THE SCOTTISH CHARITIES ACT AND ITS CROSS-BORDER IMPLICATIONS

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The Charities and Trustee Investment (Scotland) Bill was passed by the Scottish Parliament on 9th June 2005 and received Royal Assent on 14th July 2005[2]. It will come into force in the early part of 2006. Consultation on the Charity Accounting Regulations has also taken place and the Scottish Executive aims to issue a report on this consultation by the end of September 2005. This article examines some of the main provisions of the new Act and the proposed accounting regulations, noting in particular areas which have cross-border implications.

The Charities and Trustee Investment (Scotland) Act ("the Act") repeals existing charity law and brings together for the first time the various legal requirements for charities in Scotland which have hitherto been contained in separate pieces of legislation. This is very welcome to those of us who have campaigned for many years for a unified piece of legislation.

It is not only in Scotland that charity law reform is underway. A draft Charities Bill for England and Wales was published by the Home Office on 27th May 2004, and was subject to pre-legislative scrutiny by a Joint Committee of both Houses of the UK Parliament which published its report on 30th September 2004. The Bill was introduced into the House of Lords on 20th December 2004 but its Parliamentary progress was interrupted by the General Election and it was re-introduced into the House of Lords on 18th May 2005. Northern Ireland is also in the process of reforming its charity law.

While the Scottish Bill seeks to address the specific needs of the Scottish charity sector, the consultation paper which accompanied the draft Scottish Bill stated that

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2 The Act is available online at www.opsi.gov.uk/legislation/scotland/acts2005/20050010.htm

its measures would endeavour to complement the approach being taken in England and Wales where it makes good sense to do so.[3] Most important in this respect is the definition of charity, which also has significant implications for an organisation's tax status. The definition of "charitable" used for UK tax purposes is defined by English legislation, and most aspects of tax legislation are confined to the Westminster Parliament. Any departure from the definition of charitable purposes as proposed in the new Charities Bill for England and Wales therefore raises questions about the eligibility of Scottish charities for tax relief. There are also interesting issues around the roles and powers of the respective regulatory authorities in the different UK jurisdictions and their interconnection.

It is not only the legal systems in the UK which differ in several respects; their charitable sectors also have their own identity. It is therefore fitting that each part of the UK should develop its own charity law, while seeking to work together and minimise the potential for conflict and the need for multiple regulation.

It is always difficult to strike a balance between effective regulation on the one hand and the potential "strangulation" of the willing voluntary spirit on the other. A number of responses to the consultation on the draft Scottish Bill commented on the importance of legislation being applied proportionately in order to minimise the additional burden of its new requirements. Revisions were made to the draft Bill in order to take account of some of these responses.

Office of the Scottish Charity Regulator

The first measure in the Act provides for the establishment of the Office of the Scottish Charity Regulator (OSCR) as a statutory public body. OSCR[4] currently exists as a Scottish Executive Agency (with an office in Dundee) and has taken over the supervisory functions of the former Scottish Charities Office. Under the new Charities Act, in conjunction with the Scotland Act 1998, OSCR becomes a non-ministerial department with an enhanced range of powers.

The general functions of OSCR, as described in section 1, are:

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

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3 *Draft Charities and Trustee Investment (Scotland) Bill: Consultation Paper*, Scottish Executive, 2004, p.6.

4 The current website is at www.oscr.org.uk

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act,

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and

(e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR's functions

The expectation is that an independent statutory regulator will help to increase public confidence in the sector by effecting compliance with the legislation, and that as a non-ministerial department it will have the necessary degree of independence from Scottish Ministers. Scottish Ministers do, however, retain wide powers (set out in Schedule 1) in relation to the appointment and removal of members of OSCR and the determination of their terms and conditions of appointment.

Mindful of the need for proportionality, a new subsection was added when the Bill was revised to the effect that OSCR, in performing its functions, must have regard to:

(a) the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed, and

(b) any other principle appearing to OSCR to represent best regulatory practice

One of the big debates about the role of OSCR has involved what - if any - its advisory role should be. Reservations about the combination of a supportive, advisory role with a regulatory one have been expressed, *inter alia* by the Public Accounts Committee[5], in relation to the Charity Commission. In their response to the report of the Scottish Charity Law Review Commission[6] ("the McFadden report") the Scottish Ministers took the view that the regulator's role in advice must be circumscribed, acknowledging that otherwise there would be a real risk

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5 *Charity Commission: Regulation and Support of Charities*, House of Commons Public Accounts Committee 28th Report, HC 408, 2 April 1998.

