The Scottish Parliament
Pàrlamaid na h-Alba

HUTCHESONS' HOSPITAL TRANSFER AND DISSOLUTION (SCOTLAND) BILL COMMITTEE

AGENDA

3rd Meeting, 2018 (Session 5)

Wednesday 28 November 2018

The Committee will meet at 10.45 am in the Sir Alexander Fleming Room (CR3).

1. **Decision on taking business in private:** The Committee will decide whether its consideration of a draft Preliminary Stage Report should be taken in private at future meetings.

2. **Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill (in private):** The Committee will consider written evidence received on the Bill at Preliminary Stage.

3. **Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill (in private):** The Committee will consider issues for its draft Preliminary Stage report.

Vanda Knowles
Clerk to the Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill Committee
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The papers for this meeting are as follows—

Note by the Clerk	HH/S5/18/3/1
PRIVATE PAPER	HH/S5/18/3/2 (P)

HH/S5/18/3/1

Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill Committee

3rd Meeting, 28 November 2018 (Session 5)

Note by the clerk

Purpose

1. This paper provides some background information in advance of the 3rd meeting of the Committee on 28 November 2018, during which it will consider the written evidence it has received, and issues for its Preliminary Stage Report.

2. For background information on the Bill and the process so far, please consult the Note by the clerk for the 2nd meeting of the Committee.[1]

Committee consideration

3. At its 2nd meeting on 7 November 2018, the Committee took oral evidence from the Promoter of the Bill.[2]

Additional documents

4. Following the Committee meeting on 7 November, the Constitution of the new Scottish Charitable Incorporated Organisation (SCIO) was added to the Other Documents section of the Bill's webpage.[3]

Written evidence

5. At its meeting on 30 October 2018, the Committee agreed to write to two academics and an advocate, with expertise in the field, to invite written views on the Bill. By the 19 November deadline it had received two written submissions, from—

- Mr James McNeill QC; and
- Dr Patrick Ford, Dundee Law School, University of Dundee.

Both are available on the Committee webpage and in the Annex to this paper.

[1] Note by the clerk, 2nd Meeting, Hutchesons' Hospital Transfer and Dissolution (Scotland) Bill Committee http://www.parliament.scot/S5PrivateBillsProposals/Public_Pack.pdf
[2] The Official Report of the evidence session can be found here— http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11771&mode=pdf
[3] http://www.parliament.scot/parliamentarybusiness/Bills/108713.aspx

Next steps

6. At its 4th meeting on 12 December 2018, the Committee plans to consider a draft Preliminary Stage Report.

Clerk to the Hutchesons' Hospital
Transfer and Dissolution (Scotland) Bill Committee

ANNEX

Written submissions

Submission 1

REF NO. HH/S5/18/01

HUTCHESONS' HOSPITAL TRANSFER AND DISSOLUTION (SCOTLAND) BILL COMMITTEE

SUBMISSION FROM JAMES MCNEILL QC

I have been made aware of this Bill because of my expertise in matters of Scottish Charity Law and have considered the Bill, supporting documents and the Official Report of the Committee meeting held on 7 November.

I note that OSCR is content that the Bill be entertained by the Sottish Parliament and that the Bill's proposals are satisfactory. I agree with those views.

I note that OSCR and the promoters have considered an alternative approach to reorganisation through use of the mechanisms provided in the 2005 Act. I agree that, on a proper interpretation of s.42 of the Act, a proposal of this nature might not be within the competence of OSCR under that provision. Whilst the prospect of a challenge by an interested person to reliance on s. 42(6) is very remote, the Bill is within the legislative competence of the Scottish Parliament and proceeding by way of the Bill both gives security to the promoters and removes the prospect of significant legal costs were there to be a challenge.

