is there anything that we can learn from how things work down south in that regard?

John Maton: Certainly. Overall, it is not a matter of concern. The general data protection regulation and data protection legislation are well known for being especially complex and technical. We work very hard to ensure that our work is compliant, but, at the level of principle, data protection legislation is about ensuring that there is a balance of rights and responsibilities between data controllers and data subjects.

In the field of regulation, we have talked about transparency and accountability, public trust and

confidence, and how regulators are given powers and duties to handle data in furtherance of those objectives. To the extent that what is proposed in the bill matches arrangements that we already have in England and Wales, there are established understandings of how those arrangements work with regard to data protection, and I would not have a concern, certainly at the level of principle.

Jeremy Balfour: Thank you. With my second question, I will again start with you, Alan, but feel free to pass it on.

The bill uses the terminology of a "connection to Scotland". I know that the bill provides some guidance in that regard, but, as I understand it, there is no clear definition of what that means. From a Law Society or legal perspective, are you happy with that terminology or do you think that it should be more defined in primary legislation?

Alan Eccles: We recognise that defining that with great precision could be difficult to achieve. The idea here is that OSCR will be able to consider such matters on a case-by-case basis. Greater precision would be good, but the difficulty lies in deciding what that greater precision would be and whether it would capture a situation that has not been considered in which a charity had a connection to Scotland that did not fit with a very tightly constructed definition of a connection to Scotland.

10:15

Jeremy Balfour: I ask the question because there is the issue of whether the buck is being passed to the courts. Ultimately, will the matter have to be decided when someone takes their case to a hearing? Under the primary legislation, are we passing the buck to the judiciary, or is that being unfair on us?

Alan Eccles: One point relates to how often the issue crops up and what type of situations crop up. Martin Tyson might have more insight on that. In my experience, when you drill down into charities that do not have an obvious connection to Scotland, it often becomes clear that they do have some kind of connection. For the charities that have no connection at all to Scotland, you wonder why they have applied in the first place.

Martin Tyson: I will make two points. The bill sets out a bunch of things that we need to have regard to. It sets out a number of characteristics relating to what a connection to Scotland might be, including having a physical footprint in Scotland, undertaking activities here and having charity trustees here. The provisions are very similar to those that have been in operation for a number of years under the 2005 act. We have fairly clear guidance on the obligation to register as a charity in Scotland, and we have been able to explain to the sector that there is a pretty settled view on how that provision operates.

Alan Eccles is right in saying that there would be only a few marginal cases in which there might be uncertainty. At the bottom of the provisions, it says that we need to consider whether the connection is a "negligible" one. We will be able to exercise a bit of discretion in that regard, so we need to think about how we would do that.

The provisions seem relatively detailed to me, as someone who often has to look at legislation and think about how it will operate.

Jeremy Balfour: That is helpful.

The bill gives OSCR the power to appoint interim charity trustees. Have you any concerns about that, given that it is a fairly large power? Is that an appropriate power?

Alan Eccles: One aspect of the power relates to situations in which charities run out of trustees. Amendments were made that gave OSCR some powers in this area, but not in situations in which charities completely run out of trustees. You would be surprised by how many trustee charities could accidentally run out of trustees. The Parliament will soon consider the Trusts and Succession (Scotland) Bill, which includes powers relating to changing trustees. Under the current rules, if charities do not follow what parliamentarians came up with in 1921 in relation to changing trustees, they might accidentally run out of trustees, and they would then have to go through a court process to get up and running again. The Charities (Regulation and Administration) (Scotland) Bill provides for an OSCR process to deal with such situations, which is quite sensible in allowing a charity to get back up and running with trustees.

Martin Tyson: I have very little to add to what Alan Eccles has said. The power is very circumscribed. We can use it in very limited circumstances in order to break a legal logjam by allowing a charity to appoint trustees. That means that a charity will be able to deal with a problem that is in front of it, which will often have been caused by a problem relating to quorums. It is a short-term measure; the appointments are short term.

Jeremy Balfour: I have a final question for you.

When OSCR was set up, the first appeal was to a separate tribunal. Appeals now go to the First-tier Tribunal for Scotland. This question might arise from ignorance on my part, but have we ever legally disbanded the tribunals that were set up under the 1995 act? For clarity and for the sake of tidying up, would the bill be an appropriate place to do that?

Martin Tyson: I am sorry, but the answer is that I do not know. I am happy to take that question away and try to get an answer for the committee.

Jeremy Balfour: Thank you. Allan Eccles, do you have an answer?

Alan Eccles: I have the same answer as Martin.

Jeremy Balfour: If you could both write to the committee after the meeting, that would be helpful.

The Convener: I have a few questions before we finish. I apologise that we have run on slightly—we have had so much to get through. Do you have any concerns regarding the appointment of interim charity trustees, and are you satisfied that there is enough clarity around that provision? Should there be a dispute mechanism—

Jeremy Balfour: I just covered that in my question, convener.

The Convener: Oh, I apologise—did you just cover that, Jeremy? I have a few questions, so I will move on to financial implications.

Do you agree that the bill proposals will not result in any additional costs for local authorities or charities? I ask Alan Eccles to answer first.

Alan Eccles: We do not think that the bill's provisions would cause significant additional costs for the charity sector as a whole. As I said, some of the provisions that we would like to see in the bill would save on costs for charities.

