

**SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION
COMMITTEE BY THE SCOTTISH EXECUTIVE**

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

Provisions Conferring Power to Make Subordinate Legislation

Purpose

1. This memorandum has been prepared by the Scottish Executive to update the Subordinate Legislation Committee on the changes made to Charities and Trustee Investment (Scotland) Bill (the Bill) at stage 2.

Amended Delegated and Direction Making Powers

Section 2 – annual reports

2. The obligation of OSCR to comply with any direction of the Scottish Ministers about the form, content and means of publication of its general report as set out in section 2(4) of the Bill has been removed.

Section 6 – applications for further procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

3. A reference to sections 56(1) & 58(1) has been added to subsection (1) so that Scottish Ministers may also make provision, by regulation, in relation to applications to convert from a charitable company or registered friendly society to a Scottish Charitable Incorporated Organisation (SCIO) or for SCIOs to amalgamate.

4. The circular references to sections 4 and 54(2) have been removed from subsection (2)(a) as recommended by the Subordinate Legislation Committee.

Reason for taking power

5. Such detailed operational matters are more appropriately dealt with in regulations rather than in primary legislation. A broad power is required as the Register of charities is a new register. Processes may change over time and provisions may need adjustment to deal with unpredictable eventualities. It is appropriate that Ministers should be able to make further provision for applications in relation to the conversion to a SCIO and the amalgamation of SCIOs as well as the creation of charities and SCIOs

Section 7 – the charity test

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by Statutory Instrument**
Parliamentary procedure: **Affirmative resolution of the Scottish Parliament**

6. In relation to section 7(3), the existing subsection (4) has been removed. A new order making power for Scottish Ministers has been put in place at subsection (4A) which allows them to disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order.

Reason for taking power

7. During stage 1 there was much debate about the status of the 5 national collections Non Departmental Public Bodies and the Executive undertook to find a way to allow these bodies to retain their charitable status. This power will allow Scottish Ministers to provide, by affirmative order that a body whose constitution allows it to distribute or otherwise apply its property (on being wound up, or at any other time) for a non charitable purpose or whose constitution expressly permits Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, can be/or can remain a charity if it meets the other parts of the charity test. This gives Ministers a means to allow the 5 national collections NDPBs to remain charities. Exempting the bodies by order allows the flexibility necessary to deal with any future changes to those bodies.

Section 15 – references and documents

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Regulations made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

8. The regulation making power in section 15 allowing Scottish Ministers to set out the information to be contained in documents used by charities has been amended to allow them to exempt, in the regulations, charities or charities of a particular type from any of the requirements imposed by these regulations in relation to the way charities may refer to themselves in documents.

Reason for taking power

9. The power in section 15 relates to a matter of detail most appropriately dealt with in secondary legislation. The regulations will specify documents such as letters, cheques, facsimiles, e-mails etc. This type of detail may require frequent revision to take account of developments and changes in the forms of communication. The power to allow Ministers to exempt bodies from the regulations is intended to allow a period of grace for existing charities to use up stationery which does not comply with the regulations. It will be time limited and is practical matter which is felt appropriate to be set out in regulations.

Section 19 – removal from the register – protection of assets

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution by Scottish Parliament

10. The order making power in subsection (8) has been amended so that Scottish Ministers may disapply by order subsections (1) to (7) in relation to any property which is specified in the order, rather than in relation to those assets they consider to be of national importance. The Parliamentary process for the order making power has also been changed to affirmative procedure.

Reason for taking power

11. The order making power in section 19(8) is necessary to enable Scottish Ministers to disapply the provisions. It will allow property acquired with public funds to remain under the control of the relevant public body should it lose charitable status. We consider the power to make future arrangements for such property to be an appropriate use of secondary legislation. The Parliamentary procedure has been altered to allow Parliament to fully consider whether it is appropriate for the property specified in the order to remain under the control of the body losing charitable status. Any order would need to be made well ahead of the body in question losing charitable status.

Section 63 – regulations relating to SCIOs

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

12. A new paragraph (da) has been added to clarify that the power conferred by this section allows Scottish Ministers, by regulation, to make provision for the maintenance of registers of information about SCIOs. This would allow OSCR to set up specific registers in relation to SCIOs.

Reason for taking power

13. Because SCIOs are a new legal form, it is likely that experience will dictate the need to develop additional requirements and practices. Setting out administrative details in regulations will allow for greater flexibility for the development of the SCIO as a legal form for charities. Regulations in respect of winding up and dissolution may not be made unless a draft is laid before and approved by the Scottish Parliament. Paragraph (da) has been added because OSCR may need to replicate existing registers for incorporated bodies such as a register of charges when converting a charitable company or registered friendly society to a SCIO.

