

# **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL**

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## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

### **CONTENTS**

1. As required under Rule 9.3 of the Parliament's Standing Orders, the following documents are published to accompany the Charities and Trustee Investment (Scotland) Bill introduced in the Scottish Parliament on 15 November 2004:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 32–PM.

## **EXPLANATORY NOTES**

### **INTRODUCTION**

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE BILL**

4. The Bill is in 4 Parts.

5. These are:

- Part 1 – Charities
- Part 2 – Fundraising for benevolent bodies
- Part 3 – Investment powers of trustees
- Part 4 – General and supplementary.

6. Commentary explaining the provisions introduced by each Part is provided below.

### **COMMENTARY ON PARTS**

#### **PART 1: CHARITIES**

##### **Chapter 1 – Office of the Scottish Charity Regulator**

7. **Section 1** establishes the Office of the Scottish Charity Regulator (OSCR) as a body corporate and sets out its general functions. These are to determine charitable status, keep a public register of charities, encourage and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary. **Schedule 1** deals with the detailed membership arrangements for OSCR, with **paragraphs 2 and 3** providing for OSCR's members and the chair and deputy being appointed by the Scottish Ministers (after normal public appointment procedures). Certain categories of person are disqualified from being members (e.g. MSPs, MPs, MEPs, office holders of the Scottish Administration or others which may be prescribed by an Order made by the Scottish Ministers). The terms and conditions (including remuneration and allowances) of OSCR members may be determined by the Scottish Ministers. **Paragraph 5** allows OSCR to appoint a chief executive and other employees, under terms and conditions which require the Scottish Ministers' approval. Although not covered by the Bill, it is intended that OSCR will become a non-Ministerial office holder of the Scottish Administration (i.e. a non-Ministerial department) and that the employees will be civil servants.

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The formal mechanism for this will be by a section 104 order made by Westminster under the Scotland Act 1998, following enactment of this Bill.

8. **Section 2** stipulates that OSCR must prepare and publish an annual report on the exercise of its functions, send a copy to the Scottish Ministers and lay a copy before the Scottish Parliament.

## **Chapter 2 – Scottish Charity Register**

9. **Section 3** provides that OSCR must keep a public register of charities, reviewing it from time to time, and keeping it up to date. The section specifies certain information that the register must contain for each charity. This mandatory information is:

- the name of the charity;
- the principal office or the name and address of one of the charity trustees (unless, under subsection (4), OSCR is satisfied it is necessary to protect an individual or the charity's premises);
- the charity's purposes; and
- certain other information (including whether it is a designated religious charity or national collector).

10. In addition the register must include the dates of any directions or notices under the Bill that have been given to the charity by OSCR until the direction or notice has been complied with, when it is to be removed.

11. The Scottish Ministers may (under **section 3(3)(f)**) make regulations to add to the mandatory information to be held on the register and OSCR may also decide (subsection 3(g)) to include other information if it sees fit.

12. **Section 4** sets out the information that must be provided to OSCR by an applicant wishing to be entered on the register. This information includes the information required to be shown on the register and also a statement of the applicant's purposes, constitution and the most recent statement of account (if there is one). As a result of section 5 the register will only hold details of organisations that OSCR considers meet the charity test (see below) and do not have inappropriate names. The Scottish Ministers may make regulations (section 6) to set out further details relating to the form of application for the register and the process by which OSCR will determine applications.

### *The charity test*

13. **Section 7** sets out the charity test that must be satisfied by every body on the register. The test consists of two parts: the purposes of the body must be exclusively charitable and it must provide public benefit, either in Scotland or elsewhere. Unlike in the previous charity definition, none of the charitable purposes are assumed to provide public benefit. In addition, the body must be non-property-distributing, free from third party control, and non-political.

14. The charitable purposes listed in **section 7(2)** are:

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health;
- advancement of civic responsibility or community development;
- advancement of the arts, heritage, culture or science;
- advancement of amateur sport;
- advancement of human rights, conflict resolution or reconciliation;
- advancement of environmental protection or improvement;
- provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage;
- provision of care to the aged, people with a disability, young people or children;
- advancement of animal welfare; or
- any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

#### *Public benefit*

15. **Section 8** sets out certain criteria to which OSCR and the courts must have regard when determining whether a body provides public benefit. The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body's functions compared to the benefit to the public. The second criterion covers the extent to which any condition restricting persons from obtaining the benefits from a body's functions may be unduly restrictive if only a section of the public can receive those benefits.

16. **Section 9** gives OSCR a statutory duty to issue guidance, following consultation, on how it determines whether a body meets the charity test.

#### *Charity names and status*

17. **Section 10** sets out the circumstances when a charity's name may be considered to be objectionable. These are to ensure that a charity's name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.

18. Under **section 11** a charity must inform OSCR at least 42 days before it wishes to change its name, and unless OSCR directs the charity not to do so within 28 days, permission is deemed to have been granted. OSCR may refuse the change only if it considers the proposed name falls within the circumstances described in section 10 as objectionable.

19. If a charity considers that another charity has a name too similar to its own, it can ask OSCR to review the names (**section 12**). If satisfied that there may be confusion, OSCR must

direct either or both of the charities to change its name and must remove from the register a charity which refuses.

#### *References to charitable status*

20. **Section 13** places restrictions on the way that bodies may use the term “charity” to describe themselves in order to protect the charity brand and attempt to avoid confusion for the public. Under **section 13(1)**, only bodies entered in the Scottish Charity Register (“the Register”) may refer to themselves as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”. Bodies registered elsewhere, such as with the Charity Commission in England and Wales often currently refer to themselves as “registered charities”, but under this Bill they will not be able to do this in Scotland unless they are also registered with OSCR or specifically note that they are “registered in England and Wales” or “with the Charity Commission”.

21. Under **section 13(2)**, bodies on the Register which are established under the law of Scotland, or are managed or controlled in Scotland may use the terms “Scottish Charity” or “registered Scottish charity” to describe themselves. This provision aims to distinguish those charities which are directly registered with OSCR and based in Scotland from those which may be based elsewhere but also operate here.

22. A large number of “foreign” charities (i.e. registered outside Scotland) may only have relatively minor operations in Scotland, such as sending a newsletter or information to Scottish members, awarding a grant to a body in Scotland or merely advertising in a newspaper which may also be seen in Scotland. Under **section 14**, as long as they are registered elsewhere, do not occupy premises or carry out activities in an office, shop etc. in Scotland, these bodies may operate in Scotland using the term “charity” without having to register with OSCR only if they also refer to the territory where they are registered as charities. Hence such a body might, for example, refer to itself factually as a “charity registered in England and Wales” a “French charity” or a “charity recognised by the Inland Revenue” in Northern Ireland.

23. It is intended that all charities will have to clearly label their main documents to show that they are a charity and are registered (with names as set out above). Section 15 confers powers on the Scottish Ministers to make regulations requiring this and setting the detailed provisions about which documents must state a charity’s name etc. This will allow the Scottish Ministers to vary the documents to be labelled over time as different forms of communication or finance are introduced. Initially it is expected that charities will have to label documents such as cheques, credit cards and annual reports, headed notepaper, raffle tickets and other advertising material etc.

#### *Changes*

24. Many changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity’s status on the Scottish Charity Register. **Section 16** lists those changes requiring OSCR’s consent as amending the charitable purposes in its constitution, amalgamating with another body, winding up or dissolving. If the change is to amend its purposes, the charity must give OSCR 42 days notice of the proposed change and may not carry out the change without OSCR’s consent. For the other

changes, unless OSCR is willing to consent to the changes it must, within 28 days of being informed of the charity's proposals, either refuse consent to the change or direct the charity not to make the change for a set period (up to 6 months) whilst it makes a determination. If neither of these actions is taken, OSCR is considered to have consented to the proposal.

25. Several other types of change which a charity may wish to make to its organisation may be made without OSCR's consent (**section 17**), but the charity must inform OSCR within 3 months of the action being taken. These changes include: a change to the charity's principal office or name of charity trustee specified on the register, other changes to details on the register, changes to its constitution (apart from its purposes), any amalgamations, winding up or dissolving actions taken by the charity (following OSCR's agreement). Similarly OSCR must be informed of changes within 1 month following orders by the court to wind up or put the charity into administration or appoint a receiver.