Martin Tyson: Where they act as charity trustees, local authorities will have the same responsibilities as other charity trustees, so the burden will be the same. We have worked very successfully with a number of local authorities to streamline their holdings of charities. Where they have been able to do that, their costs will be proportionately lower, so the situation is probably a lot better than it would have been a few years ago.

The Convener: I will come straight back to you, Martin. We briefly touched on a communication strategy in our discussion of other themes, but I would like something specific on that. The SCVO highlighted that OSCR has a responsibility to ensure that charities understand the impacts of the bill, and it noted that

"there is a possibility that the need for communication, engagement, guidance, and clarification from OSCR to charities as a result of this Bill may have been underestimated".

Is OSCR confident that it will be able to carry out the enhanced duties efficiently and effectively with the current levels of funding, or will further resources be required?

Martin Tyson: Like other public bodies, we are looking to see how we can maximise efficiency with the resources that we have, but we see a need for further resources for both the digital changes that we will need to make and, particularly, with regard to communication and engagement. We are working with our colleagues in the Scottish Government and with ministers to identify what those resources will be on the basis of the financial memorandum and looking at our overall budget requirement.

The Convener: Do you have any further comments on that planned communication strategy should the bill be passed?

Martin Tyson: As I mentioned before, some of it will depend on commitments, phasing and so on, but we are thinking very hard about a strategy and a campaign, particularly around the areas that we have spoken about this morning, such as automatic disqualification and the trustee database—those things that will impinge on the information that charities provide to us and their interaction with us. We want to do a lot of that very proactively and in a very up-front way, in terms of the overall messaging to charities through existing channels and that specialised sector-specific communication where we think that there might be specific issues. Obviously, we are listening with great interest to what is coming out of these evidence sessions with regard to what those issues might be.

The Convener: I thank all the witnesses for giving evidence this morning. I will briefly suspend the meeting to allow for a change of witnesses.

10:24

Meeting suspended.

10:29

On resuming—

The Convener: Welcome back, everyone. I welcome to the meeting our second panel. Dr John Picton is a senior lecturer and member of the charity law and policy unit at the University of Liverpool; Nick Holroyd is a member of the Faculty of Advocates; Gavin McEwan is an executive committee member of the Charity Law Association; and Keith Macpherson is a member of the Institute of Chartered Accountants of Scotland charities panel. All our witnesses have joined us in the room.

As I did for the first panel, I will quickly mention a couple of points about the format of the meeting. Please do not feel that you have to answer every question if you have nothing new to add. We have a lot to cover, so I ask you to keep your questions and answers as tight as possible.

Again, Pam Duncan-Glancy will begin the questioning.

Pam Duncan-Glancy: Good morning. I will ask questions that are similar to those that I put to the previous panel, so, if you were here then, you will know what is coming.

Could the witnesses say a bit about the consultation that led to the bill? What are your views on that consultation? I ask John Picton to start.

Dr John Picton (University of Liverpool): The charity law and policy unit at the University of Liverpool took part in both consultations. We thought that the approach was very thorough, the questions were clear and precise, and the agenda was clear.

We noticed that one of the initial proposals in the consultation related to charities established by an act of Parliament or by charter. There were questions around whether the Scottish regulator—OSCR—should be able to consent to constitutional changes at those charities. That proposal has been dropped. We regretted that; we thought that that was a shame. Giving OSCR that power would not necessarily mean deregulation; it would just mean giving OSCR control. It can take a very strict view if it wants to in relation to those types of charities.

Pam Duncan-Glancy: That is interesting. We heard something similar on that from one of the witnesses last week. What is Nick Holroyd's view?

Nick Holroyd (Faculty of Advocates): There was general approval from the Faculty of Advocates for the proposals that were put forward and for the way in which matters were structured. There were various additional issues that may be worthy of consideration, which are listed in the written submission, including a further review of charity law. We have made individual suggestions but, broadly speaking, there was a very positive response.

Pam Duncan-Glancy: Do you think that a further review is needed? If so, what should it include? I see that John Picton is nodding. We will note that.

Nick Holroyd: A variety of issues will need to be looked at. One is the difficulty that charity trustees—in the broad sense of that term—face where the charity through which they operate is a conventional trust. The exposure to liability is a substantial issue that needs to be considered.

Another issue—to some extent, this is a separate issue, but it is one that, in practice, interfaces with the first issue—is the ability to change points of detail in constitutions or to change the medium through which the charity body operates, such as changing from a trust to a SCIO.

Other suggestions are made in the written submission as well.

Pam Duncan-Glancy: Thank you. Does Gavin McEwan have anything further to add?

Gavin McEwan (Charity Law Association): I echo those comments. To pick up on John Picton's point about the reorganisation of charities created under enactment or by royal charter, such provisions would not impact on a huge number of charities. However, if there were provisions on that in the bill, they would make a meaningful difference to those charities. It is important to emphasise that that would not transform the entire sector but it really would assist those bodies in making swift, cost-effective and cost-efficient constitutional changes. Therefore, I think that it would be really good if that aspect could be built into the bill during its progress.

I think that a wider review is essential. I am sure that there are lots of little technical things that lawyers and accountants would bring along as part of their wish list of things that they would like to see changed. What the sector feels should change would be more interesting. Having really good engagement with the sector might flush out things that we and the Parliament have not thought about. A wide review that really engages with the sector would be an extremely valuable process.