6 Scottish Charity Law Review Commission, *CharityScotland. The report of the Scottish Charity Law Review Commission.*, Scottish Executive, Edinburgh, 2001.

that standards would be subverted and enforcement weakened:

> "*The regulator cannot and should not be a 'friend' to the sector, in any sense that might give rise to collusion to avoid regulation*".[7]

The consultation paper on the draft Charities Bill[8] took the view that while there is a distinction to be drawn between the regulatory and advisory roles it is neither practicable nor desirable to set it out in legislation. OSCR is expected to interpret the principles set out in the Bill in a flexible manner as the charity sector develops. The new legislation stipulates that one of OSCR's functions is to encourage, facilitate and monitor compliance by charities with the provisions of the Act. Many respondents to the consultation apparently felt that OSCR should also offer support and advice with regard to good practice and that this should be included as an additional function for OSCR. As one of those who has always expressed concerns about the combination of regulatory and advisory roles within one organisation, I am pleased that this has not been added and concur with the view of the Scottish Council for Voluntary Organisations (SCVO)[9] that guidance on good practice should be left to the sector itself, working along with OSCR where appropriate. Section 1(3) gives OSCR broad powers to "do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions."

As part of its general functions, therefore, OSCR will have responsibility for determining whether or not organisations are charities and will keep a publicly accessible register of charities. In its response to the McFadden report the Scottish Executive appeared to reject the recommendation that the new body should be responsible for determining charitable status, taking the view that the Inland Revenue should retain this power.[10] The reason given was to preserve the parity between the definition of a Scottish charity and the Inland Revenue's definition of "charitable for tax purposes". There were well-founded fears at the time that there may be a mismatch between the new definition of a Scottish charity and eligibility for tax relief as defined in UK tax law. A new Charities Bill for England and Wales has since been developed, and the Scottish Act defines charitable purposes

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7 Scottish Executive Justice Department, *Charity Regulation in Scotland. The Scottish Executive's response to the report of the Scottish Charity Law Review Commission*. Edinburgh 2002, para. 57.

8 See note 3 above.

9 SCVO, *Charity Scotland. What happened to Scottish charity law reform?*, Policy Paper Series No. 2, February 2003, p.7.

10 Scottish Executive Justice Department, *op. cit.*, para. 32.

on similar - although not identical - lines to those contained in the English Bill. This encourages the hope that any difficulties of this kind can be overcome, although there is still scope for divergence between the English and Scottish definitions.

The Charity Test

The subject of the definition of charity has been hotly debated throughout the UK for many years, and there has long been an eagerness in Scotland to replace the present "four heads" of charity with a more modern definition. However, as noted above, the definition of charity has implications for the tax reliefs which charities receive from the Inland Revenue. As a UK department, the Inland Revenue is obliged to follow the same definition for most tax purposes[11] across the UK and the Scottish Executive therefore decided that the Scottish definition should be compatible with the Home Office's proposals in England and Wales. There were puzzling differences in the lists of charitable purposes in the two Bills which drew widespread comment from consultees in both jurisdictions. While many of the changes in the Scottish Act bring its list closer to the English one, others create further divergence.

The charitable purposes set out in section 7 (2) now read as follows:

(a) the prevention or relief of poverty,

(b) the advancement of education,

(c) the advancement of religion,

(d) the advancement of health,

(da) the saving of lives

(e) the advancement of citizenship or community development,

(f) the advancement of the arts, heritage, culture or science,

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11 Competence to levy local government taxes is devolved to the Scottish Parliament. The Scottish Charities Act provides for the new definition of charity in Scots law to apply for non-domestic rating purposes (Sched 4 of the Act substitutes a new s 4 (10) (a) in the Local Government (Financial Provisions etc.)(Scotland) Act 1962). In future only charities registered with OSCR will be entitled to claim the mandatory 80% relief from rates on Scottish properties, whereas currently this is available to any body recognised as charitable for income tax purposes

(g) the advancement of public participation in sport,

(ga) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,

(h) the advancement of human rights, conflict resolution or reconciliation,

(ha) the promotion of religious or racial harmony,

(hb) the promotion of equality and diversity,

(i) the advancement of environmental protection or improvement,

(ia) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,

(l) the advancement of animal welfare,

(m) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Categories (d) and the new (da) together replicate category 2(2)(d) in the revised Bill for England and Wales, which reads: "the advancement of health or the saving of lives". The term "citizenship" now replaces "civic responsibility" in category (e), again replicating the English Bill. Likewise the addition of (ha) and (hb) brings category (h) into line with the wording in the English Bill: "the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity". The new category (ia) closely resembles category (j) in the Bill for England and Wales: "the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage", but the Scottish Act omits specific reference to "youth" (probably deeming it unnecessary since "age" could be said to cover all age groups).

Category (g), however, which was previously identical in both Bills, has now been considerably altered in the Scottish Act: instead of "the advancement of amateur sport", we now have "the advancement of public participation in sport", and a lengthy new category (ga), which is not replicated in the English Bill.

Significantly, the differences between the final paragraph of the list of charitable purposes in the Scottish Act - section 7(2)(m) - and its English counterpart remain. While the Scottish Act has "any other purpose that may reasonably be regarded as

analogous to any of the preceding purposes", the Bill for England and Wales has "any other purposes within subsection (4)". Subsection (4) contains the following provisions:

(a) any purposes not within paragraphs (a) to (k) of subsection (2) but recognised as charitable purposes under existing charity law or by virtue of section 1 of the Recreational Charities Act 1958 (c. 17);

(b) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes falling within any of those paragraphs or paragraph (a) above; and

(c) any purposes that may reasonably be regarded as analogous to, or within the spirit of, any purposes which have been recognised under charity law as falling within paragraph (b) above or this paragraph.