Submission 2

REF NO. HH/S5/18/02

HUTCHESONS' HOSPITAL TRANSFER AND DISSOLUTION (SCOTLAND) BILL COMMITTEE

SUBMISSION FROM DR PATRICK FORD, DUNDEE LAW SCHOOL, UNIVERSITY OF DUNDEE

1. This submission is confined to the technical legal issues raised in paras 32-41 of the Promoter's Memorandum (PM) under the heading 'Alternative Approaches'. While I arrive at the same conclusion as the promoter (PM, para 41) that a Private Bill is the most appropriate method of achieving the promoter's objectives, I do so by a different route. I take a different view from the promoter on a number of points, but I would like to emphasise at the outset that the technical issues under discussion are not straightforward and that it is not surprising that more than one view can be taken on difficult points. The submission is not intended as a critique of this section of the PM but as a contribution to the Bill Committee's consideration of provisions in the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act), the reorganisation provisions contained in sections 39-43, which it is generally accepted give rise to difficulties of interpretation. (The Scottish Charity Regulator (OSCR) has called for a fundamental review of the provisions: for a full discussion see S Cross and P Ford, *Greens Annotated Acts: Charities and Trustee Investment (Scotland) Act 2005* (2017), paras 40.03, 40.04, 43.07-43.10, 44.03.) The key message for the Committee is that I support the promoter's conclusion that a Private Bill is justified in the circumstances.

2. As a preliminary I note my view that in terms of the Royal Charter of 1821 and the Hutchesons Hospital Act 1872 (the 1872 Act) the patrons of the Hospital for the time being are one and the same as 'The Royal Incorporation of Hutchesons Hospital in the City of Glasgow' (the Incorporation). The patrons as they stood in 1821, and their successors, were erected into an incorporation by the Charter and the incorporation was confirmed by the 1872 Act when a change was made to the selection criteria for patrons: see the 1872 Act, preamble (p 14) and sections 2, 26, 27. Individual patrons are members of the Incorporation (or 'corporators', to use a nineteenth century term) and in my view the 1872 Act envisages that the powers conferred on 'the patrons' (sections 3, ff) are to be exercised by them collectively as a corporate body. The patrons for the time being, as the body of persons responsible for administering the Hospital and empowered to do so, cannot in my view be distinguished from the Incorporation.

3. Accordingly, I take a different view from the PM on the application to the Incorporation of the reorganisation provisions of the 2005 Act, and of the corresponding provisions of Pt 6 of the Education (Scotland) Act 1980 (the 1980 Act) for the reorganisation of endowments. First of all, I agree that the Incorporation cannot utilise the provisions of Pt 6 of the 1980 Act, but for a different reason from the one given in the PM (para 33). By section 122(4) of the1980 Act (as amended by the 2005 Act), the Pt 6 reorganisation provisions are not to 'apply in relation to any endowment the governing body of which is a charity' under the 2005 Act. In my view, the assets administered by the Incorporation fall squarely within the definition of 'endowment' in section 122(1) of the 1980 Act (see PM, para 35): it appears from section 2 of the 1872 Act and para 14 of the PM that the assets are administered as a group of associated endowments. (A question of interpretation arises whether the term 'endowment' in this context refers only to funds intended to be permanent, in the sense of funds whose capital cannot be encroached on, despite the absence of an express requirement of permanence in the statutory definition. If permanence is to be regarded as a required feature of an endowment, however, in my view the assets of the incorporation meet that requirement: it is clear from sections 3 and 4 of the 1872 Act that, subject to a limited authorisation to expend capital in the case of the Hospital fund, the funds are to be administered as permanent funds.) I have no difficulty in identifying the Incorporation, that is the patrons for the time being acting as a corporate body, as the governing body of the endowments. In my view, the distinction made in the PM (para 35) between the patrons as the governing body of the endowments on the one hand and the incorporation on the other is unsustainable: if the patrons are separated from the incorporation the incorporation has no substance. The Incorporation is a charity in terms of the 2005 Act by virtue of its being entered in the Scottish Charity Register. Accordingly, in my view, the assets of the Incorporation amount to endowments of which the governing body is a charity and the possibility of reorganisation of the endowments under Pt 6 of the 1980 Act is excluded.

4. I agree with the PM (paras 34, 35) that, unless the exception in section 42(6) of the 2005 Act applies, the reorganisation provisions in section 39 of the 2005 Act (empowering OSCR to authorise reorganisations of charities) and section 40 (empowering the court to authorise reorganisations on an application from OSCR) are not available to the Incorporation. The disapplication by section 42(5) of the 2005 Act of sections 39 and 40 in the case of charities constituted under a Royal charter or an enactment reflects an accepted convention of deference to the royal prerogative and the legislature: a member of the executive such as OSCR or a court should not normally have power to override the terms of a Royal charter or a statute. The parallel reorganisation provisions in the Charities Act 2011 limit the powers of the Charity Commission and the court in England and Wales to authorise a reorganisation scheme

for a charity established or regulated by Royal charter or by statute without the consent of the Privy Council or of a Minister acting on behalf of and under the scrutiny of the legislature: see the Charities Act 2011, sections 67-73, re-enacting in substance long-established provisions from earlier Charities Acts.