#### *Removal from the Register*

26. **Section 18** requires OSCR to remove a charity from the Scottish Charity Register within 28 days of receiving an application from the charity itself requesting this, and to confirm in a notice that this has been done.

27. Under **section 30(1)**, one of the options available to OSCR upon completion of inquiries about a charity is that it may remove a charity from the register if it is satisfied that the charity no longer meets the charity test. If OSCR, following inquiries into a charity, gives a direction to the charity to take certain steps, but the charity fails to comply, OSCR must remove the charity from the register.

28. However, even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively "locked" for charitable uses. **Section 19** protects such assets, ensuring that several provisions of the Bill continue to apply to them, despite the charity's removal from the register. The following provisions continue to apply:

- **Sections 28 and 29:** power of OSCR to make inquiries about charities (i.e. the body holding the protected assets), and to obtain documents and information;
- **Sections 31(1) to (3), and (5) to (9):** powers of OSCR following inquiries;
- **Section 32:** notices and directions under section 31;
- **Section 33(2) to (4):** reports on inquiries;
- **Section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b):** Powers of Court of Session;
- **Section 35(1), (2) and (4):** transfer schemes to allow OSCR to transfer assets from the ex-charity to be used by another charity or body;
- **Section 37:** on charging expenses for a transfer scheme; and
- Chapter 6: **sections 45 and 46** on charity accounts.

29. These provisions allow OSCR to continue to oversee the use of the locked assets even though the body holding them is no longer a charity. It can investigate and take action if required. It can ensure that the body continues to prepare accounts showing how the assets are being used.

30. Under **section 19(4)**, OSCR may apply to the Court of Session for a scheme to transfer the locked assets of a charity removed from the register to another charity. A transfer scheme may only be approved if the Court is satisfied that it is needed to protect the assets or secure their proper application for the original purposes, and that such a transfer is the better way for this to be achieved. **Section 19(8)** allows the Scottish Ministers to exclude certain assets which they consider to be of national importance from this section. The Scottish Ministers would have to have made an order specifying either items or types of property or property owned by particular persons which come under this description. This would, for instance, allow the Scottish Ministers to ensure that national assets owned by a charity removed from the Register could not be transferred to other bodies, potentially being lost to the nation.

### **Chapter 3 – Co-operation and information**

#### *Co-operation*

31. **Section 20** provides a statutory duty for OSCR to seek to secure co-operation with other relevant regulators, which are defined in subsection 2 as public bodies or office-holders with functions that are similar to those of OSCR, or conferred on them to allow them to regulate persons for other purposes. This provision is intended to ensure that where possible the burden of dual or multiple regulation on the same body by several regulators is minimised.

32. **Subsection (3)** requires OSCR and any other regulator which has been authorised (under section 38(2)) to carry out OSCR's functions to co-operate with each other so far as is consistent with their proper functions.

33. **Subsection (4)** emphasises that there is no requirement for either party co-operating in relation to this section to share information with anyone that they are prevented from disclosing by any other law. Hence no information that is restricted from disclosure by the Data Protection Act may be disclosed by one regulator to another.

#### *Public access to Register*

34. **Section 21** requires OSCR to make the Scottish Charity Register available for public inspection. It is expected that OSCR will use its web-site to make the register widely and freely available and to publicise its arrangements, but it will also be available, free, at the OSCR principal offices and otherwise as it thinks fit. This may, for instance, mean providing information from the register in Braille, large-print or other medium as requested. OSCR may also charge a fee, limited to the cost of supply, for preparing information if this is provided by alternative means or in other places.

*Power of OSCR to obtain documents and information*

35. Under **section 22** OSCR may require, by notice, any charity to provide it with documents or information which it requires for the charity register, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session.

*Entitlement to be given information by charities*

36. Under **section 23** a charity must provide to any person who makes a reasonable request, a copy of its constitution or latest statement of accounts (in what ever reasonable format that it is requested). The charity may charge a fee, limited to the lesser of the cost of supply or a maximum fee that the Scottish Ministers may set out in an order. However, the Scottish Ministers may make an order that exempts charities from this duty (**section 23(3)**).

*Sharing information*

37. **Section 24** sets out provisions to allow OSCR to disclose information to other public bodies or officeholders (e.g. regulators) and for them to disclose information to OSCR for purposes connected with their functions. **Subsection (1)** permits OSCR to disclose information to any public body or office holder. **Subsections (2) and (3)** allow several Scottish public bodies to disclose information to OSCR to assist it in its functions. Such disclosure is subject to any obligations as to secrecy or other restriction on disclosure of information however imposed (**section 25(1)**).

38. **Section 25** allows the Scottish Ministers to designate any public body or officeholder, whether in Scotland or not, such that OSCR may provide information to them (**subsection (3)(a)**) or may designate any Scottish public authority to allow it disclose information to OSCR (**subsection (3)(b)**), without any obligation as to secrecy or other restriction on disclosure of information. This section also removes restrictions on disclosing information to OSCR by a charity trustee, independent examiner or auditor of a charity's accounts. Under **section 26**, it is an offence (with a penalty set at level 5 (currently £5000) or imprisonment up to 6 months on summary conviction) to provide false or misleading information to OSCR knowingly or to alter, conceal or destroy it deliberately.

## **Chapter 4 – Supervision of charities**

*Inquiries about charities etc.*

39. **Section 28** gives powers to OSCR to make inquiries about charities, other bodies or a person appearing to represent themselves as, or as acting for, a charity, for either general or particular purposes. Under **subsection (2)**, OSCR may direct a person or body in regard to its inquiries, not to undertake specified activities for a period of up to 6 months. **Subsection 5** provides that it is an offence to fail to comply with such a direction without reasonable excuse and subsection (5) sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

*Power of OSCR to obtain information for inquiries*

40. Under **section 29**, OSCR may require, by notice, any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled

to refuse on the grounds of confidentiality in the Court of Session. **Subsection (4)** prevents OSCR from disclosing any information or explanation obtained under this section except for the purposes of its inquiries. **Subsection (5)** allows OSCR to pay a person expenses reasonably incurred in providing information under subsection 1. **Subsection (6)** provides that it is an offence to fail to comply with a notice without reasonable excuse and sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

*Powers of OSCR where a charity no longer meets charity test*

41. **Section 30** requires OSCR to take actions if it is satisfied, as a result of inquiries, that a charity no longer meets the charity test. OSCR must either direct the charity to take steps OSCR considers necessary to meet the test (which may include applying to OSCR for approval of a reorganisation scheme to reform the charity's constitution) or remove the charity from the register. If the charity fails to comply with the direction OSCR must remove it from the register.

*Other powers of OSCR following inquiries*

42. **Section 31** sets out further powers which OSCR may use following inquiries which have been made under **section 28**. If it is satisfied that there has been misconduct (which **section 103** defines as including mismanagement) in the administration of a charity or that it is necessary for action to be taken to protect a charity's property or ensure that property is used for charitable purposes, OSCR may (**subsection (4)**) suspend a charity trustee, agent or employee. Alternatively OSCR may (**subsection (6)**) give a direction to restrict the transactions or the payments that may be made in the administration of the body without OSCR's consent. This is intended to protect the assets of a charity or a body that was representing itself as a charity. OSCR may also (**subsection (7)**) direct a financial institution (bank) or person holding property for a charity not to part with it without OSCR's consent. This will allow OSCR to ensure that assets raised for charitable purposes are not removed from a charity or body, protecting them for use for those purposes.

43. Where OSCR is satisfied, following inquiries, that a body has been falsely representing itself to be a charity, it may direct (**section 31(5)**) the body or person to stop doing so.

44. Where OSCR is satisfied, following inquiries, that a person has been claiming to act for a charity, it may (**section 31(8)**) direct the person to stop representing itself as a charity and to pay to the charity or body any assets that it had collected. OSCR may also direct a bank to pay sums collected for the charity or not to part with the property without OSCR's consent. This will ensure that OSCR has powers to require any assets raised in the name of a charity to be passed on to that charity.

45. **Section 32** provides details concerning the making and delivery of directions and notices in **section 31**. The maximum period for which OSCR may make directions is 6 months. **Subsection (5)** provides that it is an offence to fail to comply with a section 31 direction from OSCR, with the maximum penalty on summary conviction being level 5 on the standard scale (currently £5000) or maximum of 6 months imprisonment, or both.