While the English legislation specifically refers to purposes recognised under existing charity law, the Scottish legislation does not - possibly because there is less inclination than in England and Wales to preserve the existing meaning of charitable purposes as developed by English case law. Dr. Patrick Ford also emphasises the importance of the fact that there is no obligation on OSCR to consider existing case law when interpreting the charity test in his 2004 article "The Scottish Charity Test: Do We Really Need It?":

> "*Undoubtedly the most important difference is that there is no obligation placed on OSCR in the Scottish Bill to read the section constituting the test in the light of the existing case-law.*"[12]

Given these differences in the charity test criteria, there is clearly scope for a divergence in interpretation north and south of the border, with consequent implications for tax relief, particularly with different regulators making the decisions about charitable status. However, there is a provision in the Scottish Act which obliges OSCR to seek to secure co-operation between it and other relevant regulators (s.20(1)). This will, of course, include in particular the Charity Commission, and a Memorandum of Understanding between the Charity Commission and OSCR was signed on 20 May 2005[13]. This commits the two

12 Patrick Ford, "The Scottish Charity Test: Do We Really Need It?", *The Edinburgh Law Review*, Vol. 8 2004, p.412.

13 The text of the Memorandum was published on the OSCR website.

regulatory partners to the following:

- re-affirm and build on the co-operation that already exists between the Commission and OSCR;
- ensure appropriate consultation and co-ordination in the interpretation and application of the relevant law and policy;
- minimise the burden of regulation for those charities operating across the jurisdictions;
- set out the circumstances in which the Commission and OSCR will share information and collaborate operationally where a common regulatory approach is required; and
- pave the way for future co-operation between OSCR's statutory successor and the Commission, within the framework of the new legislation.

The second bullet point makes it clear that OSCR and the Charity Commission will consult each other about the interpretation of issues such as the charity test, but there is no guarantee that they will always agree, particularly given the differing charity sectors in their respective jurisdictions.

Another significant aspect highlighted during the consultation on the draft Scottish Bill was the importance of independence from external control in order to preserve public trust in the sector. The McFadden report reflected concerns about appointments to the management committees of charities from central and local government departments or agencies,[14] and it was felt that this was an issue which required specific legislative treatment. Section 7 (3) of the Act provides that a body which falls within paragraphs (a) and (b) of subsection (1) does not meet the charity test if:

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or to otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

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14 Scottish Charity Law Review Commission, *Charity Scotland. The report of the Scottish Charity Law Review Commission*, paras. 1.42-1.45.

However, subsection (4A) provides that the Scottish Ministers may by order 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, which appears somewhat to undermine the attempt to reinforce the independence of charities.

The Public Benefit Test

In addition to having purposes which consist only of one or more of the charitable purposes listed in section 7(2) there is also a second stage "public benefit" test. The presumption of public benefit which currently exists for certain of the four "heads" of charity is removed, and in order to meet the charity test the body must provide public benefit in Scotland or elsewhere. A similar approach has been adopted in England and Wales and is proposed to be introduced in Northern Ireland[15].

The consultation paper which accompanied the draft Scottish Bill expanded at some length upon the important concept of public benefit, which for the first time will have to be shown by *all* applicants for charitable status. Stakeholders consulted during the drafting process were asked to comment on whether the interpretation of "public benefit" should be left to the regulator or whether broad criteria should be provided in the new legislation. The Home Office was at the time not proposing to define public benefit in the Bill for England and Wales, leaving it to the Charity Commission for England and Wales to develop and apply its own test of public benefit based on case law and to review charities whose credentials it considers problematic. A slight majority of those who commented were in favour of including criteria, and focus groups unanimously supported the inclusion of some criteria but were divided as to how prescriptive they should be. In view of the new criteria for charity registration and the fact that the registration of charities in Scotland will for the first time be the responsibility of the Scottish regulator, OSCR, it was considered sensible to provide broad criteria in the Bill.

Section 8 subsection (2) of the Scottish Act therefore sets out the following broad criteria for determining whether a body provides or intends to provide public benefit:

(a) how any

(i) benefit gained or likely to be gained by members of the body or

15 *Consultation on the review of Charities administration and legislation in Northern Ireland in 2005*, Charities Branch, Voluntary & Community Unit, Department of Social Development, February 2005 (www.dsdni.gov.uk/consultation-zone/Document.asp?ID=49).

any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

These principles aim to provide a broad statutory framework for OSCR and the courts while allowing flexibility for the development of the sector. The specific reference to "any charge or fee" was added in a revised version of the Bill.