Section 82 – Regulations about fundraising

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by statutory instrument
Parliamentary procedure:	Negative resolution of the Scottish Parliament except 82(2)(h) which is subject to affirmative procedure

14. Section 82(2)(c) has been amended to clarify that Scottish Ministers may make regulations about the provision of both the identification and information to be provided by professional fundraisers or commercial participators to potential donors in relation to benevolent contributions. Section 85(5)(d) has been amended slightly to ensure consistency between the information required under regulations made by Scottish Ministers under section 82(2)(c) and that required by the conditions set by local authorities for those undertaking public benevolent collections (section 85(5)(d)). The Parliamentary procedure for exercising the regulation making power in the way described in section 82(2)(h) has also been changed from negative to affirmative procedure as recommended by the Subordinate Legislation Committee.

Reason for taking power

15. The Scottish Ministers have agreed that plans for the self-regulation of fundraising should be given an opportunity to prove themselves. If this approach fails, the Scottish Ministers require to have the power to intervene and provide for the regulation of fundraisers and fundraising. Regulations under section 82(h) and section 82(3) will only be made if self-regulation failed. A power to regulate these activities using subordinate legislation would allow Ministers to act promptly without having to introduce primary legislation. Fundraising for charities and other benevolent purposes is an area that has been the focus of much concern and led to a decline in public confidence in this sector. An appropriate power to regulate a wide range of fundraising issues is therefore an important part of this Bill. The regulations will have a largely administrative procedural content. However, the Subordinate Legislation Committee commented that the regulations under section 82(h) were of significant importance and that they should be subject to affirmative procedure. The Executive agrees and has made the necessary amendments.

Section 94 – amendments consequential on Part 3

Power conferred on:	The Scottish Ministers
Power exercisable by:	Order made by statutory instrument
Parliamentary procedure:	Negative resolution of the Scottish Parliament (Affirmative if adds to or omits part of an Act)

16. The powers allowing Scottish Ministers to amend by order any local, personal or private Act of Parliament and any other act of Parliament or Act of the Scottish Parliament in relation to sections 92 & 93 of the Bill has been removed. This was felt to be unnecessary given the powers already provided in section 100.

Section 97 – population of register etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

17. The order making power in this section has been substantially revised and time limits have been added. This was one of the recommendations made by the Subordinate Legislation Committee in their assessment of the Bill. The section provides that all existing Scottish charities will be entered automatically on the Register. The new subsection (2A)(a) allows Ministers to disapply section 3(3) for 18 months in relation to bodies transferred under section 97(1). This will allow OSCR the necessary time to collect the information required under that section in relation to all the charities transferred. The new subsection (2A)(b) also allows a non-Scottish unregistered charitable body to continue to refer to itself as a charity for a period of 12 months after commencement of the section. This allows the charity time either to apply to be on the register or alter the way it refers to its charitable status. The new subsection (2B) defines an “unregistered charitable body” as one which is established under the law of a country other than Scotland, and which is entitled to refer to itself as a “charity” in that country.

Reason for taking power

18. The provisions made by the regulations are time-limited. We therefore consider it unnecessary to put them on the face of the Bill. It also allows a degree of flexibility in dealing with unforeseen practical difficulties. The changes to the power have been made to improve clarity over how existing charities will be dealt with when the Act comes into force.

Section 100 – ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative and affirmative resolution of the Scottish Parliament

19. The power for Scottish Ministers to make transitional, transitory or saving provisions has been added to the ancillary powers in section 100. This follows the removal of this power from section 97.

Reason for taking power

20. The power for Ministers to make transitional, transitory or saving provisions is necessary to allow for the smooth transition for existing charities to the new regulatory framework. The provisions will be time limited and it is therefore not considered appropriate to put them on the face of the Bill.

Section 104 – short title and commencement

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **None**

21. The reference to section 97 in section 104(2) has been removed. The Executive advised the Subordinate Legislation Committee of this decision at Stage 1.

Reason for taking the power

22. The order making power is required to ensure effective commencement of the Bill. The Executive agreed with the Subordinate Legislation Committee that it was unnecessary to commence section 97 on Royal Assent as section 101 allows commencement orders to contain transitional provisions.

Proposed changes at stage 3

Schedule 2

Power conferred on: **The Scottish Ministers**
Power exercisable by: **Order made by statutory instrument**
Parliamentary procedure: **Negative resolution of the Scottish Parliament**

23. The Scottish Ministers may make rules as to the practice and procedure of the Scottish Charity Appeal Panel. At stage 3 we intend to add a power to allow Ministers to make provision about the awarding of expenses by the Panel. Section 8 of the Tribunals and Inquiries Act 1992 requires Ministers to consult with the Council on Tribunals (who in turn must consult with the Scottish Committee of the Council) before making any rules of procedure.

Reason for taking power

24. During the passage of the Bill so far there has been some discussion about the prohibition on the Appeals Panel awarding expenses. The Executive intends to remove this prohibition. It is felt that it is appropriate to deal with the detail of how expenses will be awarded with the other detailed administrative provisions. The nature of the expenses will need to be reviewed regularly to ensure they remain relevant.