### *Reports on inquiries*

46. Under **section 33** if OSCR takes direct action following inquiries under section 28 it must prepare a report about the inquiry and send a copy to the person in respect of whom the inquiry was made and publish it as it sees fit. Under **subsection (1)(b)** OSCR must also prepare a report if it is requested to do so by the person of whom the inquiries were made. It is assumed that such reports will be published on the OSCR website. OSCR may also prepare reports about other inquiries it makes under section 28. In preparing these reports, **subsection (3)** provides that OSCR must not identify the name of any person except those in respect the inquiry is made or publish any particulars that could identify any person unless OSCR is satisfied that it is required to avoid impairing the effectiveness of the report.

### *Powers of Court of Session*

47. After making inquiries, OSCR may (as described in relation to section 28 to 31) take certain actions directly for a maximum period of 6 months. However, under **section 34**, following its inquiries OSCR may apply to the Court of Session for certain other or further actions to be taken. If the court is satisfied by evidence from OSCR that misconduct has occurred, to protect the property of the charity or to ensure that property is used for the charity's purposes it may interdict the charity from taking prescribed actions, appoint a judicial factor to manage the charity's affairs, appoint a trustee to a charitable trust, suspend or remove a trustee or manager of a charity, freeze its bank account and property. If the court is satisfied that a body has been representing itself as a charity when it is not, it may interdict the body from this action, and also take similar actions that it may do against a charity.

48. Hence, if OSCR considers that action is required to be taken against a charity or body for longer than 6 months or to remove a trustee or appoint a factor, it must apply to the Court of Session.

### *Transfer schemes*

49. **Section 35** allows the Court of Session, if OSCR applies to it, to transfer the assets of a charity, or a body that has been representing itself as a charity, to another charity on certain conditions set out in **subsection (2)**. These are that there has been misconduct or the transfer is necessary to protect the charity's assets or merely to better achieve the charity's purposes.

### *Powers in relation to English and Welsh charities*

50. **Section 36** allows the Court of Session to take action to protect the assets of a charity registered in England and Wales or a body not required to register (e.g. an exempt or excepted body under the Charities Act 1993) which are held in Scotland. The procedure (**in subsection 5**) is that the Charity Commission would request OSCR to apply to the court, and if satisfied that misconduct has taken place and that the assets require protecting, the court may order the person or institution holding the assets not to part with them without the court's consent.

### *Delegation of functions*

51. **Section 38** allows OSCR to delegate certain of its regulatory functions to other regulators with devolved powers, hence the reference to a Scottish public authority with either mixed functions or no reserved functions. It may only delegate those functions relating to the

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supervision of charities in sections 28 to 35 (except section 30) (i.e. inquiries about charities, obtaining information and powers following inquiries).

52. **Section 38(1)** places OSCR's powers for its regulatory functions in relation to charitable registered social landlords in Scotland with the Scottish Ministers. It is intended that this function will be carried out by Communities Scotland (CS) on the Scottish Ministers' behalf.

## **Chapter 5 – Reorganisation of charities**

53. **Sections 40 and 41** provide a new regime allowing charities (which do not otherwise have the power in their own constitutions to reorganise themselves) to do so by seeking OSCR's approval. Currently this process normally has to be undertaken by applying to the Court of Session.

54. Under **section 40**, OSCR may approve a reorganisation scheme of a charity as long as certain conditions are satisfied. These conditions are that the charity's purposes have been fulfilled as far as possible, can no longer be given effect to, are no longer charitable purposes, no longer provide an effective means of using its property or that part of the charity's constitution is no longer desirable. In addition, OSCR must be satisfied that the reorganisation will allow the charity's resources to be better used for its charitable purposes. Under **sections 40(2) and (3)**, the Scottish Ministers may make regulations setting out the detailed procedures relating to OSCR's dealing with charity reorganisations.

55. It is also worth noting that **section 43(4)** ensures that the new provisions do not prevent the Court of Session applying a *cy pres* scheme to reorganise a charity should it wish. This would normally be at the request of the charity or another person. **Section 43(5)** prevents charities established by Royal Charter, warrant or other enactment and a trust with property held by a local authority from using the provision in **sections 40 and 41**. However, a charitable endowment (either educational or non-educational) established under the Education (Scotland) Act 1980 may make use of the reorganisation provisions (**sections 43(6) and (7)**).

### *Section 44 Endowments*

56. **Section 44** provides that educational and non-educational endowments that are also charities will be covered by the reorganisation provisions in this part of the Bill, rather than the regime set out in Part VI of the Education (Scotland) Act 1980. However, section 104 of that Act, which requires a register of educational endowments to be maintained by the Scottish Ministers (in fact by the Student Awards Agency for Scotland on the Scottish Ministers' behalf) continues to apply.

## **Chapter 6 – Charity accounts**

### *Accounts*

57. As under current legislation (sections 4 and 5 of the 1990 Act), **section 45** requires all charities to keep proper accounting records. Charities must also prepare an annual statement of account and report on their activities, have these audited or independently examined (depending on the size of the charity) and provide a copy of the statement to OSCR. Accounting records

must be retained for at least 6 years. Subordinate legislation will be prepared to set out the detailed requirements of the accounts to be prepared as this is the simplest means of allowing updating of thresholds and keeping abreast of changes in accounting methods. It is expected that the standard of accounts set out in regulations will accord closely with the UK Statement of Recommended Practice for Charities an updated version of which is currently being prepared on behalf of the Accounting Standards Board.

58. The regulations on accounting will also be used to set out different requirements for different classes or type of charities. For instance, religious bodies may, as now, be allowed to prepare accounts in a slightly different format, as long as they meet equivalent standards to other charities. Regulations will also set out the thresholds by which different sizes of charity (probably judged on the value of its income, turnover or other measure) must prepare different levels of detail in their accounts and undergo different levels of audit or examination.

#### *Failure to provide statement of account*

59. **Section 46** provides that OSCR may appoint someone to prepare a statement of accounts for a charity that fails to send a copy to OSCR within the period prescribed in accounting regulations. The appointed person has powers of entry to the charity's premises, access to financial documents and can demand information from charity trustees or employees. Costs of OSCR and the appointed persons may be charged to the charity trustees. **Subsection (6)** also provides that failure to comply with an appointed person's requirements is an offence with a liability for a fine of level 3 (currently £1000) on the standard scale.

#### *Dormant accounts of charities*

60. **Sections 47 and 48** provide a revised regime to that set out in existing legislation (section 12 of the 1990 Act). This provides a means by which OSCR can redistribute sums of money held in charity bank accounts that have not been used for several years, so that these sums may be used for similar charitable purposes. A dormant account is defined (in **section 48(2)**) as one held in a bank and for which no payments or transactions have occurred for 5 years except a payment into the account or a transaction by the bank itself (e.g. payment of interest or bank charges). OSCR must be satisfied that the body in whose name the account has been held is a charity or was a Scottish Charity under the previous charity legislation before this bill is enacted. OSCR is also to make reasonable enquiries to try to locate a person concerned with the management or control of the body holding the dormant account before redistributing any funds. OSCR must transfer the credit in the dormant account (less any expenses etc. in compliance with regulations to be made by the Scottish Ministers under **section 48(1)**) to either a charity with similar purposes, or another charity that OSCR chooses, if it cannot tell what the purposes of the original charity were. **Section 103** includes a definition of "relevant financial institution" such that the deposit banks holding dormant accounts under consideration are those defined by the Financial Services and Markets Act 2000. It is intended that a section 104 order under the Scotland Act will be made following enactment of this Bill to ensure that this definition is automatically updated as new banks become defined in that Westminster legislation.

## **Chapter 7 – Scottish charitable incorporated organisations**

### *Scottish charitable incorporated organisation*

61. Chapter 7 (**sections 49 to 63**) establish a new legal form that charities may wish to adopt. The Scottish Charitable Incorporated Organisation (SCIO) is a legal form designed specifically for charities to enable them to become a corporate body, without having to become a company or industrial and provident society. SCIOs will be regulated by OSCR.