Pam Duncan-Glancy: We heard some evidence about that from the sector last week. I think that those who gave that evidence would concur with that.

Does Keith Macpherson have anything to add?

Keith Macpherson (Institute of Chartered Accountants of Scotland): ICAS responded to both consultations, and we were satisfied with those exercises. We also welcomed the opportunity to engage with the Scottish Government's charity law team and OSCR earlier this year. We have seen OSCR's commitment in its submissions and in its panel evidence that it will continue to engage with stakeholders through the bill's implementation process.

At a high level, we broadly welcome the proposals in the bill and recognise that it is a regulation and administration bill. Our submission goes into some further areas around regulation. Gavin McEwan touched on a wish list of things that could have gone further in our interests. Those include the regulation, auditing and independent scrutiny of charity accounts, for example.

Pam Duncan-Glancy: Thank you. I think that there will be further questions from my colleagues on that particular point.

To stick with the theme of the review and what is in the bill, I think that John Picton said in his written submission that, in order to bring the bill in line with UK regulation, there would need to be a bit more on that. Does he feel that that came out in the consultation? Given his comment about bringing the bill into line with other parts of the UK, are there areas that should be part of the proposal or part of a broader review?

Dr Picton: In England and Wales, there has just been a large-scale review of charity law, which has led to some new differences between England and Wales and Scotland. Therefore, there is a question for Scotland in considering those differences and deciding whether it wants to respond.

I say that with some hesitancy, because I am not necessarily in favour of all the changes that have happened in England and Wales. However, there have been changes. For example, it is now easier in England and Wales for trustees to change their own constitutions. They have a power of amendment. In addition, it is now possible for trustees to sell goods to their own charity. Imagine, for example, that I run a stationery factory and that I, as a trustee, can sell stationery to my own charity. There are questions for Scotland about whether it wants to respond to that.

Pam Duncan-Glancy: Thank you. That is helpful. Where would you point us to for an understanding of the new differences that you have referred to?

Dr Picton: The Charities Act 2022 is coming into force in stages. It is partly in force at the moment. Of course, there are also the Charity Commission for England and Wales and its guidance, and us at the charity law and policy unit.

Pam Duncan-Glancy: Thank you. That is much appreciated.

Gavin McEwan, this is my final question on the theme. Your written submission says that the law could go further. Notwithstanding your comment about reorganisation, which we have noted, have any other issues come out through the consultation that should be part of what is now proposed, as opposed to being part of a review in the future?

Gavin McEwan: One of the joys of the Scottish charity system is that we have sometimes been slightly ahead of the game. If I can be competitive for a moment, we beat England and Wales in the introduction of charitable incorporated organisations. We had those in Scotland before south of the border had them. It has been very nice to see that Scotland has been ahead of the game in charity law and regulation.

However, I feel that we are now slightly behind the curve and that the bill might put us slightly further behind the curve. That is my concern. For example, the provision on the register of mergers is helpful, and it will allow us to catch up a bit with the system south of the border, but it covers only legacies, not lifetime gifts.

Subtle changes could be made to the bill as it stands that would help to keep us either ahead of or on the curve. If a wider review could then capture more changes to help the regime in Scotland to evolve and develop, that would, I hope, put us ahead of the curve again. There should not be a competition between jurisdictions, but we in Scotland have done well in the past, and it would be a shame if we lost that momentum.

Pam Duncan-Glancy: You are a man who knows your audience in that regard. Thank you. That is much appreciated.

Paul McLennan: Good morning to the panel. I have a couple of questions. First, on the general principles of the bill, do the provisions reflect the proposals that OSCR brought forward in 2018? Does the bill support the regulatory role? We asked OSCR that question. In addition, are the proposed extensions proportionate and appropriate at this time? Gavin McEwan and I had a chat about that during the informal session. Will you comment on that now for the evidence? I will then open things up to anybody else who wants to come in.

Gavin McEwan: In brief, the answer is yes. The bill pretty much achieves most of what OSCR put forward as its wish list of changes. As we have mentioned, the key thing that is missing is provisions on charities created by enactment or royal charter. It is a pity that that has been missed.

The proposals are appropriate and proportionate. OSCR needs to be able to carry out its jurisdiction properly. If it does not have decent powers to do that, it cannot fulfil its obligations.

It is also important to remember that OSCR is under a duty to act appropriately, transparently and proportionately so, even if a disproportionate measure were introduced, OSCR would still have to comply with it in a proportionate manner. Therefore, our framework should always lead to proportionate regulation. However, I think that what is in the bill is proportionate and appropriate.

Keith Macpherson: We support the proposals—in particular, those on the publication of accounts and on a register of trustee names. There will probably be more detailed questions on those areas but, all in all, we support those proposals to increase transparency and accountability in the sector. As long as that is undertaken proportionately, as has been talked about, we are fully supportive of those measures.

Paul McLennan: That leads nicely to the next question. Obviously, transparency and accountability in the sector are key. Were there any weaknesses on those in the sector? Does the bill address those weaknesses? I will go to Keith Macpherson first.

Keith Macpherson: The word "weaknesses" might be too strong. However, as we have said, the full publication of unredacted accounts and the maintaining of a register of trustee names will only add to the transparency oversight.

