



Scottish Law Commission
promoting law reform

(DISCUSSION PAPER No 140)

Discussion Paper on Unincorporated Associations

discussion
paper



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December 2008

DISCUSSION PAPER No 140

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EDINBURGH: The Stationery Office

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ISBN: 978-010-888227-2

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The Commission would be grateful if comments on this Discussion Paper were submitted by Friday 6 March 2009.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

Contents

	<i>Paragraph</i>	<i>Page</i>
Part 1	Introduction	
Unincorporated associations in Scotland	1.1	1
The legal status of unincorporated associations	1.5	2
Outline of the Discussion Paper	1.6	3
Preliminary consultation	1.13	5
Impact assessment	1.14	5
Legislative competence and compliance with Convention and Community law	1.15	5
Part 2	The current law	
Definition of an unincorporated association	2.1	7
Consequences of absence of legal personality	2.3	7
Contract between association and third party	2.4	8
Contract between association and member	2.7	9
Liability in delict to third party	2.9	10
Liability in delict to club member	2.12	11
Ownership of and title to property	2.14	12
Title to sue and be sued	2.18	13
Application of regulatory legislation	2.19	14
Criminal liability	2.20	14
Other examples of statutory recognition of unincorporated associations	2.23	15
Associations with "quasi-corporate" status	2.24	15
Existing alternative vehicles for non-profit making organisations	2.28	17
Part 3	Problems arising from the current law	
Contracts with third parties	3.2	20
Contracts with members	3.5	21
Liability in delict to third party	3.6	21
Liability in delict to members	3.7	21
Ownership of and title to property	3.8	22
Availability of insurance cover	3.9	22
Conclusions	3.10	23

Contents

	<i>Paragraph</i>	<i>Page</i>
Part 4 Attribution of legal personality to unincorporated associations		
Introduction	4.1	24
Optional acquisition of legal personality by registration	4.5	25
Optional acquisition of legal personality by expression of intention to do so	4.10	27
Automatic attribution of legal personality	4.12	27
Minimum threshold for automatic attribution of separate legal personality	4.18	30
Acquisition of legal personality by adoption of constitutive document	4.23	31
Ascertainment of time of commencement	4.26	32
Opting in or out of treatment as separate legal entity	4.27	32
Consequences of attribution of legal personality	4.30	34
Contractual obligations	4.31	34
Delictual obligations	4.33	35
Acquisition and disposal of property	4.35	36
Raising and defending legal proceedings	4.38	37
Application of the ultra vires doctrine to an association with separate legal personality	4.39	37
Distribution of assets on winding up	4.43	39
Insolvency	4.46	40
An alternative approach: rights and duties without separate legal personality	4.48	40
Loss of legal personality	4.50	41
Breach of minimum qualification conditions	4.51	41
Express agreement	4.52	41
Inactivity	4.53	41
Loss of "identity"	4.55	42
Large associations: an additional registration requirement?	4.58	43
Rules of internal governance	4.62	44
Multi-tiered organisations	4.64	45
Part 5 A new corporate vehicle for non-profit associations?		
Introduction	5.1	47
Incorporated associations: a model	5.2	47
Is there a need for a new corporate vehicle for non-profit associations in Scotland?	5.6	49

Contents (cont'd)

	<i>Paragraph</i>	<i>Page</i>
Part 6	Miscellaneous	
Effect of proposals on regulatory and penal statutory provisions	6.1	53
Cross-border issues: determination of the applicable law	6.3	53
Transitional measures	6.9	55
Part 7	Impact assessment	
The current difficulties	7.1	57
Risks arising from the current difficulties	7.2	57
Evidence of these difficulties	7.3	58
Aims and objectives	7.4	58
Option 1 The status quo	7.5	58
Benefits and costs of Option 1	7.6	58
Option 2 Automatic attribution of legal personality to unincorporated associations fulfilling a minimum specified criterion	7.7	59
Benefits and costs of Option 2	7.8	59
Option 3 Optional legal personality without incorporation	7.9	60
Benefits and costs of Option 3	7.10	60
Option 4 First possible modification of Options 2 and 3(b)	7.13	61
Benefits and costs of Option 4	7.14	61
Option 5 Second possible modification of Options 2 and 3(b)	7.15	61
Benefits and costs of Option 5	7.16	62
Option 6 Rights and duties without separate legal personality	7.17	62
Benefits and costs of Option 6	7.18	62
Option 7 A new corporate vehicle	7.19	62
Benefits and costs of Option 7	7.20	62
Option 8 A non-statutory Option	7.21	63
Benefits and costs of Option 8	7.22	63
Part 8	List of proposals and questions	64
Appendix	Revised Uniform Unincorporated Nonprofit Association Act (text as at 8 November 2008)	68

Part 1 Introduction

Unincorporated associations in Scotland

1.1 The law relating to unincorporated associations is included in our current programme of law reform. The suggestion, during the consultation process which preceded publication of our programme, that this area of law was in need of reform received widespread support from a variety of organisations and individuals. Scotland shares with the other parts of the United Kingdom a law of unincorporated associations which rests upon common law and has been little developed by statute. Its most striking feature is the absence of legal personality¹ accorded to associations and clubs which do not choose to establish themselves as companies or as some other form of incorporated body. Put shortly, the current law does not recognise the existence of such organisations as separate legal entities. In the case of associations of sufficient size to wish to enter into contracts, own property, engage employees and so forth, this absence of legal personality has given rise to a variety of problems, highlighted in a substantial body of case law over many years, only some of which have been pragmatically resolved.

1.2 There are a very large number of unincorporated associations in existence in Scotland. The Scottish Council for Voluntary Organisations (SCVO) estimated in March 2008 that there are approximately 45,000 voluntary organisations in Scotland, the majority of which are unincorporated associations.² Such associations exist in a wide range of sizes and structures. For present purposes they may be taken to share two principal characteristics:

- (i) as the name suggests, the association is not a body corporate which is incorporated under the Companies Acts or otherwise;
- (ii) the association exists for a purpose other than the making of profit for its members, thus distinguishing it from a partnership or joint venture.

The objects and purposes of non-profit making unincorporated associations also cover a very wide range, from purely charitable purposes at one end to purely member-interested purposes at the other. Within that range are a large number of associations which are not registered as charities but which are established for public benefit purposes and which belong, with charities, to what is often referred to as the "third sector".

¹ In this Discussion Paper we have used the term "legal personality" as it is more familiar than the term "juristic personality" which, strictly, may be more correct.

² SCVO is a representative body which works both with and for charities and voluntary (ie non-profit making) organisations, and is designed to provide help and support to the third sector. It provides advice on management and governance as well as recommending the adoption of a formal constitution, of which it provides model examples. The figure of 45,000 comprises organisations which have "at least a formal 'set of rules'".

1.3 Charities account for approximately 23,300 of the 45,000 organisations which make up Scotland's third sector. In their report "Scottish Charities 2008",³ the Office of the Scottish Charity Regulator (OSCR) provided a breakdown of the legal structure of charities which revealed that approximately 56% of charities are unincorporated associations.⁴ However, the small number which are incorporated as companies are largely those which generate the highest income.⁵ The same is true for the sector as a whole. Figures published by the SCVO show that the sector's larger organisations, which are relatively few in number, account for most of the total income of the sector.⁶ Thus a breakdown of the third sector's income in 2006 revealed that small organisations (those with an annual income of £25,000 or less) accounted for just 2% of the sector's income although in number they comprised 64% of the sector as a whole. Small organisations tend not to incorporate and thus remain, by default, unincorporated associations.

1.4 In addition to charities and associations established for public benefit, there are a large number of unincorporated associations (many of which are not included in the figure of 45,000 mentioned above) which may be described as "member-interest" associations. These are mainly local clubs and societies created with a view to bringing benefits to their members other than the making of business profits. Obvious examples are sports and social clubs, working men's clubs and "single issue" pressure groups. Although such clubs and societies are unlikely to be able to register as charities and are not normally eligible for membership of SCVO, they share the common characteristics of having defined, non-profit making objects but no separate legal personality.

The legal status of unincorporated associations

1.5 The difficulties and uncertainties which arise out of the absence of recognition of unincorporated associations as legal entities are well recognised and have been the subject of adverse judicial and academic comment for many years. We discuss these difficulties in detail below. For many commentators, the law fails to reflect factual reality. Professor Sir Neil MacCormick has observed:⁷

"The fact of the matter surely is that the law's *non-personification* of certain types of social collectivity is far more a matter of fiction than its conferment of personality is in the case of others. The fiction is not that the Royal Bank of Scotland has corporate identity, but that the National Union of Bank Employees lacks it. Indeed, clubs, trade unions and other unincorporated associations often have... much more reality than some such legally incorporated bodies as the one-man company in the celebrated case of *Salomon v Salomon and Co Ltd*.⁸ In the common law systems, there are various devices by way of manipulation of the law of trusts, of agency, and of contract, whereby to accommodate the social realities of unrecognised corporateness. The artificiality of these devices seems rather more obvious than the supposed artificiality of legal corporate personality."

³ Office of the Scottish Charity Regulator, "Scottish Charities 2008" -

<http://www.oscr.org.uk/PublicationItem.aspx?ID=a5d9afdd-1853-4a03-89df-73f0e30852e2>.

⁴ *Ibid* p 9. A further 18% are constituted as trusts; 18% as companies, and the remaining 8% as industrial and provident societies, educational endowments, statutory corporations or "other". As at October 2008 the number of unincorporated associations registered with OSCR was 12,768, representing 54.7% of all registered charities.

⁵ *Ibid* p 9.

⁶ Scottish Council for Voluntary Organisations, "Scottish Voluntary Sector Statistics 2007" -

[http://www.scvo.org.uk/Hiccap/AdviceAndGuidance/..%5C..%5CImages%5CPublications%5CStatistics%202007%20-%20finished%20pdf%20\(2\).pdf](http://www.scvo.org.uk/Hiccap/AdviceAndGuidance/..%5C..%5CImages%5CPublications%5CStatistics%202007%20-%20finished%20pdf%20(2).pdf).

⁷ N MacCormick, *Institutions of Law* (2007), p 84.

⁸ [1897] AC 22.

Outline of the Discussion Paper

1.6 The principal purpose of this Discussion Paper is to seek comment on the desirability of legislative reform which would accord separate legal personality to unincorporated associations which do not wish to incorporate as companies or as some other form of incorporated body but which meet specified minimum criteria. The most obvious practical consequences of attributing legal personality to an association would be in the application to it of the law of obligations. The association would have capacity to enter into contracts in its own right rather than through its office bearers or committee members as individuals. It could, in particular, be the employer of the association's staff. As regards claims for damages for negligence or breach of contract, membership of an association – or of its management committee – would not of itself create liability, which would rest instead upon the association itself. The possibility would, however, remain of a claim being made against an individual member or committee member who was personally responsible for the negligence or other circumstances giving rise to the claim. Property – whether heritable or moveable – could be owned by the association rather than being held by named individuals as trustees. Court actions could be raised and defended by the association rather than by named individuals as representing it.

1.7 Not every grouping of individuals working together for a common, non-profit making purpose will, however, be deserving of – or indeed desirous of – being treated as a separate legal entity. Sometimes individuals will come together for, say, social or fund-raising purposes on an informal or temporary basis in circumstances where it would not be right for them to find themselves unwittingly treated as a legal entity.

1.8 In Part 2 of this Discussion Paper we summarise the current law relating to unincorporated associations including, in particular, the consequences of not being treated as a legal entity.⁹ We discuss the extent to which the law recognises bodies with what has been described as "quasi-corporate status", such as trade unions, which do not have separate personality but are granted certain capacities by statute.¹⁰ We describe the alternatives to treatment as an unincorporated association which are available under the current law.¹¹

1.9 In Part 3, we describe what we see as the problems arising from the absence of legal personality of unincorporated associations.¹² We conclude that the jurisdictions of the United Kingdom have been left behind in reforming this area of law and that it is time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations.

1.10 In Part 4, we make proposals for the treatment of unincorporated associations as separate entities with legal personality. We discuss the relative advantages and disadvantages of, on the one hand, a statutory scheme in which legal personality is acquired voluntarily by registration in a new public register and, on the other hand, a scheme which attributes legal personality to associations which fulfil certain minimum criteria, either optionally or automatically.¹³ We invite comment on various criteria which could be applied

⁹ Paras 2.1 to 2.23.

¹⁰ Paras 2.24 to 2.27.

¹¹ Paras 2.28 to 2.29.

¹² Paras 3.1 to 3.9.

¹³ Paras 4.5 to 4.17.

in determining whether an association is to be treated as a legal entity and tentatively suggest that the adoption of a written constitutive document containing certain minimum provisions, such as a name, objects, criteria for membership and for election of office-bearers, and rules for distribution of assets on dissolution may afford an appropriate minimum threshold.¹⁴ We address the situation of associations which, though meeting the minimum criteria, prefer not to be treated as legal entities.¹⁵ We consider in detail the legal consequences of attribution of legal personality.¹⁶ We ask whether, as an alternative, it would be preferable to confer certain specific capacities on associations, such as capacity to contract, without according them separate personality.¹⁷ We discuss the circumstances in which legal personality might be lost by an association in circumstances other than its dissolution,¹⁸ and we also invite comment on whether special provision is needed for large associations which might properly be expected to incorporate rather than continue to carry on their activities with unincorporated status.¹⁹ We invite comment on whether there is a need for statutory default provisions for internal governance of associations with legal personality.²⁰ Finally, we ask whether special legislative provision is needed for multi-tiered organisations such as churches and national associations with local branches.²¹

1.11 In Part 5, we invite comment on whether there is a need in Scotland for a new corporate vehicle for non-profit making associations which wish to incorporate.²² At present the corporate vehicle most commonly used is the company limited by guarantee. Since 2005, companies throughout the United Kingdom (other than charities) have had the possibility of registering as a community interest company (CIC), which is a company limited by shares or by guarantee whose memorandum and articles conform to certain statutory requirements, notably in relation to the company's public benefit objects and restrictions on distribution of the company's assets and income to members on dissolution or otherwise. A further possibility for charities in Scotland will become available when it becomes possible to incorporate as, or convert to being, a Scottish Charitable Incorporated Organisation (SCIO). No special corporate vehicle is presently available for member-interest associations, such as sports and social clubs. Our preliminary view is that there is no need for a new form of corporate vehicle in Scotland, but we invite comment on whether there is a need either for such a vehicle for non-profit making bodies generally or, specifically, for member-interest associations.

1.12 In Part 6 we address certain issues consequential upon our proposals, namely:

- The effect of our proposals on existing regulatory and penal statutory provisions applicable to unincorporated associations,²³

¹⁴ Paras 4.18 to 4.26.

¹⁵ Paras 4.27 to 4.28.

¹⁶ Paras 4.29 to 4.46.

¹⁷ Paras 4.48 to 4.49.

¹⁸ Paras 4.50 to 4.57.

¹⁹ Paras 4.58 to 4.61.

²⁰ Paras 4.62 to 4.63.

²¹ Paras 4.64 to 4.66.

²² Paras 5.2 to 5.13.

²³ Paras 6.1 to 6.2.

- the significance (if any) of legal personality being accorded to certain associations by Scots law where equivalent associations would not be accorded such treatment by the law of other parts of the United Kingdom;²⁴
- transitional provisions for associations in existence at the time when a statute implementing our proposals comes into force.²⁵

Preliminary consultation

1.13 Prior to publication of this Discussion Paper, we have held informal meetings with representatives of a number of interested organisations, including OSCR,²⁶ SCVO,²⁷ the University of Dundee Charity Law Research Unit,²⁸ the Church of Scotland,²⁹ and the Institute of Chartered Accountants of Scotland,³⁰ and with individuals who have an interest and expertise in this field.³¹ We have also received helpful preliminary comments from the Law Society of Scotland, the Scottish Episcopal Church and SportScotland. We are most grateful to them for their assistance in drawing our attention to issues which require to be addressed in any reform of this area of law.

Impact assessment

1.14 A preliminary assessment of the impact of our proposals is set out in Part 7 of this Discussion Paper. Our preliminary conclusion is that the status quo is undesirable and that attribution of legal personality to unincorporated associations would bring significant benefits and few, if any, costs or adverse consequences. We recognise, however, that the information presently available to us, as to the potential impact of our proposals on the very large number of associations currently in existence, is incomplete. We hope that the consultation period will enable us to learn more about this from consultees throughout the range of activities of the non-profit making sector in Scotland, in order that the impact assessment which will be included in our report will be as fully supported by evidence as possible.

Legislative competence and compliance with Convention and Community law

1.15 The law of unincorporated associations is a reserved matter under Section C1 of Schedule 5 to the Scotland Act 1998 insofar as it concerns the creation, operation, regulation and dissolution of types of business association, other than charities. "Business" in this context is defined as including any kind of business, whether or not carried on for profit. Legislation implementing any recommendations which we make would apply to charities and to associations whose activities do not constitute a "business", but it would apply also to non-charitable associations such as clubs whose activities amount to the carrying on of a business otherwise than for profit. In our view, such legislation is, therefore,

²⁴ Paras 6.3 to 6.8.

²⁵ Paras 6.9 to 6.12.

²⁶ Ms Jane Ryder.

²⁷ Ms Lucy McTernan and Mr Jim Lugton.

²⁸ Dr Patrick Ford.

²⁹ Ms Janette Wilson.

³⁰ Ms Christine Scott.

³¹ Ms Laura Dunlop QC, Mr James McNeill QC, Mr Stephen Phillips, Solicitor, Miss Morag Ross, Advocate, and Mr John Stirling WS.

beyond the competence of the Scottish Parliament and would require to be passed by the United Kingdom Parliament.

1.16 In our view our proposals if enacted would not give rise to any breach either of the European Convention on Human Rights or of Community law.

Part 2 The current law

Definition of an unincorporated association

2.1 In *Conservative & Unionist Central Office v Burrell*,¹ the following definition of an unincorporated association was offered by Lawton LJ in the context of tax legislation:²

"...two or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and upon what terms and which can be joined or left at will."

At one end of the scale, unincorporated associations may be substantial organisations with property, employees and contractual commitments. At the other end, they may be informal groupings of individuals coming together for temporary and specific purposes with even less by way of formally-agreed rules than suggested by the description above.

2.2 An attempt to classify not-for-profit unincorporated associations was made by the DTI's Company Law Review Steering Group in the 2000 consultation document "Modern Company Law for a Competitive Economy: Developing the Framework"³ as follows:

- Charities "operating within an objective definition of public interest";⁴
- Hybrid bodies "operating within a subjective definition of public interest (and hence an element of member interest)",⁵ such as political organisations and pressure groups;
- Member-interest bodies, such as sports clubs,⁶ members' clubs and co-operatives.

The classification has no legal significance but demonstrates the range of organisations governed by the law of unincorporated associations which would be affected, to a greater or lesser extent, by any statutory reform.

Consequences of absence of legal personality

2.3 The critical feature of not-for-profit unincorporated associations under Scots law, as under English law, is that they are not recognised as having legal personality.⁷ The absence

¹ [1982] 1 WLR 522 (CA).