Much of the debate on this issue, both within the Scottish Parliament and elsewhere, has focused on whether independent schools should be entitled to charitable status. The Stage 1 debate in the Scottish Parliament on 9 March 2005 was dominated by a discussion on this subject, inaugurated by Scottish Socialist Party MSP Tommy Sheridan, who described private schools as "glorified child-minding agencies for the children of the wealthy" (Col. 15106) and unsuccessfully sought to add an amendment to the Bill to the effect that only in exceptional cases (such as special schools) should they be granted charitable status.

The test, on a case by case basis, will be whether or not independent fee-charging schools meet the public benefit criteria, and it will be up to OSCR to make this decision, a decision which will be based on various factors such as whether an appropriate number of bursaries and scholarships are available and open to all applicants; the extent to which sports and other facilities are open to the wider community; and how large a section of the public benefits. Where the benefit is provided to a section of the public only, the fees and any other conditions will be assessed to ascertain whether they are "unduly restrictive". Whether OSCR, particularly in the absence of an obligation to take account of existing case-law, will reach the same decisions as the Charity Commissioners in this and other controversial areas remains to be seen.

After consulting representatives of the charitable sector and other such persons as it thinks fits, OSCR must issue guidance on how it determines whether a body meets the charity test. This is very welcome. OSCR is also given powers to make inquiries about charities and to take action if a charity no longer meets the charity test. In such circumstances OSCR must direct the charity to take such steps as OSCR considers necessary to meet the charity test or remove the charity from the register.

The Register

The Act places an obligation on OSCR to maintain a publicly available register of charities to be known as the Scottish Charity Register. The information for each charity entry will include details of the principal office of the charity or the name and address of one of its charity trustees if it does not have an office, and the purposes of the charity. If the charity is a designated religious charity or a designated national collector, that fact will also be included on the register. Among the other information to be included are the dates of any directions or notices under the Act given to the charity by OSCR (until such time are they are complied with, when they will be removed). OSCR must review each entry from time to time and amend it if inaccurate, notifying the charity of any changes.

There has been widespread support in Scotland for such a register. The original intention was that the register would include all bodies eligible *to operate* as charities in Scotland, meaning that all charities registered in England and Wales, Northern Ireland or elsewhere wishing to operate in Scotland would need to register with OSCR. A majority of respondents to the consultation on the draft Bill, however, expressed concerns that the requirement for dual registration could lead to a disproportionate administrative and financial burden on bodies registered and operating in more than one jurisdiction. This was a particular concern for bodies established under the law of another country with only limited activities in Scotland. Many felt that if co-operation between the regulators were successful, dual registration would be of little benefit and might overburden OSCR if large numbers of English and Welsh charities in particular decided to register. These concerns were taken on board and a provision has been added (s.14) permitting charities managed or controlled wholly or mainly outwith Scotland which do not occupy land or premises in Scotland or carry out activities in any office or shop in Scotland to refer to themselves as charities in Scotland despite not being listed in the register. They are required to identify themselves as a charity registered in the country under whose law they are established.

As for non-Scottish charities which *do* have land or premises in Scotland and/or carry out activities there, they come under the supervisory powers of OSCR detailed in section 28 of the Act. OSCR may make inquiries into bodies not entered in the register which appear to represent themselves as charities (s.28(1)(c)). This is in contrast to the provisions in the previous legislation, the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ("the 1990 Act"), sections 6 and 7 of which give the Lord Advocate and the Court of Session wide powers not only over non-recognised bodies holding themselves out as charities in Scotland but also over all English and Welsh charities operating in Scotland. The only specific statutory power retained in relation to English and Welsh charities in the new Scottish Act is contained in section 36, which gives OSCR and the Court

of Session powers in respect of moveable property held in Scotland by financial institutions or other persons. As well as greatly curtailing the supervisory powers of OSCR in relation to English and Welsh charities operating in Scotland, the restriction to "moveable" property is in contrast to the corresponding power of the Charity Commission under section 80 of the Charities Act 1993 in relation to Scottish charities, which refers to "any property", not just moveable assets. The 1990 Act made no specific provision for Northern Irish charities,[16] and regrettably the new Act does not do so either, effectively treating them in the same way as non-UK charities.

OSCR must make the register available for public inspection (a) at all reasonable times at its principal office, (b) at such other places as it thinks fit, and (c) otherwise as it thinks fit. It is expected that most people will access the register free of charge via OSCR's web-page. It will also be available free of charge at its principal office but OSCR may charge a fee (not exceeding the cost of supply) for providing the information on the register under (b) and (c). Once registered, charities must notify OSCR of various changes such as amendments to their constitution, amalgamation with another body, any change in their address of their principal office or other details contained in their entry in the register. It is hoped that this will help to maintain an accurate, up-to-date register.

In order to address concerns about the type of information which would be publicly available on the register and possible security issues it would pose for charities working in sensitive areas, a provision has been added to the Act allowing OSCR to exclude the address of the principal office or charity trustee, on application from the charity, if OSCR believes inclusion would jeopardise the safety or security of persons or premises. Charities may elect to use the address of their solicitor or a PO Box if the security of staff and volunteers is an issue.