From surveys, we know that what builds public trust in charities is the ability to see how the money has been spent through obtaining the accounts and seeing who is in charge of the charities. Those are high on the list of things that tick off elements of public trust. A lot of that information—for charitable companies, for example—is already in the public domain. We see the bill as codifying good practice across the whole sector.

Paul McLennan: Does John Picton or Nick Holroyd have any comments on OSCR or on the accountability and transparency side of things?

Dr Picton: The bill is concerned with transparency and accountability, and it contains useful measures towards those. A very important feature is the publication of trustee names on the register. That concerns accountability. The bill is quite constrained, and it has a limited set of objectives. It is not a review of all the possible ways in which the law in Scotland could be improved.

Paul McLennan: You might have heard the discussion about whether there is a need for a further review. The need for that seems to be the emerging view. Does Nick Holroyd have anything to add?

Nick Holroyd: Generally, there is a very positive view of what is being attempted, which is the achievement of transparency and accountability. I add that some of the measures will possibly have what could be described as a side effect, in creating a degree of discipline. For example, if there are rules on accounts that are proportionately and—dare I say it?—gently policed by OSCR, there will be a gentle pressure on trustees to get their accounts in order.

Another idea that has been mooted by the Faculty of Advocates is that of making the constitutions available, because one could then marry up the accounts with those, which would to some degree explain what had been done. There is a summary of charitable objectives on OSCR's website but, if the constitutions were also published, that would, to some extent, not only promote transparency but create a sense of discipline among trustees. They would ask, "Do we need to change the constitution? Are we obtempering what we are meant to be doing?" and so forth. That would be a good idea.

The faculty has reservations in relation to having a wholly public register. The preference would be for charity trustees to have a voluntary decision on whether or not their names were made public. Part of that is inspired by practical considerations. One wants to make the environment for charitable trustees appealing, and there can be all sorts of reasons why not having one's name in public might be appealing and having it in public unappealing. However good an appeal process is, it will not be as good as having the starting point of the register not being wholly public. That is not to suggest that there should not be a list of trustees—it just should not be open to the world at large.

10:45

Secondary to that general idea is an idea that I suppose one might call jurisprudential, although it is not an academic point. There are issues to do with the invasion of privacy. Is giving all the information to the world at large strictly necessary? If it is necessary, how can that be done in a proportionate way? It is about how those matters are approached.

The faculty's written submission drew attention to a recent European Union case that shows a slight rowing back from earlier thinking on the matter due to things such as 9/11 and concerns about terrorist funding and other very real horrors. There has been a desire to achieve transparency, but the faculty's position is that that should not be done in a way that gives the information to the world at large, with potentially unknowable data implications, but in a way that can be policed by OSCR and perhaps other people with a legitimate interest in policing it. That is the main point.

If that approach is not appealing, the process in which one can make the application to not have one's name made public needs very careful thought from a practical point of view, because there might be people who do not want any flicker of a possibility of their name being made public. They would need to be able to make a prior application, and that would also need to mesh with the way in which a particular charity selected its charitable trustees. Some will be assumed by the existing trustees, but some might have some form of election procedure. There could be all sorts of possibilities.

If the faculty's primary position is not acceptable, huge care needs to be taken to achieve the result. The European Union case mentions the risks of things such as beneficial ownership rather than trusteeship, and concerns

about things such as kidnapping, blackmail and harassment. Some of those things are quite possible in a Scottish domestic context, but there are other possibilities. For example, there might be—if I may use a ghastly expression—a celebrity ex-convict who has been rehabilitated. He might be an excellent person to have on a suitable charity, but what the charity might want him to do, and what he might want to do, is help that charity, ideally in the role of a trustee, not through his celebrity status but through his real-world experiences.

Gavin McEwan: We take a view that is slightly different from Nick Holroyd's view. We feel that, if there is to be complete openness and transparency, the register of trustees is a very good starting point, so that is where we should begin in Scotland. I say "begin", but we are 17 years into the regime.

It is right that people should be able to have their names taken off the register or not to have them disclosed publicly if there are good reasons for that. It is important that the messaging from OSCR, which will have to deal with that process, is very clear, so that there is an understanding of how people can go about the process of withholding their name and in what circumstances that would be acceptable. That is the most important point there.

Keith Macpherson: We fully recognise the position of applying for dispensations, and we recognise that that can be important. I note that, under accounting regulations, the accounts of a charity need to disclose the names of the trustees unless such dispensation is in place. Under the 2005 act, somebody can write to the charity and ask for a copy of the accounts with the trustee names to be provided to them. To some extent, a lot of that information is already available, if not perhaps listed on a register that can be associated directly. It should be in the accounts anyway.

Evelyn Tweed: Good morning. It is good to see the witnesses. My first question is for Keith Macpherson. In its submission, ICAS said that, although some charities might feel "daunted" by the implementation of a register, those fears can be addressed through effective communication from OSCR, which we touched on previously. What would effective communication look like?

Keith Macpherson: I have some advantage in having listened to the earlier part of the meeting, when the witness from OSCR talked about the plans for communication. That might have answered some elements of your question.

We said in our submission that a register might seem daunting, which was about it possibly seeming to be new and different, notwithstanding my previous comments about the fact that there is already information in charities' accounts.