² *Ibid* at 525.

³ Department of Trade and Industry Company Law Steering Group, "Modern Company Law for a Competitive Economy: Developing the Framework", 2000 - <http://www.berr.gov.uk/whatwedo/businesslaw/co-act-2006/cir-review/page25086.html>.

⁴ *Ibid* ch 9, para 9.13. Excluded would, of course, be charities constituted under another legal form such as a trust or company.

⁵ *Ibid* ch 9, para 9.13.

⁶ Including clubs registered as community amateur sports clubs by HM Revenue & Customs under the provisions of the Finance Act 2002, s 58 and Sch 18 which qualify for various tax reliefs and exemptions.

⁷ For a discussion of the concepts of legal personality and capacity, see MacCormick, *Institutions of Law*, ch 5.

of legal personality of organisations which may have complex juristic relationships with others has created difficulties and injustices.⁸ Some of the difficulties have been creatively resolved; others remain. These will be considered in the following paragraphs.

Contract between association and third party

2.4 Not being a legal entity, an association cannot enter into a contract. Yet clubs and other not-for-profit associations do require to, among other things, make purchases, obtain credit and engage employees, and a solution has had to be found. In one 19th century English case, an unfortunate supplier of goods to a members' club was held to have no-one to sue on the ground that the individual members who had placed the order had not pledged their personal credit and had no authority to pledge that of the other members.⁹ In *Thomson & Gillespie v Victoria Eighty Club*,¹⁰ the Lord Ordinary (Pearson) took a different approach, observing:¹¹

"...It is impossible to affirm the liability of the club as such, for that is not a legal entity capable of contracting or of being sued. The liability must rest either with the members as such, or the committee-men, or some of them, or the club-master. Circumstances might be figured in which it would rest with the club-master alone; but, in the normal case, this has never been received with favour, any more than has the argument, submitted in some cases, that there was really no contract at all, and that the tradesman must be deemed to have relied merely on an honourable understanding that he would be paid."

The Lord Ordinary held that liability for payment for orders of liquor by the club-master rested upon the members of the committee upon whose instructions the club-master was acting, "...with such relief as they can obtain from the club funds, or from the members by way of contribution".¹²

2.5 Liability under a contract entered into on behalf of an association is, therefore, likely to be a personal liability of some or all of the members of the association who have expressly or impliedly authorised the contract.¹³ Depending on the circumstances, that might be all of the members (where, for example, the contract was authorised or ratified at a general meeting),¹⁴ or all of the committee, or one or more individuals who assumed the responsibility of entering into the contract. Where an association which has been operating a bank overdraft is dissolved, or finds itself unable to repay the bank out of its funds, there is

⁸ "Unincorporated associations do not have separate legal personalities. Almost all the myriad legal problems to which they give rise stem from this": *Hanchett-Stamford v Attorney-General* [2008] EWHC 330 (Ch), at para 28 (Lewison J).

⁹ *Overton v Hewett* (1886) 3 TLR 246, following an earlier Court of Appeal decision in *Jones v Hope* reported as a footnote to *Overton v Hewett*.

¹⁰ (1905) 13 SLT 399. For a similar decision in England, see *Steele v Gourley* (1886) 3 TLR 118.

¹¹ *Ibid* at 401.

¹² *Ibid* at 402.

¹³ See, eg, *Cromarty Leasing Ltd v Turnbull* 1988 SLT (Sh Ct) 62.

¹⁴ An example of this is provided by the US case *Security-First National Bank of Los Angeles v Cooper et al* (1944) 62 Cal App 2d 653, in which all of the members of an Elks lodge were held personally liable for obligations under a lease entered into by the lodge's office bearers following a vote at a meeting authorising them to do so. Liability was not restricted to those members present and voting at the meeting.

clearly a risk of joint and several liability of committee members¹⁵ or of individual association members.

2.6 A particular example of the problem of defining the contractual relationship arises in relation to employees. Some unincorporated associations, including many charities, employ significant numbers of people. In that situation, who is the employer? Again, it cannot be the association which is not a legal entity. In *Affleck v Newcastle Mind*,¹⁶ it had been held by employment tribunals that employees of a branch of a charity which was an unincorporated association were employed by the membership of the charity as a whole. This was reversed by the Employment Appeal Tribunal, which held that the employment contract was made with "the management committee and its members for the time being"¹⁷ (without novation each time the composition of the committee changed). The effect of the TUPE Regulations¹⁸ is that a newly constituted committee assumes the liabilities of the previous committee. The extent of personal liability of the committee for damages for a breach of contract was expressly left unexplored by the Employment Appeal Tribunal, who observed:¹⁹

"What is the relationship between the members of the committee, one to another? That is not a question with which the employment tribunal will be concerned, but it might well become necessary for the members of the executive committee to dispute between themselves as to who bears responsibility for the consequences of any unlawful act which has occurred, and it may be in relation to people who are not members of the executive committee, but who were acting in an advisory role or other role, that the members of the executive committee if found liable will have rights against such individuals. That is again something which is not a matter for the tribunal..."

Furthermore, the employment tribunal will not be concerned with the question as to whether, if there is liability, the members of the executive committee could look to the funds of the charity which are held by trustees to reimburse them in relation to their liabilities. It may be that there are no funds available – I do not know – but, even if there were funds available, questions might arise as to whether the members of the executive committee were, in what they were doing, acting properly and in the interest of the charity..."

This passage seems to us to be helpful in identifying a number of difficult issues in relation to liability under contract to which the law presently provides no clear answer.

Contract between association and member

2.7 Just as an association has no capacity to enter into a contract with a third party, it has no capacity to contract with one of its own members. When a social club member pays for a drink at the bar that member is not, contrary to what he or she might believe, purchasing it from the club. Rather, the other club members are releasing the value of their

¹⁵ As, for example, was suggested in the case of the Labour Party in May 2008. See P Webster, "Labour Ltd acts to avoid debt burden", *The Times*, 30 May 2008 -

<http://www.timesonline.co.uk/tol/news/politics/article4030593.ece>.

¹⁶ [1999] ICR 852.

¹⁷ *Ibid* at 854 (Morison J).

¹⁸ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) which apply to the transfer of "an economic entity which retains its identity". "Economic entity" is defined in reg 3(2) as an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary".

¹⁹ *Affleck v Newcastle Mind* [1999] ICR 852, at 857 (Morison J).

share in that drink in consideration of his or her payment.²⁰ For this reason the Trade Descriptions Act 1968 was held not to apply to a purchase of cigarettes in a working men's club because there could be no "offer to supply" by the club to one of its members.²¹ There can be little doubt that a person who becomes a member of an association may thereby obtain certain contractual rights, for example the right (subject to club rules) to use the facilities of a sports club in exchange for payment of the annual subscription. But the contract cannot be with the association itself; it can only be with all of the other members of the association, whether or not they are mutually aware of each other's identities.

2.8 The existence of a set of rules agreed among individuals which create contractual rights and obligations may not, however, be enough of itself to constitute an "association". In *"The Satanita"*,²² the competitors in a yacht race were held by the House of Lords to have entered into a contractual relationship with one another on the terms of the race rules drawn up by the organising committee, but there is no indication in the judgment that they were regarded as having formed an association.

Liability in delict to third party

2.9 There is no clear authority on the extent of liability of an association and its members to a third party in delict. It was settled in *Bridge v South Portland Street Synagogue*²³ that an association may be sued by calling it in its own name together with its office-bearers, as representing it, but this Outer House decision deals with the procedural formalities of such an action and not the substance. Liability to the pursuer would fall to be met out of the association's funds, assuming there were no grounds for personal liability on the part of one or more of its office-bearers. But what if the funds were insufficient to meet the claim? The answer may turn upon whether the office-bearers, while carrying out their duties on behalf of the association but without the express authority of the members for the act (or omission) in question, had failed in a particular duty of care owed to the pursuer. If so, the office bearers would be liable to make reparation to the pursuer on the basis of ordinary principles of the law of delict. If, on the other hand, the act or omission had been carried out with the members' approval, there is no obvious reason why the office-bearers as individuals should bear the whole burden of liability.

2.10 A useful example is afforded by the case of *Miller v Jackson*,²⁴ in which the Court of Appeal awarded £400 damages to two house owners in respect of property damage and inconvenience caused by cricket balls occasionally struck into their garden from a neighbouring pitch owned by an association. It was held that, despite the erection by the club of a 15-foot fence, it was foreseeable that a few balls would reach the garden, and so the club would be negligent every time it happened. If, in these circumstances, an individual in the garden were to sustain serious injury and be awarded damages in excess of the club's funds, there seems to be no reason to impose liability only upon the committee members whose decisions in relation to the adequacy of safety measures would presumably have been approved by the membership. Still less would it be reasonable to impose liability on the batsman who hit the ball for six. Nor is there any basis for limiting the amount of

²⁰ *Carlton Lodge Club v Customs & Excise Commissioners* [1975] 1 WLR 66 (CA).

²¹ *John v Matthews* [1970] 2 QB 443.

²² [1897] AC 59.

²³ 1907 SC 1351. The defenders had argued that all members of the association required to be called as parties to the action.

²⁴ [1977] QB 966.

damages payable to the pursuer. It would therefore appear that the members would be liable jointly and severally for the damages awarded, beyond the amount of their subscription to the club.

2.11 The point has not been the subject of decision by a UK court because, in the reported cases in which associations have been sued (through their office-bearers) at common law or under the Occupiers' Liability (Scotland) Act 1960, either the pursuer has failed to establish liability²⁵ or the sum awarded has been sufficiently modest to be payable in full out of club funds.²⁶ It has, however, arisen in other jurisdictions. In Australia, the possibility that committee members who had been found liable in damages to a third party might seek indemnity from members was mentioned by Jacobs JA in *Smith v Yarnold*.²⁷ At common law in the United States, members of an unincorporated not-for-profit association are liable for the tortious conduct of fellow members and agents of the association,²⁸ although it has been noted that in some jurisdictions liability has been restricted to members who participated personally in the tortious act, or who expressly or impliedly assented to it.²⁹

Liability in delict to club member

2.12 Neither the whole membership of an unincorporated association nor its management committee is vicariously liable to a member of the association for injury caused negligently. In *Prole v Allen*,³⁰ a club member was injured when she fell down stairs which had been left unlit through the negligence of the club steward, who was a member of the club and of its management committee. Her action failed in so far as directed against the members of the committee on the ground that as she was a member, the club owed her no duties for which the committee could be vicariously liable. The action did succeed against the steward as an individual because he was held to be in breach of the duty which he owed to all members to carry out the responsibilities entrusted to him with reasonable care. In *Shore v Ministry of Works*,³¹ an action by an injured club member based on breach of contract instead of tort also failed, on the ground that there was no implied term of membership that club premises would be kept reasonably safe. The decision in *Prole v Allen* as regards the committee was approved by the Court of Appeal in *Robertson v Ridley*³² and has been applied in Scotland in a number of sheriff court cases.³³

2.13 The point has now been authoritatively settled in Scotland by the decision of the First Division in *Harrison v West of Scotland Kart Club*.³⁴ A member of a karting club who was injured when his kart collided with an unprotected wall sued *inter alia* five persons as office-bearers representing the club, both at common law and under the Occupiers' Liability

²⁵ Eg *Bolton v Stone* [1951] AC 850; *Campbell v Thomson* [1953] 1 QB 445; *McQueen v Ballater Golf Club* 1975 SLT 160.

²⁶ *Miller v Jackson* [1977] QB 966.

²⁷ (1969) 90 WN (Pt 1) (NSW) 316; discussed in R Baxt, "The Dilemma of the Unincorporated Association" (1973) 47 ALJ 305, 312.

²⁸ *Pandolfo v Bank of Benson* 273 Fed. 48 (9th Circuit 1921).

²⁹ K D Lewis, "The Ramifications of Idaho's New Uniform Unincorporated Non-profit Associations Act" (1995) 31 Idaho LR 297, pp 306-307.

³⁰ [1950] 1 All ER 476.

³¹ [1950] 2 All ER 228.

³² [1989] 1 WLR 872.

³³ Eg *Milne v Duguid* 1999 SCLR 512; *Carmichael v Bearsden & District Rifle & Pistol Club* 2000 SLT (Sh Ct) 49. A decision to contrary effect in *McCall v Dumfries & Galloway RFC* 1999 SCLR 977 was disapproved in *Harrison v West of Scotland Kart Club* 2004 SC 615.

³⁴ 2004 SC 615.

(Scotland) Act 1960, and as individuals. The action in so far as directed against them as representing the club was dismissed. Delivering an opinion with which the other members of the court agreed, Lord Marnoch observed:³⁵

"While the committee of a club may well be seen as representing the members of the club in its relationship with a third party, it has, in my opinion, no special position or separate standing so far as the members themselves are concerned. In short, leaving aside responsibilities in contract (which may well arise from the rules of a club), an unincorporated association is neither more nor less than the sum of all its members who are all principals in the common enterprise of the association. In that sense the members are, as I see it, indistinguishable from the partners of a firm who, on that account, are disabled from suing the firm in respect of a delict committed by one of the partners (*Mair v Wood*,³⁶ especially per Lord Keith at p 90). Indeed, a member of an unincorporated body is in an even worse position in view of the fact that such a body has no legal personality independent of himself and his fellow members. It follows that the Lord Ordinary was, in my opinion, well-founded in seeing the pursuer as attempting to sue himself, among others, as a primary obligant."

The claim based upon occupiers' liability was dismissed for similar reasons. The case against the office-bearers as individuals was allowed to proceed to proof before answer.³⁷

Ownership of and title to property

2.14 As a non-entity, an unincorporated association cannot own property and in the absence of agreement to the contrary the assets of an association belong to the members jointly.³⁸ In *Magistrates of Banff v Ruthin Castle Ltd*,³⁹ Lord Justice-Clerk Cooper instanced membership of an unincorporated association as one of the types of trust, contractual or quasi-contractual bond which was the indispensable basis of joint (as opposed to common) ownership. Thus association property is subject to the *jus accrescendi*, which excludes the possibility of severance without dissolution of the members' relationship. With the exception of disposals impliedly authorised in the course of the day-to-day administration of the association's affairs, and in the absence of contrary agreement, disposal of its assets requires the unanimous agreement of members. As joint property, the interest of a member in the association's property is not transferable.⁴⁰

2.15 Title to an association's heritable property requires to be taken in the name of individuals or other entities with legal personality. It could in principle be taken in the name of all of the members, but in practice is normally held by some or all of the office-bearers as trustees for the members of the association.

2.16 Difficulties may arise regarding entitlement to the assets of an association whose purposes have come to an end, if no provision for this eventuality is made in the

³⁵ *Ibid* at 622, para 25.

³⁶ 1948 SC 83.

³⁷ An attempt by the pursuer to convene additional individual members as defenders was subsequently held to be time-barred: *Harrison v West of Scotland Kart Club and Others* [2008] CSOH 33.

³⁸ *Murray v Johnstone* (1896) 23 R 981. Although, Lord Moncreiff, at 990, described the right of a club member as "one of common property", he stated that while the club exists as a going concern, a member is not entitled to insist on a sale and division of the price: in other words, it is what would now be termed joint property. For a discussion, see *The Laws of Scotland (Stair Memorial Encyclopaedia)* Vol 18, paras 34-36.

³⁹ 1944 SC 36 at 68.

⁴⁰ *Livingstone v Allan* (1900) 3 F 233, concerning the analogous situation of a trustee.

association's constitution. Where the association had a public interest purpose (whether on an objective or subjective definition of public interest), then it might be competent in some circumstances to apply to the court⁴¹ for approval of a scheme applying the association's funds for public benefit in a manner consistent with its purposes, although this procedure would only be available if the court were satisfied that the association could properly be regarded as a public trust. In other circumstances, and in particular where the association has "member-interested" purposes, distribution of assets on dissolution of the association would be a matter for agreement among the members at the time of dissolution. Failing such agreement, it seems that the assets would fall to be divided among those members equally per capita⁴² or, where only a single member remained, made over to that member.⁴³

2.17 Despite the fact that it has no legal personality, an unincorporated association may be sequestrated.⁴⁴ Such a sequestration would be separate from any sequestration of an association member who had incurred personal liability.

Title to sue and be sued

2.18 Before the end of the 19th century it became settled practice in the Court of Session for an unincorporated association to be sued by calling the association by name together with its office-bearers or committee members as representing it.⁴⁵ This remains the practice, enabling the decree to be enforced by diligence against the individuals called as defenders, leaving them to exercise their right of relief against association funds or other members' assets. An association sues in the name of its office bearers, or in the name of committee or other members authorised to do so at a meeting or by the association's rules. In the sheriff court, an association may sue or be sued under its descriptive name alone, without the addition of the names of office-bearers or other individuals.⁴⁶ This, however, gives rise to the practical difficulty that a decree against the association is not a decree against any individual member and is not therefore warrant for diligence against any individual.⁴⁷ It is therefore regarded as preferable in sheriff court actions to follow the Court of Session practice of calling the association together with individuals as representing it.

⁴¹ Under s 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, or at common law for approval of a cy-près scheme.

⁴² Cf *In Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.

⁴³ For the position under English law, see the discussion in *Hanchett-Stamford v Att-Gen* [2008] EWHC 330 (Ch); [2008] P&CR 5, in which Lewison J held, after reviewing the authorities, that the assets of the Performing and Captive Animals Defence League, an association which had public benefit purposes but which was not a charity, had vested in the last surviving member of the association on the death of the only other member previously surviving. Lewison J rejected an argument that the assets had vested in the Crown as *bona vacantia*.

⁴⁴ Bankruptcy (Scotland) Act 1985, s 6(1)(c). See W W McBryde, *Bankruptcy* (2nd edn, 1995), para 4-33.

⁴⁵ *Bridge v South Portland Street Synagogue* 1907 SC 1351.

⁴⁶ Ordinary Cause Rules 1993, rule 5.7(1). Although the rule itself and its heading refer to a person "carrying on business" under a trading or descriptive name, this has been held to be broad enough to include non-profit-making clubs carrying on their activities in an organised and continuing manner (*Borland v Lochwinnoch Golf Club* 1986 SLT (Sh Ct) 13, discussing the predecessor to rule 5.7(1) which was in similar terms). An unincorporated association cannot be a party litigant and accordingly an initial writ at the instance of an association must be signed by a solicitor and not by an office-bearer (*Cultural and Educational Development Association of Scotland v Glasgow City Council* [2008] SLT 670).

⁴⁷ In *Aitchison v McDonald* 1911 SC 174, at 175, Lord President Dunedin expressed doubt about the value of a decree against a club without the conjunction of any individual, which seemed to him "...to raise grave questions as to the working out of the decree".

Application of regulatory legislation

2.19 It is common for legislation of a regulatory nature to provide expressly for its application to unincorporated associations. For example, a "body" may be defined as including an unincorporated association.⁴⁸ Specific provision is made for unincorporated associations with regard to appointment of auditors,⁴⁹ and permission to carry on regulated activities or as a recognised investment exchange or recognised clearing house.⁵⁰ In most cases, the statutory provisions go no further than is necessary to apply legislation, drafted with companies and/or partnerships primarily in mind, to unincorporated associations. The association's lack of legal personality is not addressed.