62. **Section 49 and 50** set out the basic mandatory requirements for a charity to become a SCIO. A SCIO is a corporate body and shall have a constitution, a principal office in Scotland and more than one member. The constitution of a SCIO must state its name and purposes and contain provisions about the membership and the trustees. Unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if it is wound up. The Scottish Ministers may make regulations specifying further matters relating to a SCIO's constitution.

### *Name and status*

63. **Section 52** provides that the Scottish Ministers may specify in regulations which documents a SCIO's name must be shown on if they are issued or signed on its behalf. If the body's name does not include either the words "Scottish charitable incorporated organisation" or "SCIO", then documents must include a statement that it is a SCIO. Because all SCIOs must also be charities, these provisions are instead of those in section 13 which require a charity to state on its documents that it is a charity. **Section 53** establishes as an offence the issuing of any document which should include reference to SCIO, which does not. OSCR also has powers to direct a body which is not a SCIO from representing itself as such and failure to comply may lead to interdict by the Court of Session.

### *Creation of SCIO and entry in Register*

64. **Section 54** sets out the procedure for application for registration of a SCIO. These provisions are similar to those for an application to be on the Register, with specific requirements relating to a SCIO. The effect of registration (**section 55**) is that on entry to the register as a SCIO, the body becomes a body corporate as described in the application. If a SCIO ceases to be a charity, it also ceases to be a SCIO.

### *Conversion, amalgamation and transfer*

65. **Sections 56 and 57** make provisions to allow a charity that is a company or an industrial and provident society to be converted to a SCIO. Such bodies cannot transfer if they have any share capital that is not fully paid up or if they have only a single member. An application for conversion must be accompanied by copies of both the resolution of the body to be converted to a SCIO and adopting the proposed constitution of the SCIO.

66. If OSCR grants an application for a body's conversion to a SCIO, as well as entering the body on the Register, it must send a copy of the body's resolution to convert and a copy of the entry in the Charity Register to the registrar of the original body (i.e. Companies House or the Financial Services Authority). It is intended that once OSCR has confirmed that it will grant the

body's application to become a SCIO, the relevant original registrar will cancel the body's entry on the original register. To require this to occur is however reserved and as such it is intended to include this in a section 104 order made in Westminster as a consequence of this Bill.

67. **Section 58 and 59** provide for a number of SCIOs to amalgamate by application to OSCR. A resolution to amalgamate must be passed by either a two-thirds majority of those voting at a general meeting or a unanimous vote by the members of each of the SCIOs involved. If OSCR grants the application for amalgamation, it must enter the new SCIO on the register and remove the original bodies' entries and all the property, rights and liabilities of all the old SCIOs belong to the new SCIO. Similarly, section 60 provides for a SCIO to transfer all its property, rights and liabilities to another SCIO, if OSCR confirms the application.

68. **Section 61** provides that a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. Third parties may also assume that charity trustees are authorised to act on behalf of the charity they represent in any matter. It is effectively for SCIOs themselves, and their trustees, to ensure that they have the relevant powers. This is intended to provide a level of protection to those dealing, in good faith, with SCIOs and their trustees, in a similar manner to that provided to those dealing with registered companies.

69. Under **section 63**, the Scottish Ministers may make regulations to set out further provisions on SCIOs such as the application process, the administration of SCIOs, amalgamations, transfers, the winding up, insolvency or dissolution of SCIOs, or as they see fit.

## **Chapter 8 – Religious charities**

### *Section 64: Designated religious charities*

70. **Section 64** allows OSCR to designate a charity that meets certain criteria as a designated religious charity. To be designated, the body its main purpose must be the advancement of religion, its main activity the regular holding of public worship and it must have been established in Scotland for at least 10 years and have a membership of at least 3,000 over the age of 16. In addition, it must have an internal organisation with supervisory and disciplinary functions over all its component parts and have a regime for keeping accounting record which OSCR considers correspond to those for other charities.

71. Designated religious charities will be exempt from certain provisions of the Bill; namely that it does not need to seek OSCR's consent for certain of the changes to its constitution set out in section 16, OSCR may not direct the charity or its trustees to stop undertaking activities (under **section 28(2)**) nor to suspend its charity trustees (under **section 31(4)**) following its inquiries. The Court of Session may not (under **section 34(4)**) appoint a judicial factor, appoint a trustee, nor suspend a charity trustee or manager of the religious charity. Lastly, section 68 on those disqualified from serving as a charity trustee does not apply to designated religious charities.

72. Under **section 64(5)**, OSCR may withdraw the designated status from a designated religious charity if it considers the qualifying criteria no longer apply or if, following an investigation, OSCR considers that it is no longer appropriate for the body to hold that status.

73. These provisions largely replicate the existing regime under section 3 of the 1990 Act which allow the Scottish Ministers (now OSCR acting on their behalf) to designate religious bodies to allow similar exemptions where it is satisfied that an adequate supervisory and disciplinary regime is already in place.

## **Chapter 9 – Charity trustees**

### *Section 65: Charity trustees: general duties*

74. The term “charity trustees” (which is defined in **section 103**) is used throughout the Bill to describe those persons in control of a charity. Depending on the form of the body, this term refers to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Bill and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as “charity trustees” under this Bill.

75. **Section 65** sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. Subsection (1) requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another’s affairs. A charity trustee has a duty to ensure that a charity complies with any requirements of this Bill (subsection (2)). However, subsection (3) provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties will be treated as misconduct in the administration of a charity.

### *Remuneration*

76. **Section 66** provides that a charity trustee may not normally be paid for carrying out duties and functions of being a charity trustee, unless specific authority for this is provided. This stems from the existing position that charities are generally understood to be voluntary organisations and that charity trustees will offer their services as such with no payment. However, under certain circumstances, it is acceptable that a charity trustee may also carry out additional services on behalf of the charity, i.e. services that another person (not a trustee) might otherwise undertake for payment. In these circumstances, and where the conditions set out in subsection 2 are satisfied, this “service provider” may be remunerated from the charity’s funds for those (additional) services. The conditions are that the maximum amount of the remuneration is set out in a written agreement, is reasonable, that the charity trustees are satisfied it is in the interests of the charity, that a minority of trustees are either paid in this way or connected to trustees who are, and that the constitution of the charity allows it to occur. Despite the above, **subsection (5)** ensures that a charity trustee or service provider may receive remuneration from a charity if they are entitled to receive it under a provision in the charity’s constitution (in force on the day that the Bill is introduced to the Parliament), as a result of a court order, or under any enactment. This means that charities may not make changes to their constitution merely to allow payment of charity trustees before this Bill comes into force and that trustees may be paid if other legislation specifically allows it.

77. **Section 67** sets out definitions for terms which are referred to in parts of **section 66**, such as those who would be considered to be connected with a trustee. Such a person is defined as “connected” to a charity trustee if they are married to them or living as if married, is a close family relative (i.e. a child, parent, grandchild, brother or sister of them or their spouse). Also an institution or body cooperate is considered to be “connected” with a charity trustee if it is controlled by them or a “connected” relative, or if they they have a substantial interest respectively.

#### *Disqualification*

78. **Section 68** sets out the types of person who are disqualified from serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Bill, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or from serving as a Company Director. **Subsection (4)** allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice company legislation. Under **section 69**, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.

#### **Chapter 10 – Decisions: notices, reviews and appeals**

79. **Sections 70 to 77** set out a process by which most decisions by OSCR (or those which are taken on behalf of OSCR) may be challenged by those directly affected in a process that is intended to be simple and more cheaply accessible to charities than the current process which relies on the courts. **Section 70** lists those decisions which may be reviewed and **section 71** sets out the persons that must be informed about different decisions. It also provides that notices of decisions must set out the decision, the reasons and advice about seeking a review. Further definition of a formal notification is given in **section 98**. **Sections 72 and 73** provide that, if requested by either the person or charity affected by the decision, OSCR must carry out an internal review of the decision. OSCR will publish procedures to set out how the internal reviews will be conducted, although a review is to be carried out within 21 days of receiving the request for it.