It is very much about communication, which we think should provide some idea about timescales for the roll-out, how information will be captured in, for example, the online OSCR system for reporting the annual return and the timelines for doing that. We see the need for guidance on the use of the digital system and, as necessary, offline alternatives when the online system is seen as a hindrance or a barrier. Obviously, we heard in the earlier evidence session that OSCR feels that there is very good engagement on the online system and that it is not seen as too much of a barrier.

We welcome the fact that the annual return process would become a statutory requirement; it would become an obvious point at which charities would get involved.

Another element will be ensuring that there is communication to alleviate or potentially explain any concerns that trustees might have about how the changes will affect non-compliance, timescales for compliance and reporting, and what will happen if they do not comply because they overlook the timelines. It will be necessary to include those elements in communication.

Evelyn Tweed: My next question is to John Picton. The University of Liverpool has said that dispensation—which we have talked about, but not in too much detail so far—should be allowed in situations in which trustees can demonstrate a risk of personal danger. What might the criteria for that look like?

Dr Picton: Under the bill, people would be able to keep their name off the register because of safety and security concerns. I take that to be targeted at people who are in some way vulnerable or for whom publicity might lead to personal threats. It is an open question as to whether we should go further, but that is a high threshold. It is certainly not about—again, this is just something to think about—professional embarrassment, for example. It is not a broad measure that covers the otherwise disadvantaged beyond safety and security concerns.

Evelyn Tweed: I do not know whether anyone else wants to come in on that.

Gavin McEwan: Some examples were touched on in the committee's earlier evidence session. One example might relate to charities that are involved in domestic abuse. Users of their services might also serve as trustees because they bring valuable skills and lived experience and it is very important to capture that. However, if being a trustee might put them at risk because they are suddenly much more visible, that needs to be managed. The example of the rehabilitation of

offenders was talked about in the earlier session. It is important that such situations are managed properly, so the regulatory framework must allow that.

Nick Holroyd: To some extent, we are back to the issue of whether trustees' names should be made public. I have just glanced at the European Union case. At the risk of repeating myself, mention is made of the risk of fraud, kidnapping, blackmail, extortion, harassment, violence or intimidation. In addition, I suggest that a charity might want a high-profile person as a trustee—not because they were high profile but because of their experience or skill set.

Another issue, which perhaps goes into the realm of questions about whether something is necessary or disproportionate, is that, given that OSCR would have the list of trustees' names even if they were not publicly accessible, if there was an option to make them publicly accessible—if the charity or individual could choose to do so—OSCR could police the charities for which the names were not being made public with particular vigilance. There are obviously charities—reference was made to women's refuges—for which names and addresses might not be made public. It would be interesting to know whether there have been any particular problems in those circumstances in which names and other details have been kept out of the public domain.

The flipside of that coin is that, if charities thought that having their names made public was, for want of a better expression, a good public relations position, that might be taken into account, too. However, as I said, under the tiered approach, which is favoured, there would be no obligation to make the names public. That is the primary one.

Foysol Choudhury: Good morning. Before I ask my questions, I declare my interest as a co-chair of the Edinburgh and Lothians Regional Equality Council, which is a charitable organisation.

My first question is for Gavin McEwan and John Picton. Do you have any concerns that the requirements will disproportionately affect smaller charities, particularly ethnic minority charities that are already struggling to stay in business because of the cost of living crisis?

Gavin McEwan: The Charity Law Association is not overly concerned that the bill places an undue burden on charities. We appreciate that there is quite a lot for charity trustees to get their heads around with regard to new rules, regulation and requirements. However, we do not see that as a fundamental barrier for most charities. With sufficient support and education of the sector from OSCR and other umbrella bodies, that ought to be manageable.

Therefore, we do not have undue concerns, but I think that some parts of the sector will struggle, given that there are particular pressures through inflationary cost of living issues. We have to accept that that is part of a wider social problem just now, but that does not flow from the bill.

Dr Picton: For small, amateur, entirely voluntary charities, the bill imposes frictions rather than costs. I do not think that it will necessarily cost charities money, but it means that they have to be organised because somebody has to organise conveying the information to OSCR. You would expect that even in a small charity, but the bill will impose frictions.

Foysol Choudhury: My second question is for Nick Holroyd. Do you have any concern regarding the provision for charities to redact certain information from published accounts when there might be safety or security concerns?

Nick Holroyd: That is an extremely good question. The opportunity to redact information with the approval of OSCR is a good one. For example, as we have already heard, some accounts disclose information about trustees and, for one reason or another, it might be desirable not to name them. Some accounts might indicate the location where certain charitable purposes were being fulfilled, which goes back to the example of women's refuges.

Therefore, there is scope for the redaction of some information. Again, one's hope would be that charity trustees will be able to liaise with OSCR to find an acceptable landing zone for the charity and OSCR, rather than things being contentious. OSCR has generally done a very good job in taking that approach.

11:00

On top of that, the OSCR website and, indeed, the equivalent English body's website are very helpful. They are already very good, but there is no doubt that there is always scope for additional materials, such as a publication on the circumstances in which people might wish to redact and what things people might wish to redact and liaise with OSCR about, so that is a fantastic point.

Foysol Choudhury: I have been involved in third sector organisations, and I have always found that security concerns are the main issue for trustees. Thank you for that answer.

Does anybody else want to come in on that question?

Keith Macpherson: Yes. That links back to my previous comment about the accounts requirements and the disclosure of names. Notwithstanding the fact that there are some very specific cases in which there should be dispensation, we fully support the fact that the proposal is to publish only the names of individuals and not other associated personal information, such as addresses.