Provision of Information by Scottish Charities

As far as supplying information to other parties is concerned, section 23(1) of the Act provides that a person who requests a charity to provide a copy of its constitution and/or latest statement of accounts is, if the request is reasonable, entitled to be given that copy constitution or copy statement of accounts (if any) by the charity in such form as the person may reasonably request. The Scottish Ministers may by order exempt charities from this duty. Presumably OSCR will adjudicate on any disputes about what is a "reasonable" request.

16 See Christine R. Barker and Kerry J. O'Halloran, "The regulation by public bodies of charities in Scotland and Northern Ireland", *International Journal of Not-for-Profit Law*, Vol. 2 Issue 2, 2000.

The draft Bill made no provision for charities to charge for the provision of this information. Under the terms of the previous legislation, charities must provide a copy of their "explanatory document" (defined as "the trust deed of a body or other document constituting the body"[17]) and most recent statement of accounts only "on payment of such reasonable charge in respect of copying and postage as the body may stipulate".[18] This provision has on occasion led to requests for very high charges, *inter alia* from charities reluctant to hand out the information or from legal firms administering charitable trusts, who sometimes receive multiple requests for information and who would otherwise feel obliged to charge the costs involved to the charities they represent. However, those consulted about the draft Scottish Bill were of the view that if charities were to be prevented from charging for this information then it should be up to OSCR to provide copies instead (with or without a charge). The Scottish Executive accepted that the current position should continue and the Act includes the following provision in section 23(2):

> "*A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe*."

This is to be welcomed, and is also consistent with the fact that OSCR is allowed to levy a charge for the provision of information on its register to members of the public.

Fundraising

Part 2 of the Act (ss.78-91) deals with the important and often controversial area of fundraising for charities and other benevolent bodies. This replaces the fundraising legislation contained in section 119 of the Civic Government (Scotland) Act 1982 and regulations made thereunder. The new measures seek to ensure that fundraising, both by professional fundraisers and by benevolent bodies themselves, is properly controlled. There have been several high-profile cases in which money raised from members of public, allegedly for charitable purposes, has been misappropriated by individuals.[19] The publicity attracted by cases of alleged charity fraud affects the willingness of the public to give to charities in general. This was

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17 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 1 (9).

18 Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 1 (4) and section 5 (7)(a).

19 For a synopsis of seven Court of Session cases see Charity Law Research Unit, University of Dundee, *Scottish Charity Legislation: An Evaluation*, Scottish Executive Central Research Unit, Edinburgh, 2000, pp.90-94.

demonstrated after widely publicised investigations into Breast Cancer Research Scotland and the children's cancer charity, Moonbeams, in 2003, when many cancer charities in Scotland faced a major funding crisis. The new Act aims to restore public confidence in charity fundraising by increasing the statutory powers available, but the Scottish Executive also hopes for a large measure of self-regulation from the sector itself.

This part of the Act, as noted above, does not apply only to charities but also to other benevolent organisations and good causes, and the provisions apply equally to all non-Scottish benevolent bodies raising funds in Scotland. Benevolent bodies are given the right to seek an interdict preventing unauthorised fundraising. Professional fundraisers and businesses undertaking promotions for good causes will require a formal agreement with the benevolent organisation concerned, and they will be required by regulations to state to potential donors the amount of funds which will go to the good cause. It will be an offence to solicit money or other property by suggesting that the body is a charity when it is not, and there are measures to protect funds raised, even if they are not held by a charity. These measures are very much to be welcomed. Similar legislation is already in place in England and Wales and also forms part of the new Charities Bill there.

The previous Scottish legislation refers to "public charitable collections", and "charitable purposes" are defined as "any charitable, benevolent or philanthropic purposes whether or not they are charitable within the meaning of any rule of law"[20]. The new Act renames such collections "public benevolent collections", thereby avoiding any dubiety in the meaning of "charitable" in this connection. A public benevolent collection is defined in section 83 as "a collection from the public of money or promises of money" taken in a public place or by means of visits to two or more houses or business premises. The term "promises of money" was included in order to ensure that direct debit and standing orders are covered.

The new legislation aims to continue and improve upon the current system whereby collections are licensed by local authorities. There has been much debate about the definition of "public place" in relation to collections of this kind. As well as "any road", the Act includes within its definition "any other place to which, at any time when the collection is taken, members of the public have access as of right or by virtue of express or implied permission" and which is either not inside a building or, if inside a building is "a public area within any station, airport or shopping precinct or is any other similar public area". In other words, any place to which the public has unrestricted access when it is open.

20 Civic Government (Scotland) Act 1982, s.119(16).

There has been debate as to whether collections of goods should also be covered. While no significant problems have been reported in respect of this type of collection so far, reserve powers have been added to the Act (section 90) which allow Scottish Ministers to regulate collections of goods if malpractice develops in the future.