80. **Section 74** requires the Scottish Ministers to appoint individuals to serve on a Scottish Charity Appeals Panel, a new tribunal to be set up to provide an independent appeal mechanism for decisions made by OSCR. **Schedule 2** sets out further details of the Appeals Panel. **Schedule 4** adds the Panel to the list of bodies in Part 2, Schedule 1 of the Tribunals and Inquiries Act 1992 and hence the Panel will be under the jurisdiction of the Scottish Committee of the Council for Tribunals. Following open advertising, the Scottish Ministers will appoint individuals to be available to serve on the Panel. The number of Panels will depend on the caseload, but each panel will consist of 3 persons, and the chair at least will have been a solicitor or advocate for at least 5 years. It is intended that administrative support for the panel will be provided by the Executive. The Scottish Ministers will also establish procedural rules for the Panels.

81. Following an internal review of a decision by OSCR, a person who requested the review may (**section 75(1)**) appeal the decision to the panel, within 28 days of being notified of the

review decision. The panel will consider the appeal and may under **subsection (5)**, either confirm a decision by OSCR, quash OSCR's decision (and direct it to take such other action as the Panel prescribes), or remit the decision to OSCR for reconsideration, with the Panel's reasons. Under **section 76**, if a decision is remitted to it by the Panel, OSCR must, within 14 days, either confirm, vary, reverse or revoke its decision and give its reasons.

82. Under **section 77**, either the person requesting an appeal or OSCR, may seek to have the appeal considered by the Court of Session. The Court may confirm or quash the decision. A decision by OSCR to suspend a charity trustee, agent or employee (under **section 31(4)**) can be appealed by that person directly to the Court of Session (rather than the Panel).

## **PART 2: FUNDRAISING FOR BENEVOLENT BODIES**

### **General**

83. **Part 2** regulates fundraising not just for bodies on the Scottish Charity Register, but for all benevolent bodies and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are actually charities or not. This means that many bodies which may have charitable purposes but do not provide a sufficient level of public benefit or may have chosen not to be restricted by the added regulation which falls upon charities, may, for instance, undertake public collections or fundraise (as long as they are transparent and do not claim to be charities).

84. **Section 78** sets out a number of definitions which relate to Part 2. **Section 79** also clarifies that any reference to representation or solicitation in Part 2 refers to any manner of representation, e.g. oral, written or in a statement published in a newspaper, film or radio or television programme.

### **Control of fundraising**

85. **Sections 80 and 81** give benevolent bodies greater control over those fundraising on their behalf. **Section 80** requires professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf. Regulations under **section 82** can set out the requirements of this agreement. Any agreement which does not meet these requirements is only enforceable against the body through the courts. Professional fundraisers and commercial participators are entitled to remuneration or expenses as set out in the agreement.

86. **Section 80** also gives benevolent bodies (and OSCR on behalf of charities) the right to seek an interdict preventing a professional fundraiser or commercial participator fundraising on the body's behalf, if they are doing so without an agreement or outwith an agreement in the prescribed format.

87. **Section 81** allows benevolent bodies to seek an interdict preventing anyone, other than a professional fundraiser or commercial participator (who would be covered by section 80), from fundraising on their behalf if they object to the methods of fundraising, if the person is not a fit and proper person to fundraise or if the body does not want to be associated with the venture.

88. **Section 82** provides the Scottish Ministers with powers to regulate fundraising through secondary legislation in a number of ways. This section will be used to make regulations setting out a requirement for professional fundraisers, paid charity fundraisers, commercial participators and possibly volunteers, to make a statement to potential donors regarding their remuneration or the amount of the donation that will go to the benevolent body. Regulations under this section will also cover the form of contract between professional fundraisers or commercial participators and benevolent bodies, as well as circumstances under which donations may be refunded. The Scottish Ministers have agreed to allow the sector time to develop a scheme of self regulation, however, powers under **section 82** may be used to further regulate benevolent fundraising if it was felt necessary.

### **Public benevolent collections**

89. **Sections 83 to 91** set out a local authority led system for licensing public benevolent collections which replaces the provisions for the licensing of public charitable collections under section 119 of the Civic Government (Scotland) Act 1982. The provisions are very similar to those in the 1982 Act. The main changes are the extension of the definition of public benevolent collections in **section 83** to include collections of promises of money (such as direct debits), as well as collections of cash; clarification of the definition of public place under **section 83** and the inclusion of powers under **section 90** to regulate the collections of goods.

90. **Section 84** requires organisers of public benevolent collections (collections of cash or promises of money in a public place, or from house to house or business to business) to apply to the relevant local authority for permission to collect. **Section 85** requires local authorities to make any necessary enquiries before they either give permission to collect (with or without conditions), or refuse permission on a number of grounds. Local authorities may also withdraw permission already granted. Regulations under **section 85** may remove the duty on local authorities to undertake background checks for certain types of applications.

91. Under **section 86**, OSCR may designate charities who meet certain criteria as designated national collectors. This establishes a regime similar to the current provision under the 1982 Act by which the Scottish Ministers (now OSCR acting on their behalf) may designate bodies collecting in a number of local authority areas as “exempt promoters”. In the new regime, OSCR may specify the criteria to be met for the purposes of obtaining and retaining designated national collector status, and are required to consult certain persons beforehand. Collections by designated national collectors must be notified to the relevant local authority, who may prohibit the collection if it is likely to cause undue public inconvenience.

92. **Section 87** sets out a process for organisers of public benevolent collections to appeal against a local authority decision. Further procedures for public benevolent collections will be set out in regulations made under **section 89**.

93. **Section 88** gives OSCR powers to protect funds raised in a public charitable collection and **section 91** requires local authorities to consider guidance issued by OSCR in relation to public benevolent collections.

94. **Section 90** allows the Scottish Ministers to regulate the collections of goods from the public for charitable, benevolent or philanthropic purposes through secondary legislation. These regulations could include a requirement to notify local authorities about the collection, and can create offences for non-compliance.

### **PART 3: INVESTMENT POWERS OF TRUSTEES**

95. **Sections 92 to 94** provide an extension to the investment powers of trustees (of all trusts, whether charities or not). The Trusts (Scotland) Act 1921 is amended by adding a provision (section 92(2)) allowing a trustee to make any kind of investment of the trust estate (including an investment in heritable property). The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. Subsection (2) also provides a new wide power for trustees to acquire heritable property for any other reason. These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (subsection (3)). Subsection (3) continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act. The new general power in subsection (2) is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. But if trustees in existing post-1961 Act deeds or in future deeds are prohibited from making certain investments then these prohibitions will continue to apply. This is because section 4(1) of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

96. **Section 93** provides a number of duties that apply to trustees and must be followed before exercising the wider investment powers under section 92(2). **Schedule 3** makes a number of consequential amendments to other legislation relating to powers of trustees. **Section 94** provides a power for the Scottish Ministers to amend other legislation in relation to the amendment of trustee powers of investment in **sections 92 and 93**.

### **PART 4: GENERAL AND SUPPLEMENTARY**

#### **Financial assistance for benevolent bodies**

97. **Section 95** allows the Scottish Ministers to make payments to benevolent bodies in relation to their activities, or to any person in connection with work which enables benevolent bodies to implement their purposes better.

#### **Rate relief for registered community amateur sports clubs**

98. **Section 96** makes provision for organisations that are registered with the Inland Revenue under Section 58 of the Finance Act 2002 as a community amateur sports club to receive 80% mandatory relief from non-domestic rates. Local authorities have discretionary powers to top up this relief to 100%.

### **Transitional arrangements**

99. **Section 97(1)** provides a transitional arrangement to ensure that all existing Scottish Charities at the time that **paragraph 5(a)(ii) of schedule 4** of this Bill is commenced become automatically entered by OSCR on the Scottish Charity Register. **Paragraph 1 of schedule 4** repeals the section of the 1990 Act which entitles a body recognised by the Inland Revenue (as eligible for tax relief through having exclusively charitable purposes) under the Income and Corporation Taxes Act 1988 to describe themselves as a “Scottish charity”.

100. **Subsection (2)** allows the Scottish Ministers to make further transitional orders as they consider necessary for the purposes of the Bill. It is intended that this subsection will be used to provide a period of grace to allow existing UK and “foreign” charities operating in Scotland to apply to be entered on the Register by OSCR. An order could also require a charity transferred onto the Register to provide whatever information OSCR requires to complete the body’s entry on the Register. Similarly, existing exempt promoters and designated religious bodies under the 1982 and 1990 Acts could be granted a period of grace, initially being considered as designated national collectors and designated religious charities under **sections 86 and 64**, until OSCR has established the new regime.