Criminal liability

2.20 As it has no legal personality, an unincorporated association cannot commit a common law offence. A very wide variety of statutory offences may, however, be committed by an unincorporated association and by its governing body, officers or members. There are a few recurrent statutory formulations used to impose liability on individuals as well as on the association itself, of which the following is an example:⁵¹

"If an offence committed by an unincorporated association (other than a partnership) is proved—

(a) to have been committed with the consent or connivance of an officer of the association or a member of its governing body, or

(b) to be attributable to any neglect on the part of such an officer or member,

the officer or member as well as the association is guilty of the offence and liable to be proceeded against and punished accordingly."

This is the same as the position for companies and partnerships (in both Scotland and England), including limited liability partnerships, and indeed in some statutes a single provision is found covering all of these organisations, including unincorporated associations, under the heading "Offences by bodies corporate etc". Again the strict legal position, namely, that the association is a legal non-entity, is not addressed.

2.21 The position of individual officers and members other than those to whom consent, connivance or neglect can be attributed has not, so far as we are aware, been considered in any reported Scottish cases. It has, however, arisen in two English decisions. In *W Stevenson & Sons v R*,⁵² a partnership of fish auctioneers was charged with and convicted of offences under a statutory instrument containing a provision similar to that set out above. When the Crown subsequently began confiscation proceedings against the partners as individuals, the partnership appealed against conviction on grounds which

⁴⁸ Eg Race Relations Act 1976, s 78(1); Freedom of Information (Scotland) Act 2002, s 73. "Institution" may be similarly defined: eg Building Societies Act 1986, s 107(12). In the Interpretation Act 1978, Schedule 1, "person" is defined as including a body of persons corporate or unincorporate".

⁴⁹ Companies Act 2006, s 1217(1), s1220(1).

⁵⁰ Financial Services and Markets Act 2000, s 40(1), s 287(1), s 288(1).

⁵¹ This formulation is used in the Financial Services & Markets Act 2000, s 400(6). For similar wording see, for example, the Natural Heritage (Scotland) Act 1991, s 26(3) and the Regulation of Care (Scotland) Act 2001, s 23.

⁵² [2008] EWCA Crim 273. Because an English partnership has no legal personality, the situation is analogous to that of an unincorporated association.

included the contention that the conviction was a nullity as the partnership was not a legal entity. Despite the fact that English law does not attribute legal personality to partnerships, the Court of Appeal rejected this argument, observing:⁵³

"We can see no ground for suggesting that provisions such as these are not permitted by law or capable of being effective in law. In as much as business activities are conducted in the name of a partnership and the partnership has identifiable assets that are distinct from the personal assets of each partner there is no reason why a partnership should not be treated for the purposes of the criminal law as a separate entity from the partners who are members of it."

The Court of Appeal went on to hold, however, that conviction of the partnership did not expose individual partners to liability if they were not complicit in the offence committed by the partnership. Any fine imposed could be levied only against partnership assets and confiscation orders could not be made against partners.

2.22 In *R v RL & JF*,⁵⁴ a leakage of oil from the heating system of a golf club with 900 members caused pollution of a water course. The Environment Agency initiated a prosecution under a statutory provision imposing strict liability which did not make any express reference to unincorporated associations or to their officers or members. The defendants selected were the club chairman and treasurer. The trial judge held that the golf club could have been prosecuted as an unincorporated association and that, at least in the absence of some personal culpability, the two individual defendants could not be so prosecuted. The Crown appealed, and the Court of Appeal affirmed that by virtue of the definition of a "person" in the Interpretation Act 1978, it was both permissible and appropriate to prosecute the club. It would, as an alternative, have been permissible to prosecute all of the individual members as jointly liable for the offence of causing the leakage.⁵⁵

Other examples of statutory recognition of unincorporated associations

2.23 For most tax purposes, a company or body corporate is defined as including an unincorporated association.⁵⁶ Various Acts provide for notices requiring to be served on an unincorporated association to be served on a member of the governing body.⁵⁷ The formation, dissolution etc of unincorporated associations is excluded from the Unfair Contract Terms Act 1977 along with that of bodies corporate and partnerships.⁵⁸

Associations with "quasi-corporate" status

2.24 From time to time, there have been indications that certain associations which have not been incorporated may nevertheless be regarded as some form of legal entity. In particular, there is a considerable body of case law relating to the status of trade unions. The Trade Union Act 1871, which legalised trade unions, conferred upon them the right to own property and to act through agents and trustees. The modern equivalent of this

⁵³ *Ibid* para 30.

⁵⁴ [2008] EWCA Crim 1970.

⁵⁵ The Court decided, however, that it would not be in the interests of justice to order a fresh trial of the chairman and treasurer.

⁵⁶ Eg Income Tax Act 2007, s 992; Finance Act 2003, s 100(1) (stamp duty land tax); Income Tax (Earnings & Pensions) Act 2003, s 61(1).

⁵⁷ Eg Companies Act 2006, s 1258(3)(c).

⁵⁸ S 15 (3)(a)(ii).

legislation is now contained in section 10 of the Trade Union and Labour Relations (Consolidation) Act 1992, which provides expressly that a trade union is not a body corporate but is capable of making contracts and of suing and being sued in its own name in contract, tort⁵⁹ or any other cause of action. Property belonging to a trade union is vested in trustees in trust for it.⁶⁰ A judgment is enforceable against a union "in the same manner as if it were a body corporate".⁶¹

2.25 Judicial opinions have differed as to the legal effect of the various statutory formulations of these provisions. In *Taff Vale Railway Co v Amalgamated Society of Railway Servants*,⁶² the House of Lords held that a trade union could be sued in its own name and ordered to pay damages out of its funds. Most of the judges did so without addressing the status of the union, but one (Lord Brampton) considered that a "legal entity" had been created by the 1871 Act. At about the same time in Scotland, a trade union was described in an Outer House decision as "a statutory quasi-corporation".⁶³ The issue was revisited by the House of Lords in *Bonsor v Musicians' Union*,⁶⁴ in which a union member was held entitled to sue the union for damages for breach of contract. The analysis of the status of the union was inconclusive, two judges⁶⁵ regarding it as some sort of legal entity distinct from its members, two⁶⁶ preferring the view that certain rights had been conferred for procedural purposes without creating a legal entity, and one⁶⁷ expressing no concluded view either way.

2.26 There are other examples of statutory provisions which have been held to create what were described as "quasi-corporations",⁶⁸ that is, bodies created by statute with certain attributes of legal personality but without corporate status. By way of contrast, the case of *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry*⁶⁹ concerned the International Tin Council which, in accordance with obligations undertaken by the United Kingdom under an international agreement, was created by an Order in Council which provided that the ITC "shall have the capacities of a body corporate". After the ITC became insolvent, the House of Lords rejected the argument of its creditors that a distinction could be drawn between a body corporate on the one hand and an entity with "the capacities of a body corporate" on the other, so as to impose liability on members in the latter case. Lord Oliver of Aylmerton observed:⁷⁰

"...the undoubted existence of capacities may lead and, in some circumstances, must lead to a necessary inference of the status of the person on whom they are conferred. Whether that is expressed... by saying that the status is the sum total of

⁵⁹ Although the Act does not expressly so provide, it is assumed that the reference to "tort" would include delict in Scots law.

⁶⁰ Trade Union and Labour Relations (Consolidation) Act 1992, s 12(1).

⁶¹ *Ibid* s 12(2). Provisions equivalent to s 10 and s 12 apply to employers' associations: *ibid* s 127 and s 129.

⁶² [1901] AC 426.

⁶³ *Johnstone v Associated Iron-Moulders of Scotland* 1911 2 SLT 478 at 479 (Lord Skerrington).

⁶⁴ [1956] AC 104.

⁶⁵ Lord Morton of Henryton and Lord Porter.

⁶⁶ Lord MacDermott and Lord Somervell of Harrow.

⁶⁷ Lord Keith of Avonholm.

⁶⁸ Eg *Inland Revenue Commrs v Bew Estates Ltd* [1956] Ch 407 at 415 (Roxburgh J) (describing the War Damage Commission); *Knight and Searle v Dove* [1964] 2 QB 631 at 643 (Mocatta J) (describing the London Trustee Savings Bank). The Scottish Law Commission may afford another example. For further discussion, see also K M Wedderburn, "Corporate personality and social policy: the problem of the quasi-corporation" (1965) 28 MLR 62.

⁶⁹ [1990] 2 AC 418.

⁷⁰ *Ibid* at 504.

the capacities or that the status may be deduced from the capacities is really a question of purely academic interest and does not affect the ultimate result."

2.27 The cases already discussed concern bodies created by statute and clothed by statute with certain rights, powers or attributes. In addition, there has been an isolated suggestion that an unincorporated association could be treated as a form of legal entity even where its powers were not conferred by statute. In *Willis v Association of Universities of the British Commonwealth*,⁷¹ a landlord (the defendants) opposed the grant of a new tenancy on the ground that it wished to occupy the premises itself. The tenant argued that in fact the landlord wanted the premises for occupation by a different body, the Universities Central Council on Admissions. UCCA was not a body corporate. Lord Denning MR said:⁷²

"What, then, is the legal status of the council? It is not, of course, a body corporate. But may it not be a body unincorporate? This Act of 1954, like the Interpretation Act 1889, recognises that a body unincorporate may have a juridical personality. We have reached the point foreseen by Professor Dicey long ago: 'When a body of twenty, or two thousand, or two hundred thousand men bind themselves together to act in a particular way for some common purpose, they create a body which by no fiction of law, but by the very nature of things differs from the individuals of whom it is constituted,'... This fact has now been recognised by the law. A trade union (which is a body unincorporate) is a separate entity: see *Bonsor v Musicians' Union*. I think it would be right to recognise that this council is a separate entity."

The other members of the Court of Appeal delivered judgments whose reasoning did not require examination of the legal status of UCCA. Lord Denning's suggested approach has not been followed in subsequent case law, which has emphasised rather that Parliament is free to confer such rights and powers on associations (such as trade unions) by statute as it sees fit, without necessarily creating an entity with legal personality.

Existing alternative vehicles for non-profit making organisations

2.28 Under the present law, a non-profit making organisation which wishes to escape the consequences of the absence of legal personality has little choice but to incorporate. There are various possibilities:

- (i) Incorporation under the Companies Acts as a company limited by shares or by guarantee. Formalities for incorporation are the same as for a company which intends to carry on a business for profit, except that a non-profit-making company limited by guarantee whose objects are the promotion of commerce, art, science, education, religion, charity or any profession need not include the word "Limited" in its name.⁷³ Although, the latter has been a popular vehicle for non-profit making organisations, it was not designed exclusively for non-profit making bodies and is not necessarily suitable for all clubs and associations, especially small and informal ones. Incorporation as a company limited by shares or by guarantee remains the only option available to non-profit making organisations which do not meet the requirements for incorporation under the more specialised provisions discussed below.

⁷¹ [1965] 1QB 140.

⁷² *Ibid* at 147.

⁷³ Companies Act 1985, s 30. Repealed and replaced by the Companies Act 2006, s 60 (expected commencement date 1 October 2009).

- (ii) Incorporation under the Companies Acts (whether as a company limited by shares or by guarantee) as a Community Interest Company ("CIC") fulfilling the requirements of the Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Community Interest Company Regulations 2005.⁷⁴ Provision for companies to be formed as or to become CICs was introduced for bodies which are not registered charities as an element of United Kingdom government strategy to encourage "social enterprises".⁷⁵ In order to be registered as a CIC by the Regulator of Community Interest Companies, a company must satisfy the "community interest test", namely that a reasonable person might consider that its activities are being carried on for the benefit of the community (including a section of the community). It is not a charity and has no privileged status for tax purposes but is subject to statutory restrictions (known as the "asset lock") on distribution of income or assets to its members. A CIC may have a share capital. Its principal advantage is that the "asset lock" affords third parties reassurance that the company's funds cannot be applied otherwise than in pursuance of its public benefit purposes.
- (iii) Incorporation as a Scottish charitable incorporated organisation (SCIO). This possibility has been introduced, for charities only, by the Charities and Trustee Investment (Scotland) Act 2005.⁷⁶ The relevant statutory provisions have not yet been brought into force and SCIOs will not become available until at least 2009.
- (iv) Incorporation as a mutual society under the Industrial and Provident Societies Act 1965. Registration is permitted only if a society is a bona fide co-operative society or if, in view of the fact that the business of the society is being, or is intended to be, conducted for the benefit of the community, there are special reasons why the society should be registered under the 1965 Act rather than as a company under the Companies Acts.⁷⁷ A society registered under the Act is by virtue of its registration treated as a body corporate with limited liability.⁷⁸
- (v) Incorporation under the Friendly Societies Act 1992. A friendly society which registers under the 1992 Act is incorporated from the date of registration.⁷⁹ A society registered under the previous legislation (the Friendly Societies Act 1974) may be either incorporated or unincorporated. The activities which a

⁷⁴ SI 2005/1788. See further the CIC Regulator's website <http://www.cicregulator.gov.uk>. As at September 2008 there were approximately 70 registered Scottish CICs.

⁷⁵ A social enterprise is defined in the Department of Trade and Industry's 2002 paper "Social Enterprise: A Strategy for Success" -

http://www.cabinetoffice.gov.uk/~media/assets/www.cabinetoffice.gov.uk/third_sector/se_strategy_2002%20pdf.ashx, as "a business with primarily social objectives whose surpluses are principally reinvested for that purpose in the business or in the community, rather than being driven by the need to maximise profit for shareholders and owners".

⁷⁶ Ss 49-64.

⁷⁷ Industrial and Provident Societies Act 1965, s 1(2). The SportScotland website suggests this as a possible alternative for sports clubs to incorporation under the Companies Acts, see

<http://www.helpforclubs.org.uk/TopicNavigation/Admin+and+management/Club+Structures.htm>.

⁷⁸ Industrial and Provident Societies Act 1965, s 3.

⁷⁹ Friendly Societies Act 1992, s 5(3).

friendly society may carry on are restricted to those specified by statute⁸⁰ and are principally concerned with provision of life assurance, annuities, general insurance and certain discretionary benefits.

Alternatively, an association, whether charitable or not, could establish itself as a public trust provided that the trust purposes would benefit the public as a whole, or a section thereof. Although this would not, of course, give it legal personality, it would bring it within the law of public trusts, including the statutory provisions relating to reorganisation schemes, and thereby escape some of the uncertainties described above. We understand that only a small proportion of associations follows this route.

2.29 In chapter 9 of the Consultation Document issued in 2000 by the DTI's Company Law Review Steering Group to which reference has already been made,⁸¹ the Group considered the extent to which the available legal forms met the needs of not-for-profit organisations which wished to incorporate as companies. They proposed (and in due course recommended⁸²) the creation of a special form of incorporation for charities, a proposal which will be implemented in Scotland when the SCIO becomes available. On the other hand, the Group did not propose that the new vehicle should be made available to non-charitable associations. Since the publication of that document, the new CIC form of incorporation has been introduced, providing a corporate vehicle for non-charitable organisations with public benefit purposes. There remains no corporate vehicle specifically designed for use by not-for-profit member-interest organisations. The 2000 Group observed that they saw little evidence that the Companies Act provisions were posing particular problems for member-interest organisations. A further development since 2000 has been the enactment of the Companies Act 2006 which, when brought fully into force, will simplify the law relating to private companies generally, including not-for-profit organisations which choose to incorporate.

⁸⁰ *Ibid* Sch 2.

⁸¹ Para 2.2.

⁸² Department of Trade and Industry Company Law Steering Group, *Modern Company Law for a Competitive Economy: Final Report* (2001), Vol 1, paras 4.63-4.67.

Part 3 Problems arising from the current law

3.1 In Part 2 of this Discussion Paper we set out the current law relating to unincorporated associations. We now consider the problems which arise from the treatment of associations as non-entities from a legal point of view. Our preliminary enquiries suggest that some of these problems are not always appreciated by individuals who become members of non-profit making organisations and who may also give their services to the management of the activities of such organisations.

Contracts with third parties

3.2 Since an association has no status in law, liability under a contract purportedly entered into on its behalf is likely to be a personal liability of some or all of the members of the association who have expressly or impliedly authorised it.¹ Depending on the circumstances, that might be all of the members (where, for example, the contract was authorised or ratified at a general meeting), or all of the management committee, or one or more persons (whether office-bearers or not) who assumed the responsibility for entering into the contract. This is unsatisfactory from the point of view of committee members undertaking liabilities on behalf of the club. Such liabilities could be substantial: for example, redundancy payments to former employees, or the cost of statutory repairs to buildings or dilapidations at the termination of a lease. Provided that the committee members act within their express or implied authority, they will have a right of relief against association funds. This may not, however, be sufficient to prevent them from sustaining personal loss. They have no right of relief against other members for anything beyond their respective subscriptions.²

3.3 The situation is also unsatisfactory from the point of view of the other party to the contract, to whom the precise identity of the legal person with whom he is contracting may not be obvious. Where contractual liability rests only on one or more committee members, the other party is reliant upon the credit of those members only and would have no direct recourse against the funds of the association or its other members. The problem is especially acute in relation to employees. The solution adopted by the Employment Appeal Tribunal in *Affleck v Newcastle Mind*,³ namely that an employee of an unincorporated association is employed by the management committee, an entity with no legal status, and its members for the time being, without novation on each change of its composition, is pragmatic but intellectually incoherent. Its application in a claim for damages for breach of contract or redundancy payments which exceed the association's funds has yet to be tested.

3.4 Finally, the situation could be unsatisfactory from the point of view of individual members who may find themselves liable under obligations authorised in general meeting,

¹ Equally, the association cannot itself acquire any contractual rights, which vest instead in individuals.

² *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 (PC).

³ [1999] ICR 852: see para 2.6 above.

even if they were unaware of and/or were opposed to the undertaking of the liability. Members finding themselves in such a situation could protect their position only by resigning from the association, which is unlikely to be their preferred remedy.

Contracts with members

3.5 Similar arguments arise in relation to contracts with association members. We suspect that the current legal analysis,⁴ based upon absence of the association's legal status, is contrary to the perception and expectation of most association members. Once again, the issue would be brought to a head in a case where a member's claim against an association for damages for breach of contract exceeded the association's funds and questions of individual liability of committee members, and of association members generally, would arise.

Liability in delict to third party

3.6 The likelihood of an award of damages exceeding club funds is perhaps greater in the case of a delictual claim by a third party than in the case of a breach of contract, since by its nature such a claim is impossible to quantify in advance of the occurrence of the event giving rise to it. From the point of view of the injured person, there is no logical justification for restricting recovery of damages for, say, negligence merely because the defenders happen to be sued as representing an unincorporated association. The issue is rather whether liability should extend beyond the resources of the individual whose wrongdoing caused the injury to the personal assets of other committee or association members as individuals or, alternatively, to the funds of the association. There is no authority either way in Scots or English law. The answer may depend upon the extent to which members have expressly or impliedly authorised the association activity in the course of which the third party's injury was sustained. Such uncertainty is of itself unsatisfactory. We also consider that it is out of step with public expectation that mere membership of a club or other non-profit making organisation could give rise to unlimited personal liability for a third party claim.