Under the former legislation so-called "exempt promoters", who organise collections across a range of local authority areas, were exempted from certain of the legal provisions. This caused problems for smaller, local charities who often found collecting dates booked well in advance by national charities and I have jointly argued elsewhere for the abolition of the exempt promoter scheme.[21] Under the new legislation the term "exempt promoters" is replaced by "designated national collectors", recognised and regulated by OSCR. OSCR is required to establish the criteria for achieving this status, after consultation. The designated national collectors will have to provide the local authority with at least three months' notice of any collections they intend to hold and - in order to avoid block booking years in advance - will not be able to give more than eighteen months' notice. Existing "exempt promoters" will be given the new designation on commencement of the Act until OSCR reviews the matter. I remain unconvinced of the need for "designated national collectors", but welcome the proposals to subject them to a more restrictive regime and to a review by OSCR.

The UK Cabinet Office Strategy Unit report[22] recommended the establishment of a self-regulation scheme for professional fundraisers. The Scottish Executive has decided to allow a self-regulation scheme in Scotland, and we await detailed proposals on this, but the Act does include a reserve power to allow further statutory regulation if Ministers feel that self-regulation has not been effective in improving public confidence in charities. I have concerns about the efficacy of self-regulation for professional fundraisers and therefore welcome the provision for further statutory regulation if this is necessary to improve public confidence in charities.[23]

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21 Christine R. Barker and Daphne Hamilton, *Public Charitable Collections*, Scottish Executive, Edinburgh, 2000.

22 Strategy Unit, *Private Action, Public Benefit. A Review of Charities and the Wider Not-For-Profit Sector*, Cabinet Office, London, 2002, pp.66-67.

23 See also Christine R. Barker, "Public charitable collections - the case for reform", *Juridical Review*, Part 6, 2001, pp.291-306; and Christine R. Barker, "Public Charitable Collections: Are they a Worthwhile Cause?". *The Modern Law Review*, Issue 63:6, November 2000, pp.791-812.

Scottish Charitable Incorporated Organisations

Sections 49-63 of the Act create a new legal form for charities, the Scottish charitable incorporated organisation (SCIO). A SCIO is a body corporate having a constitution, a principal office in Scotland, and two or more members. Its membership may, but need not, consist of or include some or all of its charity trustees. After some debate it was decided that "the members are not liable to contribute to the assets of the SCIO if it is wound up" (s.49 (4)).

The SCIO is based on similar recommendations in the English Charities Bill for a charitable incorporated organisation or CIO, but the CIO needs only "one or more members", and the members may be either (a) not liable to contribute to the assets of the CIO if it is wound up, or (b) liable to do so up to a maximum amount each. The draft Scottish Bill was similarly worded, but was altered before being passed by the Scottish Parliament. Respondents to the consultation on the draft Bill expressed mixed views in particular about whether there should be limited or no liability for members. Some felt that removing liability could result in charity trustees acting rashly, but the Scottish Executive took the view that limited liability would be unlikely to have a significant impact since it is normally set at a nominal sum of £1. The Executive also felt that any service providers were likely to ask for additional guarantees.

This new legal form has been long awaited by charities, enabling them to become corporate bodies without liability for members, yet without having to have recourse to company law. SCIOs will not be available immediately the Act comes into force, but should be available within a year of this.

The new legal form will only be available to charities registered by OSCR. SCIOs will be regulated by OSCR and will not be subject to company law. However, it seems that SCIOs will be subjected to the same accrual accounting thresholds as charitable companies[24], which goes against the principle of making SCIOs a simpler option with less onerous regulatory requirements. Model constitutions for the SCIO have been developed and there is to be further consultation on the detail of how SCIOs can be established and how existing charities can convert to this new legal form. These further provisions will be set out in regulations.

Designated Religious Charities

Under the previous legislation certain religious bodies could be "designated" and thereby exempted from many of its provisions, including most of the accounting

24 *Consultation on the Charity Accounting Regulations*, Scottish Executive Development Department Voluntary Issues Unit, April 2005 (www.scotland.gov.uk/consultations).

provisions. However, under the terms of the Charities (Designated Religious Bodies) (Scotland) Order 1993 (S.I. 1993 No. 2774) the accounting standards laid down by the body must approximate to the standards set down for other charities. The new Act retains the principle whereby OSCR may designate such bodies, but changes their name to "designated religious charities" and proposes that they will no longer be exempt from the accounting regulations. This is unlikely to have any practical consequences for existing designated religious bodies - in future to be known as designated religious charities - and it is clearly desirable that they should follow the same accounting regulations as other charities in Scotland. It is important that there should be a uniform regime for all Scottish charities wherever possible. The criteria for qualification as a designated religious charity are similar to those in the previous legislation, but they will be subject to review by OSCR and the designated status may be withdrawn. Some of the control and discipline powers of OSCR are disapplied for designated religious charities. In denominations where individual congregations have charitable status that will continue, with the individual congregation having to pass the charity test. This will, of course, include the public benefit test.