### **Notices, applications etc.**

101. **Section 98** sets out details relating to the giving of notices, directions and consents or requests for review, applications and decision made. The formal communications must be in writing, but may also be made by electronic means (e.g. electronic-mail etc.). Subsection (4) sets out the specific conditions and related timing for when a formal communication may be considered as having been made.

### **Offences by corporate bodies etc.**

102. **Section 99** provides that when an offence under this Act is committed by a body corporate, a Scottish partnership or an unincorporated association, with the consent or connivance of a person controlling the body, the individual is also guilty of the offence and is liable to have proceedings taken against them.

### **Ancillary provisions**

103. **Paragraph (a) of section 100** allows the Scottish Ministers to modify any enactment in order to ensure a body established by an enactment is able to meet the charity test in section 7(3)(b) of the Bill. This provision may be used if it were to be decided that an existing charitable non-departmental public body (NDPB) should remain a charity but was prevented from doing so by an enactment providing the Scottish Ministers control of the body via a power of direction.

104. **Paragraph (b) of section 100** provides ancillary powers for the Scottish Ministers to make other incidental, supplemental or consequential provisions considered necessary for this Act.

105. **Section 101** sets out the procedures for the Scottish Ministers to make orders, regulations or rules by statutory instrument under the Act. Instruments are generally made by negative resolution, except commencement orders. Regulations under section 63(d) and ancillary orders which add to, replace or omit any part of primary legislation are subject to affirmative resolution in the Parliament.

106. **Section 102** relates to **schedule 4** which contains minor and consequential amendments to other primary legislation in consequence of this Act. **Schedule 4** includes amendments to several Acts:

*Part 1: Acts*

- Paragraph 1 which amends section 4(10)(a) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 to refer to charities entered in the Scottish Charity Register to ensure that all qualifying charities on the Scottish Charity Register are eligible to receive the appropriate reduction or remission of non-domestic rates;
- Paragraph 2 which adds a reference to charities on the Scottish Charity Register to the Sex Discrimination Act 1975 to ensure that Act will continue to apply to charitable educational endowments following enactment of this Bill;
- Paragraph 3 which replaces the existing definition of “charitable purposes” in section 122 of the Education (Scotland) Act 1980, referring instead to this Bill;
- Paragraph 4 which replaces previous references to “Scottish Charities” and “charitable” referring instead to this Bill and repeals the previous provisions on the regulation of charitable collections in section 119 of the Civic Government (Scotland) Act 1992 relating to public charitable collections;
- Paragraph 5 which repeals the existing link in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 between the recognition by the Inland Revenue of bodies eligible for tax relief and bodies eligible to describe themselves as Scottish Charities, and existing provisions on the regulation of Scottish Charities by the Scottish Ministers;
- Paragraph 6 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Charities Act 1992. Section 119 on the regulation of charitable collections is superseded by this Bill.;
- Paragraph 7 which updates section 19(3) of the Further and Higher Education (Scotland) Act 1992 to refer to charities as defined in this Bill instead of the Income Tax Acts. This section allows the Scottish Ministers to make modifications, by order, to the purposes and conditions of application for educational endowments ;
- Paragraph 8 which brings the Scottish Charity Appeals Panel within the jurisdiction of the Scottish Committee of the Council on Tribunals;
- Paragraph 9 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Local Government etc. (Scotland) Act 1994. This updated section 119 on the regulation of charitable collections bringing it into line with the 1994 local government reorganisations);

*These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004*

- Paragraph 10 which applies the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to OSCR;
- Paragraph 11 which updates sections 34(8) and 71(8) of the Land Reform (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions (Scotland) Act 1990;
- Paragraph 12 which applies the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to OSCR , ensuring that members of OSCR are appointed in accordance with the public appointments process overseen by the Commissioner for Public Appointments in Scotland;
- Paragraph 13 which updates paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

### *Section 103: General interpretation*

107. **Section 103** provides a number of general definitions of terms used throughout the Bill. Reference has been made to these in the relevant sections of the commentary above.

### *Section 104: Short title and commencement*

108. **Section 104(1)** provides for the short title to the Bill. Subsection (2) provides that only sections 97, 100, 101 and this section come into force when the Bill receives Royal Assent. The remaining provisions of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders.

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## **FINANCIAL MEMORANDUM**

### **INTRODUCTION**

109. This memorandum sets out the financial implications of the Charities and Trustees Investment (Scotland) Bill.

### **Background**

110. The Scottish Executive is committed to reforming the regulatory regime for charities, in order to support the charities sector and to safeguard the public interest in relation to charities.

111. Regulation of Scottish charities is currently governed largely by Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, but a range of other statutes also apply. Organisations within the charities sector have called for reform and consolidation of the law for some time. The regulatory regime for charities proposed in this Bill seeks to address these gaps, and to deliver a system that is fit for purpose and protects the public interest without being overly burdensome or more costly than necessary. The draft Bill and ensuing regulations will apply to charities and their operations in Scotland only.

## **Consultation**

112. There has been extensive consultation and dialogue with the charities sector around the development of this Bill. More than 40 meetings with stakeholders, in addition to the consultative work of the McFadden Commission in 2000/01 and the Scottish Executive Justice Department in 2001/02, have furthered debate on the options and regulatory proposals. The public consultation on the draft Bill concluded on 25 August (<http://www.scotland.gov.uk/consultations/social/dctib-00.asp>). Accompanying the consultation paper was a draft regulatory impact assessment (RIA) providing background information on the options which were considered prior to the drafting of the Bill, and the probable impact and cost of these options. Views on the detail of this were limited and mainly pointed to the need to ensure that the Office of the Scottish Charity Regulator (OSCR) was sufficiently funded (<http://www.scotland.gov.uk/library5/social/ctisb-00.asp>).

## **Costs**

113. The Executive's proposals aim to keep compliance costs to a minimum for charities, while improving both the operating environment of charities and public confidence in them. The improved transparency that will result from the Bill should have a positive impact on charities' ability to raise funds from the public (currently charities in Scotland raise around £240 million from public donations) and from charitable trusts (recent estimates currently worth £60 million).

114. None of the provisions of the Bill are specifically directed at businesses, unless they are attached to charities or engaged in fundraising for charities. Nor is the regulation of charities as set out in the Bill expected to have any impact on competition. The provisions are aimed at making charities' activities and finances more transparent, and clarifying the legal requirements on charities.

115. Tax relief, other than rates relief, is reserved to Westminster and granted by the Inland Revenue on a UK wide basis. This Bill will not change this.

116. The proposals set out in the Bill and consultation paper include a number of criminal offences. These will lead to a fine on conviction.

117. The regulator will be tasked with reviewing implementation of the legislation and regulations, and advising the Executive of any need for change. The Executive will review the impact of the legislation and associated regulations within ten years of it coming into force.

118. Consideration of the costs associated with each part of the Bill is set out below.

## **PART 1, CHAPTER 1 (OFFICE OF THE SCOTTISH CHARITY REGULATOR)**

### **Costs on the Scottish Administration**

119. The Bill provides for a number of new functions for the Office of the Scottish Charity Regulator (OSCR), such as determining whether bodies meet the new charity test and maintaining a register of those that do. In addition OSCR will be expected to start its monitoring

programme, approve reorganisations and provide information to the public and guidance to charities. This will all require additional resources for increased staff and system management costs. Provision has been made to increase OSCR's budget from its current budget of £1.3 million to £2.3 million per annum from 2006-07.

#### **Costs on local authorities**

120. None.

#### **Costs on others (including the charity sector)**

121. None.

### **PART 1, CHAPTER 2 (SCOTTISH CHARITY REGISTER)**

122. This chapter sets out a new definition of charity, removes the previous presumption of public benefit and creates a publicly accessible register of all bodies eligible to operate as charities in Scotland. It is possible that there may be additional non-charitable organisations which will seek charity status when the new definition is enacted and some current charities may either lose their charitable status or voluntarily seek to surrender it. As the new definition is largely in keeping with the existing definition, we do not however anticipate any significant change to either the size or growth of the charity sector as a result of this.