Liability in delict to members

3.7 As discussed above,⁵ it has been consistently held in Scotland and elsewhere in the United Kingdom that no duty of care is owed to an association member by the management committee as representatives of the association. It may be thought to be unfair that a claim for damages for personal injury can succeed or fail depending upon the legal structure of the organisation alleged to have been negligent. It should, however, be noted that the dictum quoted above⁶ from *Harrison v West of Scotland Kart Club* makes clear that it was not simply a technicality of absence of legal personality which resulted in dismissal of the pursuer's action against the club. A partnership – or joint venture – does have separate legal personality, but it was held in *Mair v Wood*⁷ that in questions among themselves, as opposed to questions with third parties, the partners are in the position of principals and not fellow servants. Vicarious liability does not arise among principals, regardless of the presence or absence of legal personality.

⁴ Para 2.7.

⁵ Para 2.12.

⁶ Para 2.13.

⁷ 1948 SC 83 at 90.

Ownership of and title to property

3.8 Title to heritable property is normally held by some or all of the office-bearers as trustees for the members of the association. The effect of such an arrangement is that there co-exist a trust and an association, neither of which has legal personality but the creation of each of which has legal consequences, under the law of trusts on the one hand and under the law of associations on the other. Whilst this somewhat awkward relationship provides a partial solution to the absence of legal personality, it has disadvantages. The composition of an association's management committee is likely to change more frequently than the location of its premises, and so either some form of conveyance⁸ will be required from time to time in favour of incoming office-bearers, or else title to the association's property – or its interest as tenant under a lease – will come to be held by individuals who are no longer office-bearers and perhaps no longer even members. In the absence of contrary agreement, the trustees in whom the property is vested have no right of indemnity against individual members with regard to liabilities incurred *qua* heritable proprietors, although they do have such a right against the association's funds.

Availability of insurance cover

3.9 We understand that unincorporated associations often find it difficult to secure insurance against public liability, employers' liability and other risks at a realistic cost. A report published in 2003 following a study undertaken in England⁹ noted a number of problems which were being experienced by the voluntary sector, including:

- Average insurance premium increases of between 30-100% per annum, and up to 740%;
- Withdrawal of cover, often at very short notice;
- An increasing number of exclusions affecting a wide range of organisations and activities and particularly for care work, youth work and outdoor activities affected by child protection legislation;
- An inconsistent approach by insurers to assessing risks and pricing premiums;
- Unwillingness by insurers to raise their own awareness of the sector's needs, claims history and risk management behaviour and respond accordingly;
- Lack of an accessible and competitive insurance market place.

The view was expressed that many insurers lacked understanding of the sector and as a result were reluctant to provide cover. They preferred to involve themselves with risks that had a large degree of uniformity in terms of the activities undertaken and the processes taking place. It may be that uncertainty as to the legal position, and in particular as to the extent of the liability which they are being asked to underwrite when approached by an office

⁸ Or a deed of assumption and resignation in the form of Schedule B to the Trusts (Scotland) Act 1921. In the case of a trustee *ex officio*, s 45 of the Conveyancing (Scotland) Act 1874 renders unnecessary any form of conveyance to a successor to the office upon which the trusteeship is conferred.

⁹ Home Office Active Community Unit: *Research into Insurance Cover for the VCS in England* (2003): Report by Alison Millward Associates. The report notes that although the research work was undertaken in England, the problems identified were considered to be common throughout the United Kingdom.

bearer of an organisation which has no legal status, is a contributing factor to that lack of understanding. As a consequence, the management committees of many unincorporated associations may be carrying on their activities without a full appreciation of their exposure to liability or indeed, without any insurance cover at all. This is clearly a matter of significance to anyone who requires to take legal action against the representatives of an association.

Conclusions

3.10 Our preliminary view is that the current legal regime applicable to unincorporated associations is unsatisfactory and creates serious financial risks (of which they may be unaware) for the office-bearers, and indeed the members, of non-profit making associations. In some jurisdictions whose common law of associations was based upon English law, there have been statutory interventions by virtue of which clubs and associations have ceased to be treated as legal non-entities. In others a comprehensive "associations law" has been enacted to provide an appropriate corporate vehicle for all types of not-for-profit organisations, including member-interest associations. The jurisdictions of the United Kingdom have been left behind in this respect. We consider that it is time to propose legislative change for Scotland which would accord some form of legal status to clubs and associations. In Part 4 below we discuss a number of possible solutions and in Part 7, we provide a preliminary assessment of the impact of those solutions.

3.11 We recognise that the problems which we have identified in this Part are, to a large extent, drawn from reported case law: that is to say, they are difficulties which have resulted in litigation in Scotland or elsewhere in the United Kingdom. In the course of preparation of this Discussion Paper we have had meetings with a number of interested parties who have shared our preliminary view that the law is in need of reform, but we would welcome further information, especially from those concerned with the operation and management of non-profit making associations, as to whether the current legal status of such associations gives rise to practical difficulties. We therefore invite answers to the following questions:

- 1. Have we correctly identified the practical problems created by the absence of recognition by the law of unincorporated associations as separate legal entities? Are consultees aware of problems additional to those which we have identified?**

- 2. Do consultees agree that there is a need for reform of the law relating to the status of unincorporated non-profit making associations?**

Part 4 Attribution of legal personality to unincorporated associations

Introduction

4.1 It has been observed repeatedly that the difficulties faced by unincorporated associations are caused by their lack of legal personality. The obvious starting point, therefore, in any project to reform the law of unincorporated associations is to consider whether they ought to be accorded legal personality and, if so, under what conditions. The principal consequences of attribution of legal personality to an association would be:

- to create an entity with its own rights and liabilities in contract and in delict, capable of owning property and of suing and being sued in its own name; and
- to relieve the association's members and governing body of at least some of the personal rights and liabilities which are presently attributable to them.

From the point of view of an association's members, and in particular its officials and committee members, there is no obvious disadvantage to the attribution of legal personality to the association. However, the effect of such a change on third parties who have contractual or other relations with the organisation requires careful consideration.

4.2 If legal personality is to be conferred on unincorporated associations, a fundamental decision which has to be made is whether it should be conferred automatically as a matter of law on all associations – or, at least, on all associations which fulfil certain specified qualifying criteria – or whether it should apply only to associations who choose to "opt in". The advantage of a scheme of automatic attribution of legal personality to all unincorporated associations is that it is likely to apply to a much larger proportion of associations than a scheme which depended upon opt-in by registration in a public register or otherwise. It would therefore be more likely to apply to the smaller and less formal associations which we consider would benefit most from the proposed reforms. On the other hand, there are occasions when individuals come together informally to further a common non-profit making purpose with no desire to form an association which the law would recognise as separate from the individuals comprising it, and no need of the advantages which separate legal personality would bring.

4.3 In this Part of the Discussion Paper we discuss the following options for reform:

- a scheme whereby legal personality is acquired optionally by registration of the association in a new public register;¹

¹ Para 4.5.

- a scheme whereby legal personality is acquired optionally without any need for registration but simply by expression of intention to do so in the association's constitutive document;²
- a scheme whereby legal personality is acquired automatically by an association which meets certain specified criteria.³ We discuss various alternative criteria and consider also whether an association which meets the criteria should nevertheless be entitled to opt out of treatment as a legal entity.

4.4 We would make one further preliminary observation before setting out our proposals. Our preliminary discussions with interested parties have made clear to us that those operating in the third sector are anxious, above all, that any reform of the law relating to unincorporated associations should not impose an additional regulatory burden upon them. One of the attractions under the present law of using an unincorporated association to carry on non-profit making activities is the absence of the reporting and other obligations imposed by statutory regimes applicable, for example, to companies. In formulating our suggestions for reform of the law, we have accordingly treated it as a matter of central importance to avoid the imposition of new regulatory requirements on associations which choose not to incorporate.

Optional acquisition of legal personality by registration

4.5 Under some continental European systems, legal personality is acquired by registration in a public register. The German Civil Code affords an option to associations, whose objects are not directed at the carrying on of an economic enterprise, to acquire legal personality by registration in the Register of Associations of the competent District Court.⁴ Many of the provisions of the Code applicable to associations with legal personality are common to profit-making and non-profit-making associations. Each must have a board,⁵ but otherwise it has considerable freedom to regulate its own management by articles of association. Paragraph 31 provides:

"The association is liable for any damage which the board, a member of the board, or other duly appointed representative may, in carrying out his duties, cause a third party, if the act obliges the making of compensation."

On dissolution, the association's property is distributed in accordance with the provisions of its articles, failing which it is divided equally among the members at the time of dissolution.⁶

4.6 Paragraphs 55 to 79 of the Code contain provisions applying specifically to registered non-profit-making associations. They specify certain minimum requirements for the articles of association, and permit registration only if the association has at least seven members.⁷ Upon registration, the designation *eingetragener Verein (e.V.)* ("registered association") is added to the name of the association.⁸ Legal personality is withdrawn if the number of

² Para 4.10.

³ Para 4.12.

⁴ Bürgerliches Gesetzbuch, para 21.

⁵ *Ibid* para 26(1).

⁶ *Ibid* para 45.

⁷ *Ibid* para 56.

⁸ *Ibid* para 65.

members falls below three.⁹ The Code deals briefly in paragraph 54 with associations which have not acquired legal personality by registration as follows:

"Associations which have no legal personality are subject to the provisions relating to partnership. If a member of such an association, acting in the name of the association, enters a transaction with a third party, the member so acting is personally liable; if several members so act, they are liable as joint debtors."

There would appear to be little practical difference between a system such as this, in which legal personality is acquired by registration, and those systems¹⁰ in which non-profit making associations may acquire legal personality by incorporation, described in Part 5 of this Discussion Paper.

4.7 French law also provides non-profit-making associations with the option of acquiring legal personality.¹¹ In order to benefit from legal personality, an association must apply under article 5 of the statute to the local *préfecture* or *sous-préfecture* for registration, providing its name, objects and a copy of its articles. Initially, its administrative powers in relation to funding and property are restricted by article 6 to collecting subscriptions and donations and acquiring only such property as is strictly necessary for the accomplishment of its objects. After a probationary period of three years (with the possibility of earlier application), the association may be recognised by *décret* of the Conseil d'Etat as being of public utility and may thereafter acquire property for investment purposes beyond that which is strictly necessary to achieve its objects. The statute contains no specific provisions regarding contractual or delictual liability. On dissolution, the association's property is distributed in accordance with the provisions of its articles, failing which by agreement of the members in general meeting.¹² The Italian Civil Code likewise provides for associations to acquire legal personality by registration with the local prefecture.¹³

4.8 The disadvantage of a system of voluntary registration in order to obtain legal personality is that, like incorporation, it subjects associations to an administrative burden which they can presently avoid by deciding not to incorporate. Many would choose to remain unregistered and would not benefit from the reforms which we are proposing. Creation and maintenance of a register would have cost implications; it would require to be financed either by central government or by fees charged to registering associations, which may operate as a further disincentive to register. It would be necessary to avoid dual registration of those associations which are charities and already registered by OSCR. One solution to this potential problem could be for all associations registered as charities to be treated as legal entities without the need for a second registration.

4.9 On the other hand, a requirement for registration as a pre-requisite of legal personality would have advantages, not least the facility which it affords to third parties dealing with the association to verify its existence, the details of its objects and the capacity of individuals claiming to act as its representatives. It would also provide an opportunity for official scrutiny of the association's governing documents to check that they comply with any minimum statutory requirements. It might be regarded as desirable that associations whose

⁹ *Ibid* para 73.

¹⁰ For example, those of New Zealand, all Australian states and territories and most Canadian provinces.

¹¹ Law of 1 July 1901 (as amended from time to time).

¹² Law of 1 July 1901, art 9.

¹³ Codice Civile, art 12.

members are, in effect, obtaining the benefit of limited liability without having to go through the process of incorporation and becoming subject to the duties imposed by the Companies Acts, should be required to provide certain minimum details of themselves and their activities in a public register. This may be less so in relation to small associations whose contractual commitments, if any, are of low value, but may be of greater concern in relation to larger associations who own property, engage employees and so forth.

Optional acquisition of legal personality by expression of intention to do so

4.10 As an alternative to public registration, it could be provided that an association acquires separate legal personality by the expression of its intention to do so. An example of this approach is provided by the Swiss Civil Code,¹⁴ under which a non-profit-making association may acquire legal personality simply by expressing such an intention in its articles (though not, presumably, in some other, less formal, document such as a minute of a meeting). The Code contains detailed governance provisions which apply in the absence of specific provision in the association's articles.

4.11 This option shares some of the attractions of a system of public registration, but without the advantage of access to its details for third parties and the corresponding disadvantages of increased cost and administration. It affords an association which does not wish to avail itself of the benefits of legal personality the possibility of opting out, simply by omitting to express the necessary intention to acquire it. This might be seen as desirable by groups of individuals who come together for a discrete purpose with a limited timescale who wish the terms of their relationship to be set down in writing but who do not wish to have any closer legal association with one another, for example because they wish their financial contributions to be kept separate and not pooled.¹⁵

Automatic attribution of legal personality

4.12 As an alternative to conferring an option on unincorporated associations to acquire legal personality, whether through a system of registration or simply by expression of intention, it could be provided by statute that all associations fulfilling certain specified criteria will acquire legal personality automatically. A legislative model providing for the automatic attribution of legal personality to unincorporated associations without the need for incorporation or registration is afforded in the United States by the Uniform Unincorporated Nonprofit Association Act produced by the US National Conference of Commissioners on Uniform State Laws ("NCCUSL"). This model Act was drafted in 1992 and amended in 1996. The 1996 model has to date been adopted in 12 US states and introduced as a Bill in three more during 2007-08.¹⁶ A revised version of the Act, significantly amended from the 1996 model, was approved by NCCUSL in July 2008.¹⁷

¹⁴ Articles 52 and 60.

¹⁵ This result can also be achieved, however, by a system of automatic attribution of legal personality which includes the possibility of express opt-out: see para 4.25.

¹⁶ National Conference of Commissioners on Uniform State Laws - http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-uunaa.asp. Other states have accorded legal personality to unincorporated associations by statutes which are not based upon the model Act, eg California Corporations Code, s 18300 *et seq* (as amended in 2005); Ohio Revised Code, art 1745.

¹⁷ The 2008 Revised Uniform Unincorporated Nonprofit Association Act ("RUUNAA") is reproduced as an Appendix to this Discussion Paper. Unless otherwise stated, references in this Discussion Paper to the US model are to RUUNAA.

4.13 The 1996 model afforded a succinct illustration of legislation attributing legal personality to unincorporated associations for certain specified purposes only, notably for the purposes of "acquiring, holding, encumbering, and transferring real and personal property" and of "determining and enforcing rights, duties, and liabilities in contract and tort". In the 2008 revised model, this attribution for specific purposes is replaced by a general statement that "an unincorporated association is a legal entity distinct from its members and managers"; that is to say, the association is treated as a separate legal person for all purposes. The definition of an "unincorporated nonprofit association" is wide: an unincorporated organisation consisting of two or more members joined by mutual consent pursuant to an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes.¹⁸ The Act thus extends to small, very informal associations. Expressly excluded, however, are trusts, domestic living arrangements, joint tenancies and tenancies in common¹⁹ even if the co-owners share use of the property for a nonprofit purpose, and agreements which provide expressly that the relationship between the parties does not create an unincorporated nonprofit association. "Organisation" is not defined, but a "member" is a person who, under the governing principles of the association, may participate in the selection of persons authorised to manage its affairs or in the development of its policies and activities. Personal liability under contract or tort does not attach merely by acting as a member or manager of the association, but the Act leaves open the possibility of personal liability for a member's own conduct, including negligence and fraud.²⁰ Distribution of funds to members or managers is expressly prohibited except, in certain specified circumstances, on winding up.²¹

4.14 Other provisions in the Act deal with:

- authority to transfer title to real property;
- the association's capacity to sue and be sued in its own name; and
- territorial jurisdiction over the association.

In addition, the 2008 revised model, unlike the earlier version, contains detailed internal governance rules most of which are "default" provisions which apply unless the association's governing principles provide otherwise. These deal with matters such as:

- voting procedures;
- admission, expulsion and resignation of members;
- election of managers;
- rights and duties of members and managers;
- dissolution, winding up and merger.

¹⁸ RUUNAA, s 2(8). In the model, the word "two" is in square brackets, suggesting that states using the model may prefer to insert a higher minimum number of members.

¹⁹ These expressions would be covered in Scots law by joint ownership and common ownership (with or without a survivorship destination).

²⁰ RUUNAA, s 8.

²¹ *Ibid* s 26 and s 29.

4.15 As already noted, a significant feature of the US model Act in its original form was that a nonprofit association was treated as a legal entity separate from its members only for the purposes specified in the Act. The apparent implication is that there were other purposes for which it was not a separate legal entity, and in respect of which the common law applicable to associations would continue to apply. Although it is not readily apparent what other purposes were not intended to be included, this approach suggests that the drafters of the model Act assumed that wherever a statute does not specify the legal characteristics of an association with separate personality, the existing law of associations will continue to apply. If that were not so, any legislative scheme attributing legal personality to unincorporated associations would require to include a comprehensive set of governance provisions akin to those contained in the Companies Acts. For example, assume that an association fulfils whatever minimum criteria are selected as requirements for treatment as a separate legal entity.²² It does not, however, make specific provision in its constitutive document for voting rights at meetings in respect of issues of internal governance (other than election of office bearers). If (contrary to the approach apparently taken in the 1996 US model) the correct legal analysis were that legislation conferring legal personality on the association removed it from the scope of the common law rules applicable to associations without legal personality, it could be argued that unless the legislation also provided an express default rule for voting rights at meetings, the association (being a statutory creation) had no rule to apply at all.

4.16 We are not, however, persuaded that this argument is correct. To accord legal personality to associations would not, in our view, automatically disapply the existing law of associations in the same way as would occur if an association became a body corporate. It seems to us that there would be dangers in the earlier US approach, if applied in Scotland, in that there are types of liability, such as unjustified enrichment, which do not fall within the categories of contract and delict. Our provisional view is that it is preferable to provide in general terms for the association to be treated as a separate legal entity, as RUUNAA now does. If desired for the sake of clarity, however, legislation could provide expressly for existing rules of law relating to associations to continue to subsist except where inconsistent with the provisions of the Act.²³

4.17 Another useful comparative example is provided by the South African *universitas*. The *universitas* is a common law corporate body which is recognised as a separate legal entity. In order to be recognised as a *universitas*, an association must meet three conditions:²⁴

- (i) it must have perpetual succession, that is, it must continue as an entity despite changes of membership within it;
- (ii) it must hold property to which no member has rights by reason of membership; and
- (iii) it must not have as its object the acquisition of profits for its individual members.

²² See paras 4.18 to 4.26 for a discussion of minimum criteria.

²³ S 3(a) of RUUNAA provides that "principles of law and equity supplement this [act] unless displaced by a particular provision of it".