Foysol Choudhury: My next question is for all the witnesses. As you probably know, the majority of small third sector organisations have limited numbers of people, and the majority of their trustees are volunteers. There is loads of work involved, so what support might be provided to such organisations?

Keith Macpherson: On the provisions for some of the smaller charities and concerns about whether there will be a duplication of effort in maintaining registers of trustees or other elements, we have considered the extent to which OSCR's register itself might provide the means to support very small organisations to have that detailed information contained securely through what we presume would be a GDPR-compliant means of making the list of trustees available. That would support their governance with regard to maintaining their list of trustees and, potentially, supporting best practice, which could be a positive for some small organisations that struggle to maintain that information.

Nick Holroyd: Again, Keith Macpherson's comments are very much on point. If there is an accessible database of charities—including mergers and, let us say hypothetically, constitutions—in some circumstances, it might be possible for one charity to find out how another charity has dealt with a particular problem, whether that was by tweaking the constitution or doing something much more practical. Therefore, I can see that indirect benefits could arise from the register.

The Convener: We now move to questions from the deputy convener, Emma Roddick, who joins us online.

Emma Roddick: My first question is for Keith Macpherson. Most of the discussion around whether it is important or sensible to have the same disqualification criteria across the UK is focused on the comparison with England and Wales, but I was interested in the fact that you mentioned Northern Ireland in your submission. Why do you think that it is important to have consistent disqualification criteria in different jurisdictions? Are there particular interactions with Northern Ireland that the committee should consider?

Keith Macpherson: The submission pointed out that we are not talking only about two jurisdictions and that Northern Ireland has its own elements that are different. In that respect, it is not a question of pure alignment, but it should be borne in mind that the charity trustees or senior management of a Scottish charity will not necessarily be trustees only of a Scottish charity; they might also be trustees of other organisations. Therefore, it seems eminently sensible that the same disqualification criteria are in place across those jurisdictions. In our submission, we were not highlighting Northern Ireland in particular; we were simply noting that it was another jurisdiction to reference in that context.

Beyond that, the requirements of the criteria speak more to the legal aspects, so I would defer to other panel members on that, and they can go into it in more detail.

Gavin McEwan: From the Charity Law Association's point of view, I would simply point to what Martin Tyson from OSCR said earlier. He made it clear why there are benefits in having a consistent structure, as far as possible, across the UK. I think that that makes sense. Particularly where there are cross-border charities, it is important that the disqualification rules are the same and are as uniform as possible.

I do not see the need for the rules to be expanded in Scotland in a different way. I am not particularly familiar with the set-up in Northern Ireland, but if we can have as much consistency as possible, that will help the third sector to manage disqualifications in a practical way.

Emma Roddick: I would like to put to Nick Holroyd an issue that we discussed earlier with Martin Tyson. Is it appropriate for OSCR to maintain a publicly searchable record of trustees who have been disqualified? Does that present any issues around the handling of sensitive personal data?

Nick Holroyd: I will deal with that in two stages. Generally, it is important that there is a register of disqualifications that is available to OSCR. I am probably speaking for myself here, rather than for the faculty, but I would be sympathetic to that register being made publicly available. I would need to think quite carefully about whether that gives rise to issues akin to rehabilitation of offender-type matters; I do not know the answer to that. That is an additional issue. As I said, there could be some analogy with rehabilitation of offenders and not making such matters public after a certain time.

In substance, there should certainly be a register, and I am personally sympathetic to its being public, but I can see that you have raised an

interesting question about potential legal complications if it is made public.

The second point to make about disqualification is the faculty's point that there will be some benefit in having a declaration—for example, in the accounts—that there are no disqualified people in trustee positions or senior management positions. However, I do not have a settled view when it comes to the analogy with rehabilitation of offenders-type issues, and I do not think that the faculty expressed a view on that in the written submission. It would be worth exploring that point.

Emma Roddick: You have pre-empted my next question, because I was going to pick up on the question of a declaration. Will you expand on why, in your view, it would be helpful to have such a declaration in addition to the register? Would that force charities to declare that someone had never been disqualified, even if they did not currently appear on the register?

Nick Holroyd: Part of the inspiration for having a declaration was the fact that the charity trustee name might not be available, so a declaration would provide some assurance to those who dealt with charities that there had been some vetting, as it were, of the charitable trustees. The declaration would sit with that. I think that it would be a good thing to have, even if the names were available.

As far as the time period is concerned, neither I nor the faculty has a view on that. Again, that is worth exploring. Should the period be, say, five years? People do get rehabilitated, which is a very positive thing. Bad experiences can give rise to insights and can lead to people being able to do valuable things in the future. Therefore, the idea that someone who has been disqualified should never be a charitable trustee would be going too far.

Earlier in this morning's evidence session, I half overheard an interesting comment about bankruptcy. The suggestion was that someone who had been bankrupt could later go on to become a charitable trustee, so there is scope for people who have had misadventures to make a useful contribution at a later date.

Emma Roddick: That brings me nicely on to another question that I wanted to ask—

The Convener: I am sorry, Emma—I know that you are in mid flow, but Gavin McEwan wants to come in on that specific point, so I will interrupt you for a second.