#### **Costs on the Scottish Administration**

123. Local authorities are currently required to provide 80% relief on non-domestic rates for charities, the cost of which is covered by the Executive. In addition local authorities may provide additional relief of up to 20% of which 75% is met by the Executive. This relief forms part of the rates relief granted under section 4 of the Local Government (Scotland) Act 1975. Relief for charities under this section for the financial year 2003-04 amounted to between £78 million and £85 million. Apart from the possible implications for NDPBs, which would be cost neutral (see paragraph 128), we do not, however, anticipate any significant change to this as a result of the new definition as we do not anticipate any significant change to the overall number of charities as a result of the Bill.

124. The Scottish Executive will have to take account of the additional costs to any charitable NDPBs as a result of their losing their charitable status – see paragraph 128. There are currently 13 Scottish NDPBs that have charitable status. It is planned to consider this on a case by case basis during the reviews of each of these NDPBs. These are due to take place between now and 2007. Should decisions to give up charitable status, alongside any other outcomes of the reviews, result in a net loss of income then the Executive will consider providing additional grant-in-aid funding to reflect this, but only if the restructuring of services is not feasible. The costs of any grant-in-aid would be partly offset by a reduction in rates relief provided to local authorities. This would result in a potential cost to the Executive of up to **£7 million**.

### **Costs on local authorities**

125. The provisions of this chapter will not have any significant impact on local authority administrative costs.

126. The impact on the non-domestic rates income for local authorities is also likely to be minimal with the possible exception of lost rates relief relating to local authority managed charities. The same issues regarding the independence of charities from external direction discussed in paragraph 128 below could also arise in the context of charities controlled by local authorities. We cannot say what the impact of this would be without examining the individual constitutions and budgets of each charity under local authority control. This cannot be done without disproportionate effort on the part of local authorities. The administrative cost discussed in paragraph 130 may also apply to local authority managed charities.

### **Costs on others (including the charity sector)**

127. Some existing charities might no longer meet the requirements of the law and could therefore lose the benefits of charitable status. Equally some organisations may now seek registration and benefit from charitable tax relief for the first time.

128. This chapter includes a provision excluding bodies whose constitutions oblige them to comply with the directions of a third party from being eligible for charitable status. It has been noted that there are a number of charitable NDPBs who are obliged to follow the directions of the Scottish Ministers. While the Bill reinforces this position, the Scottish Ministers have accepted that even under the current law, charities should be independent of government and have undertaken to look at the charitable status of each of the charitable NDPBs and decide whether or not they should cease to be either charities or NDPBs. The value of tax relief, non-domestic rates relief and donations flowing from the charitable status of these 13 bodies is estimated to be approximately £10 million per annum, including some £3 to 4 million of local rates relief. Without the rates relief, which is ultimately funded by the Executive and therefore cost neutral to the Scottish Consolidated Fund the total benefit to NDPBs from such sources is estimated to be between £6 and 7 million.

129. There has been some speculation as to whether or not some independent schools might lose their charitable status as a result of the new definition. It has not been possible to obtain detailed figures but it has been estimated that charitable status to all independent schools is worth roughly £3 to 6 million to them in rates and tax relief. This figure does not include gift aid or take account of donations that might be lost. Were an independent school to lose its charitable status the impact would be largely dependent upon the school itself but this may mean an increase in its fees or in exceptional cases, see it close down. The 2003 census indicated that there are 30344 pupils in independent schools in Scotland.

130. While OSCR will not charge for registration there may be some minimal administrative costs to charities in providing the information required and ensuring charity documentation includes references to registration. The one-off cost of this to new and existing charities will vary dependent upon the size of the organisation such that for most it should be minimal but for others it could be up to **£2000**. The transitional arrangements will allow sufficient time for a phased approach to minimise the impact of this cost.

## **PART 1, CHAPTER 3 (CO-OPERATION AND INFORMATION)**

### **Costs on the Scottish Administration**

131. These provisions oblige charities to provide such information as OSCR requires, without charge. Any costs or savings made in the acquisition or processing of such information will fall to OSCR's budget as discussed in paragraph 119 above. There is no additional cost to the Scottish Administration outside of OSCR's budget.

### **Costs on local authorities**

132. OSCR will seek to work with local authorities and provide a useful single point of contact in relation to charities. Even though OSCR may require some information from local authorities regarding information they may hold about charities engaged in public benevolent collections, the overall impact should be minimal.

133. Local authority managed charities will also be subject to the costs discussed in paragraphs 134 to 135.

### **Costs on others (including the charity sector)**

134. As is the position under existing legislation, charities will be under a duty to provide their constitutions and accounts when requested to do so by the public and will continue to be able to charge to recoup the cost of them doing so. These provisions do however also oblige OSCR to make its register public. A public register should reduce the direct demands for information and the administrative burden on charities of these. Members of the public will be able to access the information on OSCR's website at no charge.

135. Concern has been expressed about the burden of dual registration and dual regulation of bodies that are charities. While there no doubt is some cost attached to this, the Bill obliges OSCR to seek to co-operate with other regulators to minimise the cost. For example we expect that this might see OSCR and the Charity Commission agreeing a protocol whereby charities subject to the jurisdiction of both regulators submit information in a common format.

## **PART 1, CHAPTER 4 (INQUIRIES AND SUPERVISION OF CHARITIES)**

### **Costs on the Scottish Administration**

136. This chapter sets out powers under which OSCR will be able to institute inquiries and take action to protect assets. There is no direct cost to the Executive under this chapter. The cost of undertaking the investigations and actions set out in this section will fall to OSCR's budget as discussed in paragraph 119.

137. This chapter also makes various provisions that relate to charitable registered social landlords, designated religious charities and charitable educational endowments. This is not expected to have any direct cost implications for the Executive. The Bill allows the regulation of charitable registered social landlords by Community Scotland. Community Scotland has indicated that they do not believe that this will have any significant impact on their costs as they

already regulate these bodies under the powers set out in the Housing (Scotland) Act 2001. The cost of doing so is about £650,000 per annum. This is not a new cost and excludes the cost of any inspections. Community Scotland has indicated that there may be minor additional costs in respect of liaison with OSCR and the collection of information OSCR may require.

138. The current regime of charity regulation requires the Scottish Ministers to apply to the Court of Session to take action against a charity or charity trustee in respect of suspected misconduct. Over the last 10 years, an average of only 2 cases per year has gone to Court. While more cases of misconduct could come to light as the Bill envisages OSCR being more proactive in taking action in instances of misconduct that was previously possible, the Bill also allows OSCR to take action without recourse to the Courts. This will probably mean that the impact of the Bill on the Scottish Courts will be minimal.

139. It is estimated that training seminars to raise the level of awareness of the new legislation amongst charities would cost about £5,000 for every hundred delegates attending. We estimate that around **£150,000** may be required to run the appropriate seminars. The Executive will consider whether this could be met through its funding of the voluntary sector. OSCR will also publish guidance on the legal requirements that charities and charity trustees will have to comply with. The cost of this is included in OSCR's overall budget.

#### **Costs on local authorities**

140. None, although charities managed by local authorities may also be subject to the same costs discussed in paragraphs 141 to 143.

#### **Costs on others (including the charity sector)**

141. While there will be administrative costs associated with complying with an inquiry being conducted by OSCR these are likely to be minimal. Nor would such costs be new costs as OSCR already has the ability to conduct inquiries. OSCR will only take further action against a charity where it is satisfied that there is misconduct. The provisions relating to registered social landlords serve to clarify the regulatory regime of charities that fall into this category and in doing so, they seek to minimise the cumulative administrative cost of complying with the legislation.

142. Given that the Bill includes a number of duties charities may decide to provide additional training for trustees, staff and volunteers of charities to educate them as to the requirements of the new legislation. This would be additional to the awareness seminars funded by the Executive and the guidance published by OSCR – see paragraph 139. The cost for this is likely to be marginal.

143. The Bill makes provision for the redistribution of money held for charities in dormant accounts. This will see funds held for charities by financial institutions that are currently unused being reunited with the original charity or passed on to a charity with similar purposes. While this will be of net benefit to the sector, this is not likely to be substantial as previous trawls by the Charity Nominee under powers in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 have already identified and dealt with the bulk of dormant accounts.