²⁴ B Bamford, *The Law of Partnership and Voluntary Association in South Africa* (3rd ed, 1982), pp 126-131; see also *Interim Ward S19 Council v Premier, Western Cape Province & Others* 1998 (3) SA 1056 (C).

No registration or other State authorisation is necessary for an association to become a *universitas*; nor is it necessary for the association to elect, in its constitution, to have legal personality. As a legal entity, it may enter into contracts and sue or be sued in contract or in delict in its own name. Unless the members have agreed to the contrary, a third party has no recourse for payment beyond the assets of the *universitas*.²⁵ Because the *universitas* is a fictional legal person, it must sue and be sued through a representative with the requisite authority such as its committee or an appointed agent (known as a *syndic*). A person intending to institute proceedings against a *universitas* is entitled to obtain, by court action if necessary, the names and addresses of committee members or of all members.²⁶

Minimum threshold for automatic attribution of separate legal personality

4.18 As the law currently stands, the categorisation of an organisation as an unincorporated association carries only negative legal consequences: absence of legal personality and thus of all the capacities attributable to legal persons. Under a scheme which confers legal personality automatically, associations would be clothed with some or all of the attributes of other legal entities. This raises the question whether an association ought to fulfil certain minimum criteria before it can appropriately be regarded as a separate legal person.

4.19 We have already observed²⁷ that the US model Act applies to any organisation consisting of two or more members joined by mutual consent for a common, nonprofit purpose. This carries the implication that two or more individuals may, perhaps to their surprise, find themselves treated as an association with separate legal personality when all they have done is agree to co-operate for some limited purpose. It is not possible to draw an analogy here with the law of partnership. Although the relationship of partnership arises by operation of law, the statutory definition²⁸ includes the positive requirement that the persons concerned be carrying on a business in common with a view of profit. In the case of associations whose common feature is the negative one that they are *not* carrying on business for profit, it seems that something else should be required before the individuals concerned find themselves in a relationship which has legal significance. To take an extreme example, the definition in the US model Act could conceivably apply to four individuals who meet on a regular basis for a game of golf. It is not our intention that the law should confer the attributes of legal personality in such circumstances, where the individuals concerned would clearly not want them or derive any benefit from them.

4.20 Among the threshold criteria which could be applied are the following:

- (i) A minimum number of members. Although the US model Act requires only two members, some other jurisdictions require more. For example, as discussed above in the context of optional personality,²⁹ the German Civil

²⁵ *Morrison v Standard Building Society* 1932 AD 229, 238.

²⁶ Bamford, *The Law of Partnership and Voluntary Association in South Africa*, pp 208-9.

²⁷ Para 4.13.

²⁸ Partnership Act 1890, s 1(1).

²⁹ Para 4.6.

Code requires seven members, and legal personality is withdrawn if the number falls below three;³⁰

- (ii) A minimum asset value;
- (iii) A minimum annual income or turnover;
- (iv) Adoption of a constitutive document containing certain essential provisions concerning the association's objects and internal governance.

4.21 Of these possibilities, (i), (ii) and (iii) are wholly objective and would confer or withhold status as a separate legal entity irrespective of the wishes or intentions of the members of the association. In contrast, (iv) depends to some extent upon the intention of the association members to opt into the legal regime of separate personality. The adoption of a constitutive document would be regarded as demonstrative of an intention to pursue a specific activity or goal in a serious and organised manner, and the attribution of legal personality would follow, as a matter of law, from that intention.

4.22 Our preliminary view is that the use of purely objective criteria is unlikely to produce a satisfactory result. Any threshold based upon minimum membership, or upon asset value or turnover would be arbitrary and would be likely either to exclude many small organisations which would benefit from the attributes of legal personality or to sweep in some informal arrangements among individuals who have no desire or need for a relationship with legal consequences. We consider that, even in a scheme of automatic attribution of legal personality, the intention of the members of the association is of great importance. We therefore consider possibility (iv) in more detail.

Acquisition of legal personality by adoption of constitutive document

4.23 Under this model, an association would acquire legal personality upon adoption of a constitutive document containing certain minimum essential provisions. These would be specified by statute and might include, for example:

- the association's name;
- the association's address (in Scotland);
- the association's objects;
- criteria for membership;
- provision for appointment and/or election of office bearers and, where appropriate, a governing body such as a management committee;
- the duties and scope of authority of office bearers and members of the governing body;
- the formalities for alteration of the constitutive document of the association;

³⁰ Luxembourg requires three (Law of 21 April 1928 *sur les associations et les fondations sans but lucratif*, art 2 (3)). The Greek Civil Code (art 78ff) requires 20 members.

- provision for disposal of the assets of the association on dissolution.

4.24 Under this proposal, the adoption of a formal constitutive document is taken to be indicative of a common intention, shared by the association's members, to work together towards a common, non-profit goal, whether that goal be charitable, non-charitable but for public benefit, or member-interested. No express statement of the members' intention that the association should acquire legal personality is required. Instead, it follows as a matter of law that an association meeting the statutory requirements is a separate legal entity, in the same way as persons carrying on business together with a view of profit are treated by law as partners without any express statement by them of intention to be so treated. The advantage of this option is that it would make the attributes of legal personality available to those associations which need it, without the administrative burden of registration in a public register, while excluding less formal arrangements among individuals. It may be argued that if the production of a written constitution is appropriate for the implementation of an association's purposes, then it is also appropriate to treat it as a separate entity as a matter of law.

4.25 Assuming that treatment as a separate legal entity is regarded as beneficial, it may be that making such treatment dependent upon adoption of a written constitutive document will act as an incentive to some associations to adopt a written constitution who would not otherwise have done so. We would regard such an effect as a good thing, especially as good model documents are freely available online. Anecdotal evidence suggests that some associations begin to consider the need for a written constitution only when problems arise, by which time it may be too late to resolve them in an orderly fashion.

Ascertainment of time of commencement

4.26 For various reasons it could be necessary to determine precisely when the separate legal entity came into existence. This should not be problematic, regardless of which minimum threshold were to be selected. If objective criteria were applied, the association would begin to exist when those criteria were satisfied. If acquisition of legal personality were dependent upon adoption of the necessary written constitutive document, then adoption would fix the time of commencement.

Opting in or out of treatment as separate legal entity

4.27 There may still remain cases where a group of individuals carrying out a common non-profit-making purpose consider it desirable, for the sake of good order, to set out in writing the basis upon which they are acting together but who do not wish to be regarded in law as an entity separate from the individual participants. For example, they might not wish to create a pool of funds to meet the liabilities of the association, but may prefer to agree to contribute funds personally if and when required. Such circumstances could be addressed by providing in any new legislation for a right of express opt-out from treatment as a legal person.³¹

4.28 It will be appreciated that there are similarities between, on the one hand, this model providing for the automatic attribution of legal personality except if the association members choose to opt out of such treatment and, on the other hand, the Swiss approach, described

³¹ Cf RUUNAA, s 2(8)(E).

above,³² of opting into treatment as a separate legal entity by inclusion of an appropriate expression of intention in the association's constitutive document. The choice between these two approaches depends upon whether it is considered more important

- (a) to attribute legal personality automatically to associations which meet the statutory criteria (unless they expressly choose not to be treated as separate legal entities); or
- (b) to attribute legal personality only to entities which make a positive decision to be so treated.

We would welcome comment on which approach is considered preferable. We would also welcome comment on whether, if the second alternative is preferred, the option of "opting in" to separate legal personality should be available only to associations which meet statutory minimum criteria or, alternatively, whether any association, however informal, should have this option available to it.

4.29 We invite responses to the following questions:

- 3. (a) **Should unincorporated associations which meet a minimum specified criterion be accorded separate legal personality?**
 - (b) **If so, should the association be accorded separate personality generally or only for certain purposes specified by statute?**
- 4. **Should the criterion for attribution of separate legal personality be:**
 - (a) **minimum number of members;**
 - (b) **minimum asset value;**
 - (c) **minimum annual income or turnover;**
 - (d) **adoption of a constitutive document containing specified minimum provisions;**
 - (e) **some other criterion?**
- 5. **If separate legal personality were to be accorded to associations upon the fulfilment of a criterion such as number of members, minimum asset value or minimum annual income or turnover, what should the threshold be?**
- 6. **If separate legal personality were to be accorded to associations which adopt a constitutive document containing certain minimum provisions, what should those provisions be?**
- 7. **As an alternative to automatic attribution of legal personality, should attribution of legal personality be optional and dependent upon either**

³² Para 4.10.

- (a) registration in a new public register; or
 - (b) an expression of intention in the association's constitutive document to be treated as a separate legal entity?
8. If either of alternatives 7(a) or 7(b) were to be preferred, should the availability of the option depend upon the association also fulfilling a statutory criterion and, if so, what should that criterion be?

Consequences of attribution of legal personality

4.30 Any legislative reform which attributes legal personality to associations without the requirement of registration in a public register and without statutory controls such as those imposed, for example, on limited liability companies and on charities, must strike a balance between protection of the association's office bearers and members on the one hand and the protection of third parties dealing with the association, voluntarily or otherwise, on the other. We are conscious of the need to ensure that the conferring of legal personality cannot be used as a device to evade liabilities incurred to third parties. The policy underlying our proposals is that in situations where separate personality is being exploited in this way, the benefit conferred by it should be withdrawn, leaving the individuals concerned personally liable as they are under the current law.³³

Contractual obligations

4.31 One of the most significant consequences of attributing legal personality to an association is that it would be capable of being a party to contracts, including contracts with its members, and could be liable, both to members and to third parties (including its staff), for breach of contract. The question therefore arises of the extent to which members, including committee members, are relieved of liabilities which presently fall upon them. The US revised model Act addresses this by providing, on the one hand, that

"A debt, obligation, or other liability of an unincorporated nonprofit association, whether arising in contract, tort or otherwise... does not become a debt, obligation, or other liability of a member or manager solely because the member acts as a member or the manager acts as a manager",³⁴

but, on the other hand, that

"A person's status as a member or a manager of an unincorporated nonprofit association does not prevent or restrict law other than this act from imposing liability on the person or the association because of the person's conduct".³⁵

A manager or member is not, therefore, exempted from liability for his own conduct. The existence of such liability would continue to be determined by the general law of contract. Thus, for example, a member would incur personal liability:

- where he failed to disclose to the other contracting party that he was acting on behalf of an association;

³³ Para 4.45.

³⁴ RUUNAA, s 8(a).

³⁵ *Ibid* s 8(b).

- where he exceeded his actual or apparent authority; or
- where he induced the contract by a fraudulent or negligent misrepresentation as to the creditworthiness of the association.

In all such cases, the other party to the contract would be in the same position, in terms of protection from the consequences of a breach of contract, as he is under the present law.

4.32 Where a representative of an association properly disclosed his agency status prior to entering into a contract, the rights of the other contracting party would be enforceable only against the association. Any personal liability of committee members or of ordinary members which arises under the current law simply by virtue of membership would be removed. The position of the party contracting with the association (such as a bank providing credit facilities) would be similar to that of a person contracting with a corporate body: the party's entitlement to payment or to damages in the event of a breach of contract would be exercisable only against the assets of the association. It would, of course, be open to such a party to make inquiries as to the association's financial situation and to seek any personal guarantees which might be considered appropriate before supplying goods or services to the association.

Delictual obligations

4.33 Similarly, with regard to delict, an association member would remain liable for his own personal fault. The practical change is that if he was an employee of the association, or otherwise acting on behalf of the association when he committed the wrongful act, then the association would also be vicariously liable. On the other hand, members of the association who were not personally liable would cease to be co-principals in relation to the wrongful act with two consequences:

(i) Firstly, the risk of unlimited personal liability being imposed on all members would be removed: in exchange, the pursuer would obtain a direct right of action against the association and its assets. Thus, for example, a member of the public who is injured when she slips on a wet floor during a fund-raising event organised by a charity which is an unincorporated association would have a right of action against the association if the accident was caused by the negligence of an individual acting on behalf of the association. She would also have a right of action against the individual in question but not against other committee members or association members either in a representative capacity or as individuals.

(ii) Secondly, the argument that where a member sues the association in delict he is suing *inter alia* himself could no longer be sustained. So, for example, on the facts of *Prole v Allen*,³⁶ the plaintiff would cease to be disqualified from suing the club as vicariously liable for the negligence of the club steward who failed to light the steps because she would no longer be a co-principal so far as the club's duties were concerned. She could still also sue the steward as an individual in respect of his own conduct. Similarly, on the facts of *Harrison v West of Scotland Kart Club*,³⁷ the club could (as a matter of law) be liable for the negligence of a person acting on its behalf

³⁶ [1950] 1 All ER 476; see para 2.12.

³⁷ 2004 SC 615; see para 2.13.

who failed adequately to protect competitors from injury on collision with the wall. The pursuer would no longer be disqualified from suing because he was a co-principal. The individual or individuals concerned might, once again, remain personally liable.

4.34 In practice, of course, associations may wish to carry insurance against liability to third parties, to employees and to members. If the law were to be amended by providing for attribution of legal personality to unincorporated associations, such clarification might assist in encouraging insurers to offer cover against risks such as public liability, as one element of uncertainty as to the nature and extent of the risk assumed would be removed.³⁸ This would obviously be beneficial to those associations who are currently unable to secure cover, as well as to third parties who find it necessary to raise actions against them, and would have the further, incidental advantage of expanding the market for insurers.

Acquisition and disposal of property

4.35 The next consequence of attributing legal personality to an unincorporated association would be that it could hold property, including heritage in its own name, and there would no longer be any need for property to be held by individuals as trustees for the association. This would remove the need to transfer ownership when individual trustees die or, for whatever reason, no longer wish to be trustees of the association's property.

4.36 Rules would be required for execution of documents on behalf of the association. At present, the Requirements of Writing (Scotland) Act 1995 makes no provision for execution of documents on behalf of an unincorporated association. It does, however, make provision in Schedule 2, paragraph 5 for execution of documents on behalf of a body corporate other than a company or local authority. Paragraph 5(2) states (except where an enactment provides otherwise) that a document is signed on behalf of a body corporate if signed on its behalf by:

- a member of the governing body (or, if there is no governing body, by a member of the body itself);
- the secretary of the body by whatever name he is called; or
- a person authorised to sign the document on behalf of the body.

The remaining sub-paragraphs of paragraph 5 adapt other provisions of the Act (such as presumptions as to the grantor's signature or the date or place of subscription) for application to bodies corporate. These rules would appear to provide an appropriate model for rules of execution of documents on behalf of unincorporated associations with legal personality.

4.37 The US model Act to which reference has already been made,³⁹ provides an optional mechanism for registration of a "statement of authority" to transfer an estate or interest in real property on behalf of a non-profit-making association. The statement requires to be filed at the title registration office in the county in which a transfer of the property would be

³⁸ For a summary of the difficulties currently faced by third sector bodies in obtaining insurance, see para 3.9.

³⁹ See paras 4.12 to 4.16.

registered, and must contain certain specified particulars which identify clearly both the association and the authorised signatory. The US model provision is open to the criticism that the authenticity of the "statement of authority" may itself be questionable: it might, for example, have been registered fraudulently. In this regard, the presumptions in the Requirements of Writing (Scotland) Act 1995, already discussed, would appear to give greater protection to parties contracting with the association than would a system of registration of a "statement of authority". We doubt, therefore, whether there is much advantage in the creation of such a facility in Scotland. If, however, such a system (whether optional or compulsory) were considered desirable, there would be no reason why it could not be introduced by a statutory provision requiring or facilitating, for example, registration of a statement containing the necessary particulars in the Books of Council and Session.

9. Is there merit in providing by statute for registration in a public register of a "statement of authority" to transfer heritable property?

Raising and defending legal proceedings

4.38 An association with legal personality would sue and be sued in either the sheriff court or the Court of Session in its own name, without the need for addition of the names of any office bearers. The present difficulty regarding enforcement of sheriff court decrees against an association alone would not arise as the decree would be enforceable against the association as a legal entity. We are not aware that the absence of a public register containing details of the addresses of unincorporated associations has created any practical difficulty in commencing proceedings against an association. In a case where a person wishing to sue an association was aware only of the whereabouts of an individual office-bearer or other representative of the association, the necessary information could be obtained by means of an application to the court⁴⁰ for an order to disclose the necessary details.⁴¹ Alternatively, legislation could provide (as in the case of a South African *universitas*) for service to be effected in such circumstances on an office-bearer of the association.

Application of the ultra vires doctrine to an association with separate legal personality

4.39 An unincorporated association with separate legal personality would be subject to the *ultra vires* doctrine in the same way as other non-natural persons. In the absence of provision to the contrary, this would have the following consequences:⁴²

- acts of the association which fell outside its objects would be void (not merely voidable) and incapable of ratification by members;
- the authority of the office bearers would be limited by the association's objects;
- an *ultra vires* act by the office bearers might constitute a breach of duty to association members, exposing them to personal liability to members.

⁴⁰ Under the Administration of Justice (Scotland) Act 1972, s 1(1A).

⁴¹ Which, according to our proposals, would be contained in the association's constitutive document.

⁴² Cf *Palmer's Company Law*, Pt 2, para 2.603, discussing the *ultra vires* doctrine in relation to companies at common law.

So far as companies are concerned, the first of these consequences (though not the others) is removed by section 35(1) of the Companies Act 1985⁴³ which provides that the validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum. This is qualified, however, with regard to a company which is a charity⁴⁴ by the Companies Act 1989, section 112(3) which disapplies section 35(1) except in favour of a person who either (a) gives full consideration in relation to the act in question and does not know that the act is *ultra vires* or (b) does not know at the time of the act that the company is a charity.

4.40 Full application of the common law *ultra vires* doctrine to associations with separate legal personality would have the consequence that third parties would be at risk of finding that contracts into which they had entered were void *ab initio* and incapable of ratification. This would be likely to lead to the drafting of lengthy objects clauses and to repeated demands by third parties for sight of the association's constitutive document prior to entering into any contract with the association. It is less obviously objectionable that office bearers would remain accountable to members for any breach of duty consisting of acting outwith the association's objects. Appropriate restriction of the common law doctrine could be achieved by adapting some or all of the Companies Act provisions referred to above. One question is whether the legislative qualification in relation to companies which are charities should be imported, either (a) in relation to associations which are charities or (b) in relation to all associations. It would seem logical at least to equate the position of unincorporated charities with corporate charities. There also seems to be a good case for importing the qualification in relation to all associations: if the office bearers of any non-profit making association were to enter into an *ultra vires* contract with a third party for less than full consideration, the association members would appear to be more deserving of protection than the third party.

4.41 A distinction must be drawn between the *objects* of an association on the one hand and the *powers* of its governing body which may be exercised in order to carry out these objects on the other. An example of an object is the operation of a drop-in day centre; an example of the exercise of a power is entering into a lease of suitable premises in which to operate the day centre. In contrast to objects, we think that it might be helpful for legislation to confirm that an association's powers are not limited, except as otherwise provided by its constitutive document. For example, the US revised model⁴⁵ states that:

"An unincorporated nonprofit association has the same powers as an individual to do all things necessary or convenient to carry on its purposes".