Gavin McEwan: Thank you, convener. I support what Nick Holroyd was saying, but I want to add that, when considering whether potential trustees have previously been or are disqualified at the time of their appointment, many charities are taking that on trust, because they have only the charity trustees' word for that, unless they are able to carry out other due diligence.

In the context of a charitable company, you can search against the register of disqualified company directors, but for any other kind of trustee, you do not have that ability. Without a register of disqualified trustees maintained by OSCR, it is very difficult for charities to carry out any additional due diligence at all. Therefore, it is something that is currently taken on trust, and the availability of a register—which would need to be managed properly—would be a help to charities.

The Convener: Please continue, Emma.

Emma Roddick: In last week's session, we heard concerns that the disqualification criteria might disproportionately impact certain demographics and, in particular, charities that work in sectors in which lived experience is valued, and that the application of the disqualification criteria might become a barrier. Does anybody in the room share those concerns?

Dr Picton: Yes—possibly. There is a point to be made about uniformity in the United Kingdom through having the same disqualification criteria, and there is a separate point to be made about dispensation, which could be much softer and could be done by OSCR on a policy basis. In other words, dispensation could be given informally for people with undischarged convictions or bankruptcy.

That said, it is important to note that a regulator does not have much incentive to give dispensations to people who have a record of dishonesty so that they can take a trustee position, because the regulator would be taking on some sort of culpability—or responsibility, I should say. In those circumstances, there should be very clear guidance on the circumstances in which OSCR would be prepared to give dispensation to someone who had been disqualified.

The Convener: Would any of the other witnesses like to respond?

11:15

Nick Holroyd: The point about lived experience is important. In most charities, you want to have a mixture of people: someone with financial insights and someone who knows the territory where the charitable purposes are going to be fulfilled. A helpful comment was made that, even if someone cannot be a charity trustee or a very senior manager, they could nonetheless make a valuable contribution to the charity by being a less senior employee or having a voluntary role.

As far as dispensations are concerned, the other matter that crosses my mind—it is an off-the-cuff thought—is that there might be scope for

allowing somebody to take on a senior management role or more obviously a trustee role while restricting the type of activities in which they are involved. To give a crude example, you might be less concerned if someone who has had an unfortunate past to do with money irregularities had a role as assistant secretary than if they were treasurer, and you might feel less anxious if they had no access to signing the cheques, to use old-fashioned language. It could be quite a flexible regime and people could even progress from one role to another—for example, being a volunteer, becoming a manager and then becoming a charity trustee with restrictions on them.

Emma Roddick: That makes a lot of sense. Martin Tyson said something along similar lines about there perhaps being scope for exceptions where it makes sense, but would that present challenges with charities being able to make a declaration in the accounts as you suggested? Would it not cause problems if there was wiggle room?

Nick Holroyd: It would undoubtedly complicate that picture. I suppose that, unless the charity got a dispensation from making the dispensation, it would have to make it clear that it could not in good faith say that none of the charity trustees has been disqualified or whatever the declaration was. It obviously could not say something that was not true. However, that would not necessarily be a complete barrier because it could put something in the narrative. For example, the presence of a person who had been disqualified or whatever might make it unappealing to certain people who wish to make donations, but the charity might say that the person—perhaps a reformed convict—has only a limited role. That could be made explicit. Doing so might put people off giving funds, but that would have to be balanced. I would hope that OSCR, the charity and the individual concerned could liaise between themselves. It is important to get people with lived experience doing active things within charities.

Miles Briggs: Good morning, panel. Thank you for joining us. The changes that are proposed in the bill would allow OSCR to investigate former charities and their trustees. I will ask a couple of questions with regard to that. Is it appropriate for OSCR to be able to issue positive directions following that inquiry work?

Gavin McEwan: It is important that OSCR can investigate former charities and former charity trustees. It needs to be able to investigate former charities because the body might still exist and, therefore, still have assets that are subject to use restrictions under section 19 of the 2005 act. OSCR should have the ability to police those funds to ensure that they are not at risk.

It is important that OSCR has those powers in relation to former charity trustees, because we do not want to find people leaving a charity and their role as a trustee in order to escape liability while, at the same time, they are a trustee of other charities. If there is a pattern of behaviour or misconduct that needs to be managed, OSCR needs to have the ability to step in. It is proportionate for OSCR to have those powers and important for the instilling of public confidence in the sector.

Dr Picton: It might be reasonable to ask OSCR to produce guidance on the circumstances in which it would like to use the positive power. I was struck that there has not been much explanation of the circumstances in which the power might be used, so, although it seems reasonable and proportionate, it is quite difficult to see what its function is.

Keith Macpherson: Primarily, we support most of what Gavin McEwan said, for all the reasons that he gave. Being able to do that investigative work of former charities and former trustees would give the regulator the ability to demonstrate good governance.

I have sat in on one of the informal sessions on the bill, and it is clear that the power on positive directions would be used after inquiries had been undertaken, so decisions would be made after the charity had been engaged with. That is a key point that perhaps had not been fully understood. Perhaps some charities thought that it was going to be an ability to issue positive directions that would affect a large number of charities as a kind of blanket power. That will need to be a key part of the communication process.

Miles Briggs: We have heard, with regard to designated religious charities, that, in some cases, church acts and constitutions will be exempt from the bill. Does the panel believe that it is appropriate for designated religious charities to be exempt from the provision on positive directions?