Charity Accounts

Section 45 requires all charities to keep proper accounting records, which now include an obligation to include within the annual statement of account a report of the charity's activities during the financial year. As in the previous legislation, the statement of account must be independently examined or audited, and there is now an obligation to send a copy of the accounts to OSCR after this examination or audit. Accounting records must be preserved for six years from the end of the financial year in which they are made. OSCR sent out pro-forma annual return forms to be completed by all charities on the Index of Scottish charities[25] (some 24,000) in 2005, but on this occasion only required submission of accounts from charities with an income over £25,000. . OSCR eventually proposes to develop a two tier reporting structure whereby charities with an income below £25,000 will have to fill in a short annual return and those with an income above £25,000 will have to complete a longer "monitoring return" as well.

There is a new legal obligation under the Act (s.45A) for auditors and independent examiners to inform OSCR of any suspected wrongdoing on the part of their clients. This duty supersedes their obligation to their clients.

Further details of the requirements in relation to charity accounts are set out in the Charity Accounting Regulations, currently in draft form. A consultation was

25 The Index is currently available online on the OSCR website.

published in April 2005[26], with a deadline of 4th July 2005, and the Scottish Executive intends to publish a report by the end of September 2005. Details of some of the main proposals are given below.

Change in Financial Thresholds

The current and proposed minimum requirements for external scrutiny of charity accounts are summarised in Table I below.

Table I

Minimum permitted scrutiny of accounts	Unincorporated charities established in Scotland Current income/expenditure level (£)	Unincorporated charities established in Scotland & SCIOs Proposed income level (£)
Independent Examination	0 to 100,000	0 to 250,000
Full Audit	over 100,000	over 250,000

Minimum permitted scrutiny of accounts	Charitable companies established in Scotland Current income level (£)	Charitable companies established in Scotland Proposed income level (£)
None	0 to 90,000	N/A
Independent Examination	N/A	0 to 250,000
Independent Accountant's Report	90,000 to 250,000	N/A
Full Audit	over 250,000	over 250,000

The current accounting regulations provide that charities whose gross receipts do not exceed £25,000 per annum may produce a simplified statement of accounts i.e. they do not have to produce accrual accounts but may instead choose to produce a receipts and payments account. They also provide that if a charity's income or expenditure exceeds £100,000 an audit (by a person eligible for appointment as a company auditor under the provisions of section 25 of the Companies Act 1989) is required. Charities with income over £25,000 but under £100,000 have to produce

26 See note 26 above.

accrual accounts, but are not subject to audit unless their income exceeds £100,000, provided again that their founding document does nor require an audit. It is proposed to increase the income threshold for producing receipts and payments accounts substantially, from £25,000 to £250,000. The same level is set for requiring accounts to be audited, provided that the charity's constitution does not require the accounts to be audited regardless of income level. It is felt that unincorporated charities with income under £250,000 would "rarely have transactions of a complexity that would make receipts and payments accounts misleading",[27] and it is certainly the case that a receipts and payments account will be easier to prepare and also for the general public to understand - thereby increasing the transparency of the accounts.

The proposed increase in the threshold for unincorporated charities from £25,000 to £250,000 for producing receipts and payments accounts and from £100,000 to £250,000 for audit purposes is indeed a "major deregulating move"[28] and is also a welcome one. SCVO has collected income information from some 30% of the charity sector in Scotland, and of these 90.6% have an income under £200,000 and 92.4% an income under £300,000.[29] The proposed threshold of £250,000 therefore seems appropriate, in combination with the monitoring regime being put into place by OSCR. It also makes sense to set the same threshold both for the form of accounts and for audit requirements. This is also the level above which companies currently must have their accounts audited. Stating the thresholds in regulations instead of in primary legislation will allow them to be altered more easily should this prove necessary in the future.

Charities below the audit threshold will need to have their accounts examined by an independent examiner. The current definition of an independent examiner, as defined in section 8 of the Charities Accounts (Scotland) Regulations 1992, is "an independent person who is reasonably believed by the trustees to have the requisite ability and practical experience to carry out a competent examination of the accounts". This person does not need to be a qualified accountant. It is proposed to continue the current definition in the new regulations, and this is to be welcomed. OSCR has already issued helpful guidance for independent examiners under the previous legislation.[30]

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27 Scottish Executive, *Charity Accounting Regulations. Consultation Paper*, Edinburgh, April 2005, p.13.

28 Scottish Executive, *Charity Accounting Regulations. Consultation Paper*, Edinburgh, April 2005, p.13.

29 SCVO, *Analysis of Scottish Charity Sector*, February 2004.

30 *Scottish Charity Accounts – A brief guide*, OSCR, 2005, available at www.oscr.org.uk.

Although there is currently no proposal to exempt smaller charities from independent examination, it is noted on page 14 of the Charity Accounting Regulations Consultation Paper that there have been suggestions that charities with an income less than £10,000 should be exempted from the requirement for independent scrutiny of their accounts. SCVO is among those who have called for this exemption because of the limited capacity of such organisations. Their 2004 *Analysis of the Scottish Charity Sector*[31] shows that 59% of the charities for which they have the relevant data have an annual income under £12,500, and such an exemption would therefore remove a sizeable section of the sector from the obligation to have their accounts independently examined. It is surely in the interests of the transparency and accountability of the sector that there should be an independent examination of all charity accounts, whatever the level of income, and the definition of an independent examiner is such that even very small charities should not find it difficult to appoint a suitable person. The introduction of an additional category of charities would, in my view, be an unnecessary and unwelcome complication.