This could afford a succinct and appropriate default rule.

4.42 We invite responses to the following questions:

10. (a) **Should the effect of the *ultra vires* doctrine be restricted in relation to the acts of associations with separate legal personality in the same way as it is in relation to acts done by companies?**

⁴³ Repealed and replaced by the Companies Act 2006, s 39(1) (expected commencement date 1 October 2009).

⁴⁴ Defined as a body entered in the Scottish Charity Register; there are parallel provisions for England and Wales in the Charities Act 1993, s 65(1).

⁴⁵ S 5(c). For a discussion of the US model Act, see paras 4.12 to 4.16.

(b) If so, should the qualification of that restriction which applies to companies which are charities also apply (i) to associations which are charities or (ii) to all associations?

(c) In the absence of any restriction in its constitutive document, should an association be granted by statute the same powers as an individual to do what is necessary or convenient to carry out its objects?

Distribution of assets on winding up

4.43 In the absence of agreement or statutory provision to the contrary, the assets of an association with legal personality would fall to be distributed among members at the time of dissolution, presumably on a per capita basis.⁴⁶ This may or may not be a desirable outcome. Where the association has been carrying on a "member-interested" purpose such as a sports club or a members' club, distribution of assets among members on dissolution does not seem inappropriate. On the other hand, where the association has been carrying on a public benefit – albeit non-charitable – purpose, such as political campaigning, and has been funded by members and, perhaps, by non-members in furtherance of that purpose, it seems less appropriate to allow a windfall benefit to those individuals who remain members at the time of dissolution.

4.44 A well-drafted constitutive document will provide for disposal of an association's funds on dissolution. If, therefore, our proposal to confer legal personality only on associations which adopted a constitution including certain minimum provisions were to be followed, this difficulty would resolve itself if provision for disposal of funds on dissolution were included among those specified as necessary. If some other minimum criterion for legal personality were to be adopted, it would be necessary to provide by statute for entitlement to the association's funds on dissolution. This would not be altogether satisfactory because the desirable method of disposal would vary significantly from one association to another. If, however, a statutory default rule had to be stated, it could be argued that since so many non-profit associations are created for public benefit, the rule should provide for the application of association funds for a public benefit purpose similar to the association's objects. On the other hand, the view might be taken that the most appropriate default rule would allow distribution among members per capita, leaving it to public benefit associations to adopt constitutions providing otherwise.

4.45 One matter of concern could be that an association owing money to creditors, and with funds sufficient to meet its debts, could be dissolved and its assets distributed to members, thereby defeating the creditors' claims. In such circumstances the existing law relating to gratuitous alienations would permit a trustee on the sequestrated estate of the association to recover funds from members to the extent to which they have received or benefited indirectly from the distribution.⁴⁷ Where, on the other hand, the funds have been disposed of for a public benefit purpose, it might not be regarded as appropriate to allow

⁴⁶ Distribution among members could not take place with regard to an association which has been registered as a charity and thus meets the "charity test" in the Charities and Trustee Investment (Scotland) Act 2005, s 7, which will not be met if the association's constitution allows it to distribute its property (on being wound up or at any other time) for a purpose which is not a charitable purpose. This is, therefore, a situation where there would necessarily be agreement to the contrary.

⁴⁷ Bankruptcy (Scotland) Act 1985, s 6(1)(c) and s 34, and the common law.

such funds to be recovered. If not, the creditor could be given a right exercisable against the persons who authorised the dissolution which defeated his claim, which might (depending upon the circumstances of the case) either be the governing body or the membership as a whole.

Insolvency

4.46 It was noted above⁴⁸ that despite the absence of legal personality, unincorporated associations may be sequestrated. Bodies corporate which are not companies registered under the Companies Acts may likewise be sequestrated, as may partnerships.⁴⁹ There is therefore no difficulty in principle with the concept that an unincorporated association upon which legal personality has been conferred may be sequestrated and indeed it seems that current legislation would accommodate this without the need for amendment.

4.47 We invite responses to the following questions:

11. Is there a need for a statutory "default" rule governing the distribution of an association's assets on dissolution and, if so, should that rule provide for

(a) distribution of the assets equally among members; or

(b) application for a public benefit purpose similar to the objects of the association?

12. Where an association is dissolved and funds are disposed of while a creditor of the association remains unpaid, should the creditor be entitled to recover the debt from members

(a) to the extent that they have received or benefited indirectly from the distribution of association funds; or

(b) to the extent that they have authorised a distribution of assets other than to members

which, in either case, had the effect of defeating the creditor's claim against the association in whole or in part?

An alternative approach: rights and duties without separate legal personality

4.48 The express conferring of legal personality is not the only means which could be adopted of conferring certain capacities on unincorporated associations. The desired capacities could simply be specifically conferred, as has been done in the case of trade unions and employers' associations.⁵⁰ By this means, unincorporated associations could be given capacity to contract and to sue and be sued, in contract or delict or otherwise, without being granted the "open-ended" status of legal personality. This might be thought to be an

⁴⁸ Para 2.17.

⁴⁹ Bankruptcy (Scotland) Act 1985, s 6(1)(b) and (c).

⁵⁰ See para 2.24.

adequate and prudent means of addressing the most serious difficulties faced by unincorporated associations under existing law.

4.49 Such an approach would, however, have disadvantages. It would leave some of the existing problems, such as holding title to property, unresolved. It would leave open the question whether by conferring such capacities the law has *ipso facto* conferred the status of a legal entity on associations to which it applied, a matter which has yet to be resolved with regard to trade unions.⁵¹ It is not readily apparent that there are disadvantages in the more straightforward approach of conferring legal personality, albeit for specific purposes, which would be removed by this more cautious approach. However, we would welcome views in response to the following question:

- 13. Should unincorporated associations be granted certain legal capacities, for example, to contract and to sue and be sued, without attributing legal personality to them?**

Loss of legal personality

4.50 There are likely to be circumstances in which an association should lose its separate legal personality otherwise than by being formally dissolved. These may include the following.

Breach of minimum qualification conditions

4.51 Where, as we have suggested, statutory minimum criteria (such as a minimum number of members) are specified for recognition as a separate legal entity, it follows that a future failure to continue to meet those criteria (or perhaps different criteria, such as a lower minimum number of members⁵²) should result in the loss of legal personality. If, therefore, the qualification requirement were to be the adoption of a constitutive document containing certain specified minimum provisions, an amendment to the document which removed any of those provisions would result in loss of the association's legal personality, and the revival of the personal liabilities of office-bearers and members at common law in relation to existing as well as future liabilities. Since the association's governing body and members are the greatest beneficiaries of according legal personality to an association, it seems reasonable that they should be responsible for ensuring that they do not lose it by their own actions.

Express agreement

4.52 Again, if it is permissible to "contract out" of separate legal personality when an association is formed, it should, logically, be possible to contract out at any future time, with the same consequences regarding revival of personal liability.

Inactivity

4.53 A more controversial issue is whether separate legal personality should be lost if the association is inactive for a specified period of time (such as, say, five years). Unlike a dormant company which at least has to confirm its continuing existence annually, an

⁵¹ See the discussion at para 2.25.

⁵² See para 4.20.

association could simply vanish without any formal process of dissolution. One might take the view that the legal person should not be regarded as continuing to exist in these circumstances.

4.54 Our preliminary view is that there is no need to specify inactivity as a means of loss of personality. If the association remains undissolved then, even if it is inactive, there is no obvious mischief in treating it as continuing to exist as an entity. An association may be formed with the purpose of acting only if a specific problem arises, and it would be artificial to regard it as a new legal person each time it was reactivated. An association at the other end of the scale of durability, formed for a specific, finite purpose, might well be formally dissolved when that purpose was achieved, but even if it was not, its continuing existence as a legal entity does not appear to do any harm. There may indeed be advantages in so far as ownership of assets such as dormant bank accounts would remain clear. Continuing existence might also make it more difficult for a member who was minded to appropriate association property to himself to argue that title had ceased to vest in the association.

Loss of "identity"

4.55 It is necessary also to address another, related question: can an association with legal personality become a different association – and hence a different legal person – as a consequence of changes to its objects or composition? In other words: are there circumstances in which an association with legal personality continues to exist but ceases to be the same association?

Example

The members of a tennis club, which meets the criteria for separate legal personality but whose membership has fallen to an unviable level, vote unanimously in general meeting to alter the objects of the club with a view to applying for registration as a charity for the relief of poverty in deprived urban areas in Scotland. The club's tennis court is sold and an office acquired. The balance of the proceeds of sale is retained to fund the new charitable activities. In due course the name of the club is changed to reflect its new objects, and its constitution is further substantially amended to comply with the conditions for registration as a charity, including the insertion of a prohibition on distribution of funds among members on dissolution. The association's application for registration as a charity is accepted by OSCR. Several months later, a creditor claims payment for catering supplied at the tennis club's (sparsely attended) gala day the previous summer. Two years later, a member of the public claims damages for an injury sustained when she tripped and fell during the same gala day. Is the charity liable to meet these claims?

4.56 The situation is not analogous to that of a company incorporated under the Companies Acts. Although a company may change its name and its objects, it has a unique identifying number which ensures that, no matter how radical the changes may be, it undoubtedly remains the same legal person. An unincorporated association has no equivalent unique identifying feature. In the example above, the newly-created charity may meet all of the specified statutory criteria for recognition as a separate legal entity but, even so, should it be regarded in law as the same entity as the tennis club? It seems unjust that a creditor should lose his claim through circumstances beyond his control, despite there being funds available in the charity to meet it. Difficulties could also arise under the TUPE

Regulations in relation to the rights of association employees if the club and the charity were treated as separate persons and reliance had to be placed upon this being a transfer of "an economic entity which retains its identity".⁵³ An analogy might also be drawn with the situation in which the assets of a partnership are transferred gratuitously to another firm: in such a case, in contrast to the position where the transfer is for value, the transferee firm would be held to assume the transferor's liabilities.⁵⁴ On the other hand, it might be regarded as unnecessarily artificial to regard an organisation as continuing to be the same legal person when nothing remains of its original identity.

4.57 We invite responses to the following questions:

14. **What are the circumstances, other than formal dissolution, in which legal personality should be lost by an unincorporated association?**
15. (a) **Should an association with separate legal personality be capable of losing its identity (without losing personality) so as to become a different legal person?**
 - (b) **If so, in what circumstances?**

Large associations: an additional registration requirement?

4.58 In the discussion above, voluntary registration and adoption of a written constitutive document have been presented as alternative minimum thresholds of entitlement to separate legal personality. The principal advantage of the latter approach is to enable associations, and in particular small associations, to obtain the benefits of legal personality without having to undertake the unnecessary expense and inconvenience of a process of public registration. But it may be thought less desirable for this advantage to be made available to larger associations. As matters stand, such associations can avoid the inconveniences of not being treated as a legal entity by incorporating as, for example, a company limited by guarantee. It may be reasonable to expect an organisation which, say, owns heritable property or engages a significant number of employees to do so. A possible consequence of our reforms is to remove the incentive to incorporate, since the conferring of legal personality on unincorporated bodies will, in effect, bring the benefits of limited liability without the need for incorporation. This would make it possible for quite large organisations to avoid the degree of openness to public scrutiny which is the consequence of incorporation under the Companies Acts. For example, title to land could be taken in the name of "The East Lothian Pictish Society" without there being any public record of the members, managers, objects or financial affairs of the land owner. We would welcome comment on whether this would be regarded as problematic, and whether there is a need for statutory provisions requiring disclosure of the identity of the individuals responsible for management of such an association.

4.59 If the combination of separate legal personality and a lack of publicly available information were regarded as a problem, one solution might be to require registration, in a

⁵³ Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246), reg 3(1). See para 2.6 above and also *Dr Sophie Redmond Stichting v Hendrikus Bartol* [1992] ECR I-3189.

⁵⁴ *Hedde's Exrx v Marwick & Hourston's Tr* (1888) 15R 698. For an example of the opposite situation, ie where liabilities are not assumed by the transferee because the transfer is for value, see *Ocra (Isle of Man) Ltd v Anite Scotland Ltd* 2003 SLT 1232 (OH).

register to be created, of those associations which fulfil a specified criterion such as ownership of heritable property, ownership of assets generally in excess of a specified value, or annual turnover in excess of a specified amount. Such associations could be required to provide information such as names of office bearers, objects, geographic address etc. They might also be required to file annual returns. The beneficial effect of these requirements would be to remove the disincentive for such associations to incorporate. The difficulties created by such a scheme are, however, readily apparent:

- A new register would require to be created and maintained by an appropriate public authority. It may be, however, that an online register could be created which would be easy to use and which would not be expensive to create and maintain. Presumably the expense to the public purse would be recovered in the form of fees charged to associations which are obliged to register.
- The criterion for registration would have to be defined.
- A sanction for failure to register would have to be imposed. This could take the form of a fine or, alternatively (or in addition), the imposition of personal responsibility on the association's office bearers for debts and other liabilities incurred during the period of failure to register.

4.60 Alternatively, one could, without creating a new register, disqualify certain large unincorporated associations from the benefit of limited liability, thereby removing the disincentive for such associations to incorporate. For example, the legislation could provide that the members of an association with assets (or turnover) in excess of a specified threshold would be liable as cautioners for the debts for which the association becomes liable in the year in which the threshold is exceeded. Such a provision would have the advantage that sanctions to enforce it would not be needed. The disadvantage would be that associations near the threshold might move in and out of limited liability from year to year. It might also be difficult for third parties with claims against the association to ascertain whether members were liable as cautioners or not.

4.61 We invite comment on the following questions:

- 16. Should there be created a register in which large unincorporated associations meeting certain specified criteria are required to register and, if so:**
 - (a) What should those criteria be?**
 - (b) What should the sanction be for failure to register?**
- 17. Alternatively, should a large association which exceeds certain specified criteria automatically lose its separate legal personality?**

Rules of internal governance

4.62 We have suggested the adoption by an association of a constitution including certain minimum provisions as one possible threshold for treatment as a legal entity. Regardless of whether this is regarded as the most appropriate threshold, the question arises as to whether any new legislation should go further and include a set of default rules of internal

governance which would apply to all associations in the absence of agreement to the contrary. This is, in effect, what the Partnership Act 1890 does for unincorporated associations formed with a view to making profits. The US model Act reproduced in the Appendix to this Discussion Paper affords an example of legislation containing default internal rules.

4.63 Devising a set of model management rules which would suit the range of associations which will fall within the scope of the legislation is not easy. As already noted, the rules appropriate to a public benefit association may differ significantly from those suitable to a member-interest club. The size of an organisation will also dictate how much is needed by way of internal rules. There is much less homogeneity among non-profit making bodies than there is among partnerships or, indeed, companies incorporated under the Companies Acts and adopting articles in the form of Table A in the relevant regulations. It is also the case that model constitutions are already widely and freely available for use by a variety of types of unincorporated non-profit associations. Examples can be found on, and downloaded from, websites of bodies such as SCVO and SportScotland. Given the wide variety of associations to which any new legislation would apply, and the ready availability of model constitutive documents, we are not presently persuaded that there is a need for a set of statutory default governance rules for unincorporated associations with legal personality. Our inclination is, rather, to leave it to individual associations to decide what is needed by way of management rules, bearing in mind our proposal that adoption of a constitutive document containing certain minimum essential provisions could be a pre-requisite for attribution of legal personality. We invite comment, however, on the following questions:

- 18. Is there a need for provision of a set of minimum statutory default governance rules for associations with separate legal personality?**
- 19. If so, what are the rules which require to be provided by statute?**

Multi-tiered organisations

4.64 There exist a number of non-profit-making non-corporate organisations which include management and decision-making functions at more than one level. Examples include churches,⁵⁵ GirlGuiding Scotland and the Royal British Legion Scotland. The conferring of legal personality on such organisations may give rise to complexity. Where an organisation comprises a network of local branches with a single, central management office, it seems likely that, whatever criterion for conferring personality is adopted, there will be a single legal person. Where, on the other hand, local branches have autonomy with regard to internal governance rules and financing, there is no obvious reason why these should not all be treated as separate legal entities, in addition to the central governing body. There does not appear to us to be any difficulty with the concept of an association whose members – or some of whose members – are themselves associations. Equally, there does not appear to be a difficulty with the concept of an association in Scotland with legal personality which is itself a member of an international association which has no such status.

⁵⁵ With the possible exception of the Church of Scotland. In *Percy v Board of National Mission of the Church of Scotland* 2006 SC (HL) 1 at para 117, Lord Hope of Craighead described the Church as "a voluntary association, of which its adherents, whether they be elders, communicants or baptised persons, are all members". In *The Courts, the Church and the Constitution* (2008), p 8, note 54, Lord Rodger of Earlsferry has pointed out that the weight of authority is that the Church of Scotland is "at least, a common law corporation".

4.65 Churches pose a particular problem as their organisational structures are complex and do not conform to a single pattern.⁵⁶ It is difficult to apply the same concept of membership as would be understood by membership of a club or an association established for charitable or non-charitable public benefit. If our proposal to use adoption of a constitutive document as the criterion for recognition as a separate legal entity were to be followed, it would afford churches a degree of discretion as to which elements of the organisation would acquire legal personality and which would not. Some might choose to meet the criterion at congregation level; others may prefer to have a single, national legal entity. Use of an objective criterion such as asset value or number of members would clearly be more difficult to apply in a situation where it is unclear to which element of the larger organisation it is being applied.

4.66 We invite comment on the following question:

- 20. Is there a need for special statutory provision for multi-tiered organisations and, if so, what matters should be covered by such provision?**

⁵⁶ Similar problems may arise in relation to the organisational structures of other religions.

Part 5 A new corporate vehicle for non-profit associations?

Introduction

5.1 In Part 4 we discussed the resolution of the problems raised by the current law by conferring legal personality on unincorporated associations. A different approach, which could be used instead of or in addition to what we have already discussed, is to provide a corporate vehicle designed to be suitable for non-profit organisations, so that associations which hold property, engage employees or undertake substantial contractual commitments are encouraged to incorporate, thereby acquiring legal personality. This is the approach which has been adopted in many Commonwealth jurisdictions, notably Australia and New Zealand. To some extent this method has also been used recently in the United Kingdom, but has not gone so far as to provide a corporate vehicle for all non-profit associations regardless of whether their objects are charitable, public benefit or member-interested.

Incorporated associations: a model

5.2 An example of the approach of providing a custom-built corporate vehicle for all non-profit associations is afforded by New Zealand's Incorporated Societies Act 1908.¹ In terms of section 4(1) of the Act,

"Any society consisting of not less than 15 persons associated for any lawful purpose but not for pecuniary gain may, on application being made to the Registrar in accordance with this Act, become incorporated as a society under this Act."