5. As the PM (para 35) points out, section 42(6) of the 2005 Act provides for an exception from the section 42(5) disapplication in the case of the reorganisation of an endowment if the governing body of the endowment is a charity (being a charity constituted by Royal charter or under an enactment). In my view (see para 3 above), the Incorporation falls within the exception and could, in principle, invoke the provisions of section 39 or section 40 in reorganising the endowments of which it is the governing body. There is uncertainty, however, about the force of the exception. On one view it empowers OSCR and the court to override the terms of a Royal charter or enactment when reorganising an endowment without any reference to the Privy Council or the legislature. On this view it was the intention of the legislature on enactment of the 2005 Act to equip OSCR and the court with far-reaching powers in relation to endowments similar to those of the Commissioners on Educational Endowments under the Educational Endowments Act 1882 (the statute from which the reorganisation provisions in Pt 6 of the 1980 Act are ultimately derived). There is no doubt that the Commissioners had power to override the terms of Royal charters and statutes: see *Governors of Donaldson's Hospital v Commissioners on Educational Endowments* (1885) 13 R 101.

6. The more cautious view is that the legislature intended OSCR and court to have power under the section 42(6) exception to authorise reorganisations of endowments governed by a charter or an enactment charity, but subject to the principle of deference to the prerogative and legislature. In other words, on this view OSCR or the court may authorise reorganisations of such endowments under sections 39 and 40 of the 2005 Act but the consent of the Privy Council or legislature to implementation of a reorganisation, once authorised by OSCR or the court, is still required. OSCR's guidance on reorganisations, though not unambiguous, appears to favour this cautious approach: see OSCR, *Charity Reorganisations: Guidance for charity trustees and their advisers on reorganising a charity* (2012), p 8. On this view, the requirement for consent, though not expressly provided for as in the case of the Charities Act 2011, is to be implied.

7. I agree with the PM (para 36) that the Explanatory Notes to section 42(6) shed little light on what was intended. It seems likely that the issue of deference to the prerogative and the legislature was not fully considered.

8. Against this background one possible course for a charter charity wishing to reorganise an endowment might be to invoke the powers of OSCR or the court under section 39 or 40 and to obtain the consent of the Privy Council to implementation of the reorganisation once authorised. Where a charity is constituted under an enactment, a similar approach could be followed, but obtaining the consent of the legislature would be problematic in practice in the absence of a provision in the 2005 Act similar to the one in the Charities Act 2011 authorising a Minister to give consent on the legislature's behalf. It seems that a Private Bill would be the surest way of obtaining consent. Possibly an order might be obtained from the Scottish Ministers under section 102(b) of the 2005 Act but that route would be uncertain and untried.

9. Applying the foregoing to the Incorporation, the Incorporation might apply to OSCR under section 39 of the 2005 Act for authority to reorganise its endowments, making use of the section 42(6) exception. On the one hand it might dispense with the consent of the Privy Council and the legislature and risk challenge (possibly at the instance of the Lord Advocate acting in the public interest), though it appears that in any event OSCR might be reluctant to proceed on those terms (PM, para 37). A reorganisation under section 40 would encounter similar difficulties. (An application to the court must be made by OSCR, not the charity concerned.) On the other hand, the Incorporation might adopt the cautious approach and seek the consent of the Privy Council and the legislature to implementation of the reorganisation once authorised. In the case of the legislature consent would be obtained by means of a Private Bill. (Consent of the Privy Council might be regarded as unnecessary because the legislature is free to override the terms of a charter and could in effect supply any necessary consent from the prerogative.) If a Private Bill would be required in any case, however, the alternative of proceeding entirely by Private Bill without involving OSCR appears attractive.

10. In conclusion, therefore, there are obvious merits in proceeding entirely by Private Bill, as proposed in the PM, and by-passing the various difficulties of interpretation inherent in the reorganisation provisions of the 2005 Act as they stand. On that basis I support the conclusion in para 41 of the PM.