Nick Holroyd: We considered that matter in the faculty's written submissions and ultimately thought that it was probably better that the designated religious charities point was considered under a fuller review. We discussed why one group should get treated specially compared with another, and there was a slight anxiety that something might be being missed. Putting it very grandly, was some constitutional issue to do with the separation of church and state being missed? There was a feeling that something not obvious as to why one group should be treated differently from another was being missed, so it was suggested that the matter should go into a further review process.

Gavin McEwan: Obviously, designated religious charities having their own structures means that, hopefully, they can police any areas of difficulty, including misconduct. From that point of view, having a slightly different regime for them works, but it is fair to say that some members of the Charity Law Association are against the idea of separate treatment for DRCs. If the exemption were to be removed as a result of a future review, some of our members would not be particularly disappointed.

Jeremy Balfour: Good morning, panel. Obviously, you have heard these questions before, as they are the same ones that I asked the first panel. My first one is on data protection implications. Does Keith Macpherson have any comments on the data protection stuff?

Keith Macpherson: Not really. ICAS has not considered that area in any great detail, so we would not look to make detailed comment.

Gavin McEwan: I will make two brief points. First, there is a whole body of law on data protection, and I have no reason to suspect that OSCR would not comply with that. In my experience, OSCR is already responsible for how the data that it handles is used, controlled and released, if it has to be released. I have no personal qualms about how OSCR would comply with the data protection rules. It is simply a matter of compliance, and the rules exist to give that framework.

Jeremy Balfour: Does Nick Holroyd or John Picton have any comments?

Nick Holroyd: I do not claim to be an expert in data protection, but I return to the point that there is anxiety about having some information, such as names, available to the world at large. I also pick up on the point that was raised about the idea of liaising with OSCR over what sort of information should be redacted so that it would not give rise to risks. However, I do not have any specific points on data protection beyond that.

Jeremy Balfour: We have two lawyers and a lecturer in the room. Are you happy with the definition of a "connection with Scotland"? Should it be tighter or will it help us to move forward?

Nick Holroyd: That should be kept under review. If it gives rise to problems, it might need to be tweaked. I do not have any views on how it should come into life at present. I am trying to think about how it could be dealt with and whether there could be a mechanism for an easy way of reviewing how the definition is working in practice.

The faculty considered, slightly mischievously, whether there should be a requirement at all or whether it might be a good source of business for Scotland to regulate other charities. Ultimately, we came to the conclusion that there should be a requirement for a Scottish connection, not least because the area would be difficult to police otherwise. However, the best way of dealing with the definition would probably be to keep under review how it works in practice.

Jeremy Balfour: One of the powers that OSCR will get if the bill becomes law is the power to appoint interim trustees. We heard the evidence on that from previous witnesses. Are there any practical concerns about how that might work, or are you all happy with it?

Gavin McEwan: It is right that OSCR should have the power to appoint interim trustees if there is a particular difficulty that needs to be tackled in a particular charity. For me, the practical issue is where OSCR will find them. It is difficult enough for some charities to find their own trustees without looking to OSCR to appoint interim ones. I guess that that is a problem for OSCR rather than Parliament or us, but it is at the back of my mind as a difficulty with the system.

Jeremy Balfour: That is a fair point.

Nick Holroyd: Following on from Gavin McEwan's point is the question of who would bear the expense of the interim trustee. If the trustee was, for example, a professional person, it would presumably be a paid professional person unless there was a panel of volunteers who would be prepared to be appointed to suitable interim positions.

Jeremy Balfour: When OSCR was set up, one of the first things that it was supposed to do was review every Scottish charity to see whether it was fit for purpose. That has taken a long time, mainly due to a lack of resources, and I am not absolutely sure how well it has been achieved.

How confident are you that it is possible to implement what the bill asks with the resources that OSCR has? Are we in danger of setting the organisation up to fail?

Gavin McEwan: Obliging OSCR at the outset to review every charity on the register was a noble aim. With OSCR's limited resources, it is simply an impossible task and one that would never end, because new charities are constantly added to the register. The bill allows OSCR to carry out a review of any charity that it sees fit to review. That is better, because it allows randomised checks to be made. However, the original, noble aim is simply unrealistic. OSCR would need a lot more financial resource and person power to be able to carry it out.

Jeremy Balfour: John Picton, from the point of view of good practice, should we ask OSCR to do more investigation, or is the balance about right in what we have at the moment?

Dr Picton: OSCR has come to you and asked for a suite of new powers. They are technical powers but they seem broadly proportionate. However, you can give your regulators as many powers as you want, but the question is always one of resources.

The Convener: Do the witnesses agree that the bill's proposals will not result in any additional costs for local authorities or charities?

Gavin McEwan: In theory, most charities should not feel much cost. There is a bit of compliance work to be done, and charities will need to apply a bit of resource. The cost implications ought to be minimal for most charities. At the CLA, we did not have a particular concern about that.

The Convener: John Picton, do you have anything to add?

Dr Picton: No. I agree with Gavin McEwan. There will be frictions but not costs, and the frictions are appropriate.

The Convener: Thank you very much, everyone, for your evidence. Next week, we will continue to take evidence on the bill when we hear from the Cabinet Secretary for Social Justice, Housing and Local Government.

That concludes our public business.

11:31

Meeting continued in private until 11:35.

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