The Act sets out various matters which must be stated or provided for in the rules of the society, including its objects, membership procedure, modes of alteration of the rules, meeting and voting procedures, control and investment of the society's funds, and the disposition of its property in the event of being put into liquidation.² Application for incorporation is made by sending to the Registrar of Incorporated Societies a copy of the rules on which is written an application for incorporation signed by at least 15 members, together with a certificate by an officer of the society or a solicitor that a majority of the members have consented to the application.³ On issue of the certificate of incorporation, the members become a body corporate, and membership of the society does not of itself impose personal liability on the members for any contract, debt or other obligation entered into or incurred by the society.⁴ Except as otherwise provided for by the Act or by the society's rules, membership does not confer any right, title or interest in the property of the society.⁵ Every society must have a registered office⁶. It must keep a register of its members and

¹ As amended from time to time.

² Incorporated Societies Act 1908, s 6.

³ *Ibid* s 7.

⁴ *Ibid* s 10 and s 13.

⁵ *Ibid* s 14.

⁶ *Ibid* s 18 (with provision for a fine on office-bearers and committee members in the event of default).

provide it to the Registrar on request.⁷ Annual financial statements in prescribed form must be delivered to the Registrar.⁸ The society may be put into liquidation by resolution of the members,⁹ or by the High Court if:

- (a) it suspends its operations for the space of a year;
- (b) the number of members reduces below 15;
- (c) it is unable to pay its debts;
- (d) it carries on any operation whereby a member makes a pecuniary gain; or
- (e) the court considers it just and equitable to do so.¹⁰

5.3 Associations Incorporations Acts also now exist in all Australian states and territories. Most were passed many years ago, but legislation in Queensland, Victoria and New South Wales was only enacted in the 1980s "as a result of a combination of public pressure and strong recommendations by law reform agencies".¹¹ These Acts demonstrate that there may be variants of the model. Some (generally the more recent statutes) adopt the New Zealand approach of placing the emphasis on the requirement that the society be non-profit making. Others have sought to define the purposes for which a society must be established in order to be eligible for incorporation under this legislation, at the Registrar's discretion.¹² Requirements for financial reporting and auditing vary widely, from provisions similar to those applicable to companies incorporated under the Companies Acts to none at all.¹³ Some states prohibit the division of surplus assets among members on winding up. Similar legislation, with a similar range of variations, exists in most Canadian provinces and in many

⁷ *Ibid* s 22.

⁸ *Ibid* s 23.

⁹ *Ibid* s 24.

¹⁰ *Ibid* s 25.

¹¹ S Sievers, "Incorporation and regulation of non-profit associations in Australia and other common law jurisdictions" (2001) 13 Australian Journal of Corporate Law 124, at p 129.

¹² For example, in South Australia, s 18(1) of the Associations Incorporation Act 1985 provides that:

"An association formed –

- (a) for a religious, educational, charitable or benevolent purpose; or
- (b) for the purpose of promoting or encouraging literature, science or the arts; or
- (c) for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability; or
- (d) for the purpose of sport, recreation or amusement; or
- (e) for the purpose of establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community; or
- (f) for conserving resources or preserving any part of the environmental, historical or cultural heritage of the State; or
- (g) for the purpose of promoting the interests of students or staff of an educational institution; or
- (h) for political purposes; or
- (i) for the purpose of administering any scheme or fund for the payment of superannuation or retiring benefits to the members of any organisation or the employees of any body corporate, firm or person; or
- (j) for the purpose of promoting the common interests of persons who are engaged in, or interested in, a particular business, trade or industry; or
- (k) for any purpose approved by the Minister,

is, subject to this Act, eligible to be incorporated under this Act."

¹³ Details of state/territory variations are described by Sievers, "Incorporation and regulation of non-profit associations in Australia and other common law jurisdictions", at p 130.

states within the United States. The American Bar Association has produced a Model Non-profit Corporation Act.¹⁴

5.4 It should be noted that in all of the jurisdictions mentioned above, the legislation covers bodies both with charitable and with non-charitable purposes. In the United States, the legislation in certain states, following the American Bar Association model, draws a distinction between "public benefit corporations" and "mutual benefit corporations", with the former being subject to more stringent reporting requirements and restrictions on members' rights, and to prohibition of distribution of surplus assets to members on winding up.

5.5 The provision of a custom-built corporate vehicle for non-profit organisations and the conferring of legal personality on unincorporated associations meeting certain minimum requirements are not mutually exclusive solutions. It would be possible to provide by statute for both, so that a club or association could choose either to incorporate as an association or to remain unincorporated but with legal personality. In their Report on Unincorporated Associations,¹⁵ the Northern Ireland Law Reform Advisory Committee recommended adoption of both (i) legislation similar to RUUNAA, the US model Act, (conferring legal personality on unincorporated associations) and (ii) legislation similar to the New Zealand Incorporated Societies Act 1908, (a scheme of optional incorporation). The recommendation has not been implemented to date.

Is there a need for a new corporate vehicle for non-profit associations in Scotland?

5.6 It will be recalled that a variety of corporate vehicles already exist (or will soon be made available) for non-profit associations in Scotland. For charities, there will in due course be the possibility of being constituted as or converted to a Scottish Charitable Incorporated Organisation (SCIO). The applicable legislation¹⁶ is intended to provide a statutory framework which is better adapted to organisations with charitable, non-profit making objects than the Companies Acts which are drafted with profit-making businesses in mind. It will also avoid the need for charitable corporations to be registered both on the Scottish Charity Register and on the Register of Companies.

5.7 Non-profit making bodies which cannot – or do not choose to – register as charities under the 2005 Act may incorporate as companies limited by shares or by guarantee. In either case, they may decide to be formed as or become a community interest company (CIC). In order to do so, the company must satisfy the "community interest test", which it does "if a reasonable person might consider that its activities are being carried on for the benefit of the community".¹⁷ Its memorandum and articles must also contain a prohibition (the "asset lock") on transfer of any of the company's assets for less than full consideration, together with certain restrictions on share transfers and voting rights.

5.8 There are therefore available in Scotland – or at least there will be available when constitution as an SCIO becomes possible – purpose-built corporate vehicles both for

¹⁴ The most recent revision was in 1987. For the text of the model, see Online Compendium of Federal and State Regulations for U.S. Non-Profit Organisations - http://www.muridae.com/nporegulation/documents/model_npo_corp_act.html. The German system of acquisition of legal personality by registration, described at para 4.4 above, is also similar.

¹⁵ Report No 14, 2004.

¹⁶ Charities and Trustee Investment (Scotland) Act 2005, Part 1, ch 7.

¹⁷ Companies (Audit, Investigations and Community Enterprise) Act 2004, s 35(2). Political campaigning activities are expressly excluded: Community Interest Company Regulations 2005 (SI 2005/1788), reg 3.

charities and for those organisations which would be categorised by the US legislation as "public benefit corporations". There is, however, no corporate vehicle designed specifically for non-profit making member-interest organisations such as sports and social clubs. Associations of this kind which wish to take advantage of the benefits of incorporation (such as limited liability) must use a structure such as a company limited by guarantee or an industrial and provident society.

5.9 If it were considered desirable to create a further form of incorporated body in Scotland, the first question would be whether it should be designed for all types of association, including those presently catered for, or whether it should be designed for those types of association for whom the SCIO and CIC models are unavailable.¹⁸ Our impression is that there would be little demand for a new, all-encompassing form of incorporated association on, say, the New Zealand model. It is obviously not yet possible to gauge the attractiveness of the SCIO as a corporate vehicle. However, we doubt whether a further new form of incorporated association would be able to improve significantly on the SCIO model. Being a charity, the organisation would still have to comply with the statutory provisions regulating charities, and a requirement to register both with OSCR as a charity and on a new register to be created as an incorporated non-profit association would be a step backwards from the position established by the 2005 Act. So far as public benefit companies which are not charities are concerned, it appears from the statistics that use of CICs to date in Scotland has been modest.¹⁹ Again we doubt whether there is a need for the creation of a further option for organisations contemplating incorporating under the Companies Acts with CIC status.

5.10 The alternative is to create a corporate vehicle designed for use by member-interest non-profit organisations. Because such organisations are created for the mutual benefit of their members rather than the public interest, rather less in the way of statutory regulation would be required. Financial protection is required primarily for members rather than for the public at large. Nevertheless, a new statutory regime would have to be devised. Neither the legislation relating to SCIOs (which focuses on the public interest in the proper financial conduct of the affairs of the organisation) nor the legislation relating to CICs (which merely imposes additional requirements on companies registered under, and bound to comply with, the Companies Acts) affords an appropriate model.

5.11 Among the matters which legislation would have to address, whether or not restricted to member-interest organisations, would appear to be the following:

- Whether the association should be required to have a minimum number of members before being entitled to incorporate;
- The creation and operation of a new Register of Incorporated Associations, which would require to be financed either by public funds or by charges on associations

¹⁸ A more radical solution would be to remove *all* non-profit making bodies from the Companies Acts and create instead a new and comprehensive corporate regime for charities and other non-profit making bodies alike. We express no view on this idea, as we regard it as outside the scope of our project which is concerned with associations which are presently unincorporated.

¹⁹ <http://www.cicregulator.gov.uk>.

which choose to register. It may be that such a register, if created and maintained online, would not give rise to substantial expense;²⁰

- The duties of the person appointed to operate the Register, and a mechanism for appealing against decisions made by that person.
- The status as a body corporate of an association which has registered;
- The minimum content of the association's constitutive document (including a prohibition on engaging in business activities with the object of making a profit for its members as individuals);²¹
- (Possibly) a default set of internal governance rules which would apply in absence of adoption of rules to the contrary in the association's constitutive document;
- The association's duties in relation to record-keeping and (if thought appropriate) lodging of accounts and annual returns with the Registrar;
- Circumstances in which an order may be made for the dissolution of the association, and the procedure by which this may be effected.

5.12 Our preliminary view is that there is no real need for such a new corporate vehicle, especially if our proposal to attribute legal personality to unincorporated associations meeting certain minimum requirements were to be enacted. Having studied a number of versions of Associations Incorporation Acts, we are not persuaded that they offer significant advantages over forms already available to Scottish associations such as incorporation as a company limited by guarantee. All require registration; most require lodging of accounts and returns; most have a liquidation procedure similar to that applicable to companies. The provisions of the Companies Act 2006, once fully brought into force,²² will do much to simplify the statutory regime to which private companies, including non-profit making corporate bodies, will be subject.

5.13 For the sake of completeness, however, we invite comment on the desirability of introducing a new form of incorporated non-profit association designed for use by, for example:

- sports and social clubs and other organisations which operate for the mutual benefit of members rather than for the wider public benefit; and
- non-profit making bodies (other than charities) which do not meet the statutory tests to become CICs.

²⁰ Recommending the introduction of an incorporated associations scheme, the Northern Ireland Law Reform Advisory Committee expressed the view that such a system would not be expensive to establish or maintain (see the Report discussed in para 5.5).

²¹ And also the other matters listed above at para 4.23.

²² Due to be completed with effect from 1 October 2009.

We would welcome comment in particular on whether the statutory provisions relating to such associations should include any reporting or auditing requirements. We therefore ask:

- 21. Is there a need for a new statutory corporate vehicle in Scots law for non-profit making associations?**
- 22. If so, should it be designed for use by:**
 - (a) any non-profit making association which is not a charity capable of being registered as a SCIO; or**
 - (b) member-interest associations only?**

Part 6 Miscellaneous

Effect of proposals on regulatory and penal statutory provisions

6.1 Since much regulatory legislation, and many statutory provisions creating criminal offences, already apply to unincorporated associations and their officers, the conferring of legal personality on associations would have limited practical consequences in relation to these kinds of liability. In particular, it would have no effect upon the tax treatment of associations because they are already treated for tax purposes as if they had corporate status. So far as criminal liability is concerned, an association may already be convicted of a statutory offence¹ and there would be no change in the law in that regard. On the other hand, it would no longer be permissible to prosecute individual members except those who were personally culpable.² This seems to us to be an appropriate change in the law.

6.2 Similarly, the creation of a new corporate vehicle, whether restricted to member-interest organisations or not, would not require legislative changes of a substantial nature. Any amendments necessitated would, it seems to us, be largely formal, to extend existing provisions of a regulatory or penal nature to the new corporate form.

Cross-border issues: determination of the applicable law

6.3 If the law of Scotland, but not the law of other parts of the United Kingdom, were to be amended to confer legal personality upon unincorporated associations, as proposed in Part 4 of this Discussion Paper, it does not appear to us that this of itself would give rise to any practical difficulties. The situation would be similar to that which currently exists in relation to the law of partnership. As we noted in our Joint Consultation Paper with the Law Commission on Partnership Law,³ existing differences on the matter of the legal personality of partnerships have not, so far as we are aware, given rise to any problems. We are not aware of any reported cases which turn on the difference in law regarding partnerships and see no reason why a difference in law regarding unincorporated associations would create any greater difficulty.

6.4 We do, however, consider that it would be necessary to be able to determine whether a particular association was a Scottish association with separate legal personality or a non-Scottish association without personality, since the presence or absence of personality is obviously important in relation to the rights and obligations of the association's office bearers and members. A third party who is considering entering into a contractual relationship with the association, such as a bank which is asked to provide credit facilities, will need to have some means of ascertaining whether it is contracting with a separate legal entity or with a group of individuals. It is necessary, then, to identify a criterion or one or more criteria for determining whether or not an association's legal status is governed by Scots law, bearing in

¹ See para 2.20.

² Cf *R v RL and JF* [2008] EWCA Crim 1970, discussed at para 2.22 above.

³ Discussion Paper No 111; Law Commission Consultation Paper No 159, at para 4.33.

mind that it will be comparatively rare for this to be an issue and not to be obvious from the nature and location of the association's activities.

6.5 One approach might be to leave the matter to be determined by the rules relating to choice of law in contracts with an international element. The Rome Convention set out in Schedule 1 to the Contracts (Applicable Law) Act 1990 applies as between different jurisdictions within the United Kingdom as it does to different contracting States. However, although the formulation of the rules to be contained in the constitutive document of an unincorporated association would – at least to some extent – be a matter for agreement among the parties to it (that is, the founding members), the choice of law rules in the Convention do not apply to "questions governed by the law of companies and other bodies corporate or unincorporate".⁴ One would therefore require to apply the common law regarding choice of law, which looks to the parties' express or implied choice of law and, failing that, to either presumed intention or connecting factors.⁵ In the absence of a clear test, we do not think that this approach would be helpful.

6.6 Another possible starting point is afforded by the Civil Jurisdiction and Judgments Act 1982 which provides that a person domiciled in a part of the United Kingdom shall be sued in the courts of that part.⁶ An association is domiciled where it has its seat.⁷ It has its seat in a particular part of the United Kingdom if and only if

- It has an official address in that part;
- Its central management and control is exercised in that part; or
- It has a place of business in that part.⁸

An association may thus have a seat (and therefore be domiciled) in more than one part of the United Kingdom. However, for the purposes of the provisions conferring exclusive jurisdiction over proceedings relating to the formation or dissolution of an association or to the decisions of its governing body, it has its seat in only one part of the United Kingdom, that being:

- The part under whose law it was formed; or
- If formed under the law of a state outside the United Kingdom, the part in which its central management and control is exercised.⁹

⁴ The Rome Convention will in due course be replaced by the Rome I Regulation (Regulation No 593/2008 of the European Parliament and Council) which will apply to contracts concluded after 17 December 2009, and which the UK Government has expressed its wish to opt into. The Rome I Regulation, art 1(2)(f), similarly excludes from its scope "questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body".

⁵ See A E Anton (with P R Beaumont), *Private International Law* (2nd ed, 1990), chapter 10.

⁶ Civil Jurisdiction and Judgments Act 1982, Sch 4, para 1. Paras 3 to 13 contain additional, special rules as to where a person domiciled in a part of the United Kingdom may be sued.

⁷ *Ibid* s 42(1).

⁸ *Ibid* s 42(4).

⁹ *Ibid* s 43(3).

6.7 There would be an attraction in treating an association as Scottish – and hence capable of acquiring separate legal personality – in the same circumstances in which the Scottish courts would have exclusive jurisdiction over proceedings relating to the association's formation, governance and dissolution. Unfortunately, as noted above, the 1982 Act uses the criterion of the part of the United Kingdom under whose law the association was formed. In relation to determining applicable law, this test would be circular and cannot be used. It seems that the choice lies instead between applying:

- (a) a formal test, that is, the part of the United Kingdom in which it has its official address as stated in a constitutive document or other formal agreement among members; or
- (b) a factual test, that is, the part of the United Kingdom in which its management takes place; or
- (c) both tests.

6.8 Our preliminary view is that the formal test alone would not suffice. An association whose activities and management are wholly carried on elsewhere in the United Kingdom should not acquire – or have the option of acquiring – legal personality merely by specifying an accommodation address in Scotland in a formal document. Equally, to use only the place of management might not give a sufficiently clear indication to parties dealing with the association that it is Scottish. Our preliminary view is that both tests should be met before an association will be treated as Scottish and hence capable of acquiring separate legal personality. The fact that the association has its address in Scotland would be a *prima facie* indication to third parties that it is a legal entity and, if the circumstances warranted it (for example, if a bank were being asked to provide a credit facility), proof of the place of management could be provided in the form of minutes of committee meetings. We therefore ask:

- 23. Should our proposals conferring legal personality extend only to an association where:**
- (a) the official address stated in its constitutive document (or other formal agreement among members) is situated in Scotland; and**
 - (b) its management takes place in Scotland?**

Transitional measures

6.9 The major transitional issue arising would be the status of associations which, as at the date of commencement of the new legislation, met the statutory criteria for attribution of legal personality.¹⁰ If a system of "opting in" were adopted, transition would be straightforward: an association fulfilling the statutory requirements which wished to acquire legal personality would do so by appropriate amendment of its constitutive document after the legislation had come into force.

¹⁰ As discussed at paras 4.10 to 4.26 above.

6.10 The position would be rather more complicated if legal personality were conferred automatically on all associations meeting the statutory criteria which do not opt out of such treatment. Associations which did not wish to be treated as separate legal entities could find themselves included on commencement of the new legislation, without having had the opportunity to opt out. A solution to this problem could be to allow a transitional period of, say, one or two years, at the end of which any association meeting the statutory criteria which has not resolved to opt out shall automatically acquire legal personality.

6.11 Under either scenario, the acquisition of legal personality would not have retrospective effect. Contracts entered into prior to the change would continue to be governed by the former law, as would rights and obligations which had arisen in delict or under the law of unjustified enrichment. So, for example, where prior to commencement an association had opened a bank account with credit facilities, the persons liable to the bank for repayment of any debt would remain unchanged unless and until a new arrangement was entered into between the association (now as a legal entity) and the bank. Actions raised after commencement but relating to events occurring before commencement would continue to be raised or defended in the name of the appropriate individuals as representing the association. Property held in the name of individuals as trustees for the association would continue to be so held, although it would now become competent for the trustees to transfer it to the association.