The current audit threshold for charities in England and Wales is £250,000, the same as the new level proposed for Scotland. However, the new audit threshold proposed in the draft Charities Bill for England and Wales is £500,000. This, of course, raises an issue (a) about parity between the two regimes and (b) about charities operating throughout the UK. UK-wide charities operating in Scotland with an income between £250,000 and £500,000 would be required to have their accounts audited to comply with the Scottish legislation. As the new accounting regulations both in Scotland and in England and Wales rely on UK accounting standards for charities set out in *Accounting by Charities: Statement of Recommended Practice* (the Charities SORP), it is expected that any adjustment of the charity's accounts to meet the Scottish regulations should be minimal. However, there would be additional audit costs, which could be considerable. It is therefore proposed that charities registered in England and Wales with operations in Scotland will choose between registering a separate charity operating in Scotland, for which Scotland-only accounts would be required, or registering the charity with OSCR for its Scottish operations only, for which accounts of the UK charity would be required. It is to be expected that most UK charities would choose the latter option, which would mean that all charities operating in Scotland would not be subject to the same audit requirements. This is regrettable, but perhaps inevitable, given the differences in the size and income levels of charities in the two jurisdictions.

31 See note 31 above.

Charitable Companies

Charitable companies are, of course, subject to different accounting requirements under the terms of the Companies Acts. Incorporated charities with a gross annual income over £250,000 must have their accounts audited, but those with an income between £90,000 and £250,000 may choose to have an independent accountant's report instead of an audit and those with an income of less than £90,000 are exempt from both audit and accountant's report. It is not only the thresholds which differ. Charitable companies must prepare fully accrued accounts irrespective of the level of activity unless the company is dormant. The external review requirements are also different, since unincorporated charities with an income under the upper threshold (currently £100,000) are not obliged to engage an accountant to undertake the independent examination of their accounts. This is despite the fact that unincorporated charities with income between £25,000 and £100,000 currently have to be prepared on an accruals basis, like those of charitable companies.

In the interests of achieving greater parity between unincorporated and incorporated charities, it is proposed that the accounts of charitable companies below the audit threshold should be independently examined, regardless of the requirements of company law. This is a major departure from the previous legislation, which exempted incorporated charities from the Charities Accounts (Scotland) Regulations 1992 (to be repealed by the Charities and Trustee Investment (Scotland) Act). The Consultation Paper on the accounting regulations for Scotland states, however, that although Company Law is a reserved matter, the setting of the audit thresholds for charitable companies is devolved.[32] Although the Charities Bill for England and Wales proposes an increase in the audit limit for charitable companies from £250,000 to £500,000, it is proposed that the audit threshold for Scottish charitable companies will remain at £250,000 in order to ensure that all charities in Scotland are subject to the same thresholds.

Accounting Periods

A rather puzzling proposal in the draft accounting regulations is to reduce the period for submitting accounts to OSCR from ten months to seven months of the period end date. If a charity fails to do submit accounts within this period, OSCR may make the default public, launch an enquiry into the charity and appoint a person to complete the accounts at the charity's expense.

The Consultation Paper does not give any reason for the reduction in the period for submitting accounts to OSCR or for the selection of seven months. I am aware

32 Scottish Executive, *Charity Accounting Regulations. Consultation Paper*, Edinburgh, April 2005, p.16.

that there have been some accountability problems, particularly in the case of new charities effectively being able to operate for 22 months before being legally obliged to produce accounts. However, the sanctions for failure to comply with the obligation to submit accounts to OSCR within the due period are fairly severe, and surely a reduction in the time-frame for submitting accounts will make it more difficult for small charities without any paid staff to comply. It would also create a further disparity with Company Law since charitable companies have ten months within which to send their accounts to Companies House. I therefore favour retaining the ten month period, particularly as I cannot see that a three month reduction would greatly assist the process of regulating problem charities - if this is indeed the aim of the proposed change.

Concluding Remarks

The first unified Charities Act for Scotland is a major and very welcome development and is the product of many years of research, consultation, and lobbying. As the Act's title suggests, the Charities and Trustee Investment (Scotland) Act also contains measures extending the investment powers of trustees; it also facilitates the re-organisation of charities, public trusts and endowments. While there are actual and potential divergences between the new Scottish regime and that existing or planned for England and Wales and for Northern Ireland, it is hoped that practical solutions to any difficulties can be found by co-operation between the regulators. The legislation, which inevitably reflects the nature and size of the charitable sector in each jurisdiction as well as the different legal systems, gives the regulators flexibility to develop the new regime. It is hoped that they will do so in consultation not only with each other but also with the sector, and that they will issue clear guidance in order to facilitate compliance with the new legislation.