## **PART 1, CHAPTER 5 (REORGANISATION OF CHARITIES)**

### **Costs on the Scottish Administration**

144. There is no direct cost to the Executive under this part. Any cost will be included in the OSCR budget.

### **Costs on local authorities**

145. This part of the Bill provides for OSCR to consent to the reorganisation of charities that previously could be done through the Court of Session. This will allow local authority-managed small charitable trusts to be amalgamated and more efficiently administered. The administrative savings of this are difficult to quantify.

### **Costs on others (including the charity sector)**

146. The simpler provision for reorganisation in the Bill will allow for more efficient administration of charitable assets.

## **PART 1, CHAPTER 6 (CHARITY ACCOUNTS)**

### **Costs on the Scottish Administration**

147. This Chapter requires charities to prepare and provide accounts. There is no direct cost to the Executive under this chapter.

### **Costs on local authorities**

148. None, although charities managed by local authorities will also be subject to the costs discussed in paragraphs 149 to 150.

### **Costs on others (including the charity sector)**

149. There should be no new costs to charities under this section as they are already required to produce audited or independently examined accounts.

150. Regulations will set out the form of the accounts and thresholds. These will rely on the Accounting Standards Board's Statement of Recommended Practice for charities (SORP). The nature of the accounts and the requirement for audit or independent examination of accounts will be according to certain income thresholds set out in the regulations. The levels of these thresholds have not yet been decided but they will be higher than existing levels, meaning that smaller and medium sized charities will be able to make some administrative savings.

## **PART 1, CHAPTER 7 (SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS)**

### **Costs on the Scottish Administration**

151. The Bill will establish a new legal form for charities – the Scottish Charitable Incorporated Organisation. This will be regulated by OSCR. There is no direct cost to the Executive under this chapter. Provision for the regulation of these will be included in OSCR's budget.

### **Costs on local authorities**

152. None, although charities managed by local authorities will also be able to convert to this form if they wish.

### **Costs on others (including the charity sector)**

153. It is estimated that around 5000 of the more than 25,000 Scottish Charities currently have company status. While it is unlikely that charitable companies will wish to convert to SCIOs in the short term, unincorporated charities that are attracted to the benefits of incorporation may choose to do so. SCIOs will provide charities with a simple, accessible legal form of incorporation without the complexity and expense of dual regulation by the company regulator.

## **PART 1, CHAPTER 9 (CHARITY TRUSTEES)**

### **Costs on the Scottish Administration**

154. This chapter sets out broad legal duties for charity trustees. This chapter should therefore have no direct cost implications for the Executive.

### **Costs on local authorities**

155. No direct costs.

### **Costs on others (including the charity sector)**

156. The duties are based on existing duties not just in charity law but also company law and trust law. These duties were not designed to replace any existing duties and the Bill provides that they should not do so. The aim of this chapter is to clarify existing case law and good practice and should therefore not mean any additional costs deriving from the Bill.

157. The core of these duties, the need for charity trustees to act in the interests of their charity, runs alongside the requirement for charities to be independent of external direction. See paragraph 128.

## **PART 1, CHAPTER 10 (DECISIONS, NOTICES, REVIEWS AND APPEALS)**

### **Costs on the Scottish Administration**

158. The Bill makes provision for an internal review process and an appeals panel to allow charities to appeal OSCR's regulatory decisions. The costs of the review process will be met from OSCR's budget.

159. The Charity Appeal Panel will be directly funded by the Executive. It is estimated that it will cost approximately **£160,000** to set up the panel and between **£145,000 and £210,000** per annum to run it. The latter figure is based upon the assumption of between 50 and 100 cases annually as we estimate the basic running cost of the Panel will be around £80,000 per annum rising by about £1300 for each case it deals with.

### **Costs on local authorities**

160. None

### **Costs on others (including the charity sector)**

161. Charities wishing to dispute OSCR's decisions will be able to do so in the first instance without incurring the costs associated with a court action. This potential saving will be variable depending on whether or not an appellant chooses to seek legal advice.

## **PART 2 (FUNDRAISING)**

### **Costs on the Scottish Administration**

162. There is no new cost to the Executive under this part.

### **Costs on local authorities**

163. The provisions in the Bill may have some impact in terms of widening the scope of local authorities' powers to license public benevolent collections and additional resources may be required to administer the system and deal with returns. This is expected to be minimal. Local authorities have indicated that they each process approximately 100 applications annually and that each application takes in the region of 20 minutes to deal with. This suggests a current labour cost of about £500 per annum per local authority.

164. The Bill will allow local authorities to manage this system more effectively by clarifying its purpose and receiving advice from OSCR on a more consistent national regime.

### **Costs on others (including the charity sector)**

165. The cost in terms of public benevolent collections should largely be neutral as this is based upon existing law and good practice.

*These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004*

166. Although more charities and benevolent collectors may be required to submit licensing applications to local authorities, as for example face to face (direct debit) fundraising is brought into the regulatory scope for the first time, OSCR should assist in creating a more consistent application process across local authorities.

167. The improvements to the existing system should allow more efficient collections but may require some additional training for fundraisers, and may restrict the fundraising activities available to charities.

168. We believe that the Bill will promote public confidence and will increase willingness to give thus improving charities' ability to raise funds from the public. However, as any increase in giving will also be dependent upon a number of economic factors, we would not be able to determine what percentage of any future change in giving patterns was a direct result of the Bill.

### **PART 3 (TRUSTEE INVESTMENT POWERS)**

#### **Costs on the Scottish Administration**

169. The Bill provides for wider powers investment for trustees. There is no direct cost to the Executive or OSCR under this part.

#### **Costs on local authorities**

170. None, although charitable trusts managed by local authorities may also benefit from the wider investment powers.

#### **Costs on others (including the charity sector)**

171. There is no cost associated with this part. In proposing reform to existing legislation (the Trustee Investments Act 1961), the Scottish Law Commission indicated that not only would the reform enable many trusts to acquire and hold investments which are likely to produce a better return than the investments to which they are restricted at present, but it would also lessen the administrative burden and associated costs of maintaining the regime required by the 1961 Act.

### **PART 4 (GENERAL AND SUPPLEMENTARY)**

#### **Costs on the Scottish Administration**

172. It is anticipated that much of Executive's direct funding of the voluntary sector will be carried out under the new generic power set out in this Part. This is expected to amount to some £18.9 million per annum. There will however be no net cost to the Executive as this figure represents the pulling together of funding currently carried out under different funding powers.

#### **Costs on local authorities**

173. Section 96 brings rate relief for community amateur sports clubs (CASCs) in Scotland into line with those across the rest of the UK. This will make mandatory what is already being done on a voluntary basis by local authorities. Therefore, it is not expected that this provision will

have any material effect on the level of rate relief already provided nor the administrative cost of providing it. The current level of rate relief to CASCs is not separately available but is included in the figure provided in paragraph 123.

**Costs on others (including the charity sector)**

174. CASCs will continue to benefit from the relevant rates relief.

<b>SUMMARY OF ESTIMATED ADDITIONAL COSTS ON THE SCOTTISH ADMINISTRATION</b>		
	<b>Ref</b>	<b>Cost</b>
OSCR	para 119	£1 million pa
Net cost of possible additional grant-in-aid funding to NDPBs	paras 124 and 128	up to £ 7 million pa
Appeal Tribunal	para 159	set up costs of £160,000 and between £145,000 and £210,000 pa
Awareness and training seminars	para 139	up to £150,000

<b>SUMMARY OF ESTIMATED ADDITIONAL COSTS ON LOCAL AUTHORITIES AND OTHERS</b>		
	<b>Ref</b>	<b>Cost</b>
Possible loss of charitable status by local authority managed charities	paras 123 and 126	not known
NDPBs	paras 124 and 128	see above under “costs on the Scottish Administration”
Administrative costs to charities associated with registration	para 130	mostly minimal but up to £2000

## **EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE**

175. On 11 November 2004, the Minister for Communities (Malcolm Chisholm MSP) made the following statement:

“In my view, the provisions of the Charities and Trustee Investment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

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## **PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE**

176. On 11 November 2004, the Presiding Officer (Right Honourable George Reid MSP) made the following statement:

“In my view, the provisions of the Charities and Trustee Investment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

*These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004*

# **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL**

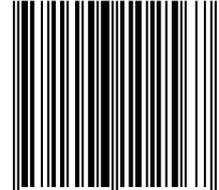
## **EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)**

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