6.12 We invite responses to the following question:

- 24. If legal personality were to be automatically conferred, should a transitional period be allowed for opting out of such treatment and, if so, how long should that period be?**

Part 7 Impact assessment

The current difficulties

7.1 From the information available to us, it appears that there are approximately 45,000 voluntary organisations in Scotland, the majority of which are unincorporated associations. In addition to these voluntary organisations, there is a large number of unincorporated associations, such as sports and social clubs and working men's clubs, which may be described as "member-interest" associations. The problem to be resolved is that these bodies may require to engage in legal relationships with others, in important matters such as contract and delict, but are precluded from doing so as they do not have separate legal personality. We have identified the following difficulties as arising from the absence of such personality:

- The extent of liability of association members, and of association officials, under contracts with third parties, including staff, is uncertain;
- An association cannot contract with any of its own members, resulting in legal analysis which many would regard as unduly sophisticated;
- The extent of liability of association members, and of association officials, under the law of delict is uncertain;
- An association cannot be liable in delict to any of its own members, even in circumstances where an incorporated body would be held vicariously liable for the fault of a director or employee;
- Title to heritable property must be held in the name of individuals who may cease to be members of the association's governing body, or of the association itself;
- The practice by which an unincorporated association sues or is sued varies according to whether the action is being brought in the Court of Session or the sheriff court.

Risks arising from the current difficulties

7.2 In the preceding paragraph, we identified certain difficulties which arise from the fact that an unincorporated association does not have separate legal personality. The effect of this is that the risks which would be borne by an association if it were recognised as a legal entity are instead borne by some or all of its members. For example, in relation to contracts entered into on behalf of an association in order to make purchases, obtain credit or take on employees, liability under such contracts is the personal liability of some or all of the members who have expressly or impliedly authorised the contract. In terms of delict, the members of an association are potentially personally liable to pay damages (which could be substantial) awarded to a pursuer. Many association members are totally unaware of the personal liabilities which they may incur by virtue of their membership. We consider that this is out of step with public expectation. The end result is that costs are incurred by

associations, members and third parties in the course of attempting to resolve issues which arise from the everyday operation of unincorporated associations and which cannot be resolved quickly due to the unsatisfactory state of the current law.

Evidence of these difficulties

7.3 The current case law, as discussed in this Discussion Paper, is indicative of the problems which occur in practice but we know, from informal consultation with various people and organisations with experience of this area, that these are merely the tip of the iceberg. To enable us to assess the impact of the recommendations which we will make in our final report, we would be grateful for information on any issue of relevance to this project and, in particular, on the nature of the various problems which unincorporated associations and their members face, the frequency with which they occur, the consequences for members, associations and third parties and any means resorted to in an attempt to bypass these problems. We would also be interested to learn more about particular difficulties faced in relation to obtaining insurance. We intend to take this information into account when preparing an impact assessment in relation to any recommendations which we make for legislative reform.

Aims and objectives

7.4 Our aim is to provide a means by which an association or club, which does not wish to establish itself as a company (or as some other current form of incorporated body), may avoid encountering the difficulties mentioned above. There are various options.

Option 1 The status quo

7.5 In terms of this Option, no changes would be made with the result that none of the existing difficulties would be resolved.

7.6 *Benefits and costs of Option 1:* There would be no identifiable positive benefit. The tens of thousands of associations in existence would remain unable, for example, to enter into contracts such as making purchases, obtaining credit or taking on employees. Liability under a contract entered into on behalf of an association would remain the personal liability of some or all of the members who have expressly or impliedly authorised the contract. In terms of delict, the members of an association would continue to be potentially personally liable to pay damages (which could be substantial) awarded to a pursuer. Many association members are totally unaware of the personal liabilities which they may incur by virtue of their membership. We consider that it is out of step with public expectation that mere membership of a club could give rise to unlimited liability for a third party claim. Title to property is usually held by some or all of the office-bearers as trustees for the members of the association. This means that some form of conveyance or deed of assumption and resignation would be required from time to time in favour of incoming office-bearers. In terms of costs, Option 1 would have no implementation costs but costs would continue to be incurred by associations, members and third parties in the course of attempting to resolve issues which arise from the everyday operation of unincorporated associations and which cannot be resolved quickly due to the unsatisfactory state of the current law. Costs would also be incurred from time to time in executing and registering any necessary conveyance or deed of assumption and resignation as mentioned above.

Option 2 Automatic attribution of legal personality to unincorporated associations fulfilling a minimum specified criterion

7.7 This Option envisages that all unincorporated associations which meet a minimum specified criterion should be accorded separate legal personality. Suggested possible criteria are:

- (a) minimum number of members;
- (b) minimum asset value;
- (c) minimum annual income or turnover; or
- (d) adoption of a constitutive document containing specified minimum provisions.

7.8 *Benefits and costs of Option 2:* The principal benefit of this Option would be that those unincorporated associations which would gain from having separate legal personality would have that status automatically with no need at all for formal regulation. As a legal entity, such an association would be able to enter into contracts and sue and be sued in contract or in delict in its own name. Personal liability would not attach to a member merely by the fact of membership although he or she would remain liable for his or her own personal fault. Such a change in the law would not only benefit individual members but might also benefit the third sector as more people might be prepared to devote time to third sector purposes if they knew that, without personal fault, they would not incur personal liability. As far as contracts are concerned, the other party to any contract would have the benefit of being clear about the identity of the party with whom he or she was contracting. One disadvantage, however, would be that third parties contracting with an association would lose whatever right they presently have to sue members and committee members personally. On the other hand, as unincorporated associations with separate legal personality may find it easier to obtain insurance, we consider that this would work to the advantage of third parties pursuing a delictual claim against such an association. The association would also be able to hold property in its own name thereby removing the need to transfer ownership when trustees die or no longer wish to be trustees. If the applicable criterion were to be the adoption of a constitutive document, we consider that this would have the beneficial effect of putting in place written rules to which reference could be made if and when problems arose. As no regulation would be involved, the only cost of implementing this Option would relate to the adoption of a constitutive document were that to be the minimum specified criterion decided upon. This, however, would be a one-off negligible cost. We anticipate that styles of suitable constitutive documents would be made available on the websites of organisations such as the SCVO and SportScotland in the same way that they presently make model constitutions available free of charge. We would also anticipate that the clarity which this Option would bring to the law relating to unincorporated associations would reduce the need for litigation and the duration of any litigation and hence benefit the court system through efficiency savings. The possibility that individuals could be treated in law as having created a legal entity when they have no need or desire to be so treated could be eliminated by permitting associations to resolve that they will not have separate legal personality.

Option 3 Optional legal personality without incorporation

7.9 This Option envisages that unincorporated associations would be provided with the option of being able to opt into acquiring separate legal personality. This could be achieved by either:

- (a) registration in a new public register; or
- (b) an expression of intention in the association's constitutive document to be treated as a separate legal entity.

As in Option 2, the availability of this option could be made to depend upon the association fulfilling a statutory criterion.

7.10 *Benefits and costs of Option 3:* The benefits of this Option would be those benefits relating to Option 2 with the difference that an association would be required to take a positive step to obtain separate legal personality, rather than simply fulfilling a statutory criterion, before being able to enjoy those benefits. We think that it is, therefore, likely that this Option would apply to a much smaller proportion of associations than the automatic attribution of legal personality scheme as set out in Option 2 and hence those benefits would be less. However, the requirement to opt in may be seen as desirable by some associations who would not wish legal personality and by those who consider that absence of legal personality should remain the default situation.

7.11 The disadvantage of Option 3(a) would be the administrative burden and consequent costs which could operate as a disincentive to register; the effect of this might be that this Option would apply to a much smaller proportion of associations than the automatic attribution of legal personality scheme as set out in Option 2. On the other hand, a requirement of registration would enable third parties to check the details of the association and would permit officials to check the necessary documents for compliance with the specified minimum criteria. There is an argument that certain associations (perhaps those owning property or employing staff) should be required to provide certain minimum details in a public register before obtaining, in effect, the benefit of limited liability without having to go through the process of incorporation and becoming subject to the companies regime. Again, there would be the disadvantage that third parties contracting with an association which had opted for legal personality would lose whatever right they presently have to sue members and committee members personally. On the other hand, as unincorporated associations with separate legal personality may find it easier to obtain insurance, we consider that this would work to the advantage of third parties pursuing a delictual claim. As far as costs are concerned, the creation and maintenance of a register would have cost implications. There would be one-off set up costs and ongoing maintenance costs which may or may not be significant. We anticipate that such a register would require to be financed by central government and by fees charged to registering associations. There would also be the added complication that it would be necessary to avoid dual registration of those associations which are charities and already registered with OSCR; it may be possible to provide that all associations registered as charities would be treated as having separate legal personality without the need for further registration.

7.12 Option 3(b) would, of course, not have the costs relating to a public register. The disadvantage of Option 3(b), however, would be that third parties dealing with the association may be unclear about the identity of the party with whom they were contracting. Again, there would be the disadvantage that third parties contracting with an association which had opted for legal personality in this way would lose whatever right they presently have to sue members and committee members personally. There would be a one-off negligible cost relating to the drawing up of an appropriate constitutive document. Again, we anticipate that styles of suitable constitutive documents would be made available on the websites of organisations such as the SCVO and SportScotland in the same way that they presently make model constitutions available free of charge. We would anticipate that the clarity which Option 3 would bring to the law relating to unincorporated associations would reduce, to some extent, the need for litigation or the duration of any litigation and hence benefit the court system through efficiency savings. However, as the Option is not of automatic application, we do not think that its impact in this regard would be as significant as that in relation to Option 2.

Option 4 First possible modification of Options 2 and 3(b)

7.13 Options 2 and 3(b) could be modified. The first possible modification would be a requirement for large unincorporated associations meeting certain specified criteria to undergo a process of public registration.

7.14 *Benefits and costs of Option 4:* Although acquisition of legal personality by the adoption of a written constitutive document or expression of the requisite intention have been suggested above, such Options may be thought less desirable in relation to larger associations. Under the current law, such associations may avoid the difficulties of not having separate legal personality by incorporating. There is an argument that it may be reasonable to expect an organisation of a substantial size which perhaps owns heritable property and employs staff to do so. If such large associations were treated in the same way as smaller associations under Options 2 and 3(b), they would obtain the benefits of limited liability without the need to incorporate; there would be no incentive for them to incorporate and hence subject themselves to the degree of openness to public scrutiny which the companies regime involves. The principal benefit of this Option would be that large unincorporated associations would be subject to a degree of public scrutiny in return for receiving the benefits of separate legal personality as described above. It would also encourage such organisations to take advice on the most appropriate legal vehicle for their particular needs. The creation and maintenance of a register would have cost implications. There would be one-off set up costs and ongoing maintenance costs which may or may not be significant. We anticipate that such a register would require to be financed by central government and by fees charged to registering associations. There would also be the added complication that it would be necessary to avoid duplication of registration of those large associations which are charities and so registered by OSCR; it may be possible to provide that all large associations registered as charities would be treated as having separate legal personality without the need for further registration.

Option 5 Second possible modification of Options 2 and 3(b)

7.15 Another possible modification of Options 2 and 3(b) would be to disqualify certain large unincorporated associations from acquiring separate legal personality without

incorporating. A threshold such as assets or turnover in excess of a specified amount could be introduced.

7.16 *Benefits and costs of Option 5:* The reasons for this possible amendment are the same as the reasons given in relation to the first possible amendment. The principal benefit of this option would be that large unincorporated associations, which should perhaps be subject to some form of public scrutiny, would not be able to obtain the benefits of separate legal personality without complying with some form of regulation. It would also encourage such organisations to take advice on the most appropriate legal vehicle for their particular needs. The disadvantage would be that it would be possible for associations to move in and out of limited liability from time to time by crossing the threshold in one direction or the other. This might cause difficulties for third parties pursuing the association. As far as costs are concerned, third party costs in ascertaining the exact status of the association at a particular time could be incurred.

Option 6 Rights and duties without separate legal personality

7.17 This Option envisages that certain capacities (for example, the right to contract) could be conferred on unincorporated associations by statute but without the grant of separate legal personality.

7.18 *Benefits and costs of Option 6:* The benefit of this Option is that it would solve some of the difficulties faced by unincorporated associations; it could give them the capacity to contract and to sue and be sued, in contract or delict or otherwise. It would not, however, resolve some of the other difficulties such as holding title to property. As is the case in relation to trade unions and employers' associations (which have legal capacities conferred on them in this manner), there would still remain the question of whether, by conferring such capacities, the law has conferred the status of a legal entity on such associations. Such uncertainty can lead to disputes and consequent costs.

Option 7 A new corporate vehicle

7.19 In terms of this Option (which could be instead of or in addition to one of the Options described above), a new form of statutory corporate vehicle would be established for non-profit making associations. It could be confined to any non-profit making association which is not a charity capable of being registered as a SCIO or could be applied to member-interest associations.

7.20 *Benefits and costs of Option 7:* This Option would provide associations with the benefits of separate legal personality (as described above) by means of the corporate route. Such an option would, however, involve various public and private costs; a new Register would require to be set up and operated. (It could be financed from public funds or by fees charged to associations opting to register); an appeal mechanism regarding the decision of the person operating the Register would require funding; there would be administrative costs for associations in complying with regulatory matters such as annual returns and there would be dissolution costs for the associations.

Option 8 A non-statutory Option

7.21 An alternative approach would be to retain the existing law relating to unincorporated associations but to increase awareness of the current difficulties through a process of education.

7.22 *Benefits and costs of Option 8:* The advantage of this Option would be that a large proportion of those joining unincorporated associations and those who deal with them would be made aware of the current difficulties described above, including the possibility that members may be found personally liable for large amounts of money. The disadvantages would be that the current legal difficulties would remain unresolved and that people may be less inclined to give their time to such associations. There would also be cost implications relating to a suitable process of education. We would envisage that this would fall to bodies such as the SCVO. As the number of unincorporated associations is large (see paragraph 7.1 above) and as the number of people or bodies which could have dealings with them is potentially enormous and impossible to ascertain, the costs of such a campaign would be considerable and ongoing.

- 25. We would be grateful to receive comments and information as to what consultees regard as the costs and benefits of our proposals.**

Part 8 List of proposals and questions

1. Have we correctly identified the practical problems created by the absence of recognition by the law of unincorporated associations as separate legal entities? Are consultees aware of problems additional to those which we have identified?

(Paragraph 3.11)

2. Do consultees agree that there is a need for reform of the law relating to the status of unincorporated non-profit making associations?

(Paragraph 3.11)

3. (a) Should unincorporated associations which meet a minimum specified criterion be accorded separate legal personality?

(b) If so, should the association be accorded separate personality generally or only for certain purposes specified by statute?

(Paragraph 4.29)

4. Should the criterion for attribution of separate legal personality be:

- (a) minimum number of members;
- (b) minimum asset value;
- (c) minimum annual income or turnover;
- (d) adoption of a constitutive document containing specified minimum provisions;
- (e) some other criterion?

(Paragraph 4.29)

5. If separate legal personality were to be accorded to associations upon the fulfilment of a criterion such as number of members, minimum asset value or minimum annual income or turnover, what should the threshold be?

(Paragraph 4.29)

6. If separate legal personality were to be accorded to associations which adopt a constitutive document containing certain minimum provisions, what should those provisions be?

(Paragraph 4.29)

7. As an alternative to automatic attribution of legal personality, should attribution of legal personality be optional and dependent upon either
- (a) registration in a new public register; or
 - (b) an expression of intention in the association's constitutive document to be treated as a separate legal entity?
- (Paragraph 4.29)
8. If either of alternatives 7(a) or 7(b) were to be preferred, should the availability of the option depend upon the association also fulfilling a statutory criterion and, if so, what should that criterion be?
- (Paragraph 4.29)
9. Is there merit in providing by statute for registration in a public register of a "statement of authority" to transfer heritable property?
- (Paragraph 4.37)
10. (a) Should the effect of the *ultra vires* doctrine be restricted in relation to the acts of associations with separate legal personality in the same way as it is in relation to acts done by companies?
- (b) If so, should the qualification of that restriction which applies to companies which are charities also apply (i) to associations which are charities or (ii) to all associations?
- (c) In the absence of any restriction in its constitutive document, should an association be granted by statute the same powers as an individual to do what is necessary or convenient to carry out its objects?
- (Paragraph 4.42)
11. Is there a need for a statutory "default" rule governing the distribution of an association's assets on dissolution and, if so, should that rule provide for
- (a) distribution of the assets equally among members; or
 - (b) application for a public benefit purpose similar to the objects of the association?
- (Paragraph 4.47)
12. Where an association is dissolved and funds are disposed of while a creditor of the association remains unpaid, should the creditor be entitled to recover the debt from members
- (a) to the extent that they have received or benefited indirectly from the distribution of association funds; or

(b) to the extent that they have authorised a distribution of assets other than to members

which, in either case, had the effect of defeating the creditor's claim against the association in whole or in part?

(Paragraph 4.47)

13. Should unincorporated associations be granted certain legal capacities, for example, to contract and to sue and be sued, without attributing legal personality to them?

(Paragraph 4.49)

14. What are the circumstances, other than formal dissolution, in which legal personality should be lost by an unincorporated association?

(Paragraph 4.57)

15. (a) Should an association with separate legal personality be capable of losing its identity (without losing personality) so as to become a different legal person?

(b) If so, in what circumstances?

(Paragraph 4.57)

16. Should there be created a register in which large unincorporated associations meeting certain specified criteria are required to register and, if so:

(a) What should those criteria be?

(b) What should the sanction be for failure to register?

(Paragraph 4.61)

17. Alternatively, should a large association which exceeds certain specified criteria automatically lose its separate legal personality?

(Paragraph 4.61)

18. Is there a need for provision of a set of minimum statutory default governance rules for associations with separate legal personality?

(Paragraph 4.63)

19. If so, what are the rules which require to be provided by statute?

(Paragraph 4.63)

20. Is there a need for special statutory provision for multi-tiered organisations and, if so, what matters should be covered by such provision?

(Paragraph 4.66)

21. Is there a need for a new statutory corporate vehicle in Scots law for non-profit making associations?

(Paragraph 5.13)

22. If so, should it be designed for use by:

(a) any non-profit making association which is not a charity capable of being registered as a SCIO; or

(b) member-interest associations only?

(Paragraph 5.13)

23. Should our proposals conferring legal personality extend only to an association where:

(a) the official address stated in its constitutive document (or other formal agreement among members) is situated in Scotland; and

(b) its management takes place in Scotland?

(Paragraph 6.8)

24. If legal personality were to be automatically conferred, should a transitional period be allowed for opting out of such treatment and, if so, how long should that period be?

(Paragraph 6.12)

25. We would be grateful to receive comments and information as to what consultees regard as the costs and benefits of our proposals.

(Paragraph 7.22)

Appendix

Revised Uniform Unincorporated Nonprofit Association Act (text as at 8 November 2008) without the Comments and legislative notes.

The text of the model Act is reproduced here with the kind permission of the US National Conference of Commissioners on Uniform State Laws (NCCUSL). It was approved by NCCUSL at a meeting in July 2008 and is to be submitted for final approval by the American Bar Association in February 2009.

(Please see next page)

REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-SEVENTEENTH YEAR
IN BIG SKY, MONTANA
JULY 18 - 25, 2008

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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

November 8, 2008

REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATIONS ACT

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REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

TABLE OF CONTENTS

PREFATORY NOTE	
SECTION 1.	SHORT TITLE
SECTION 2.	DEFINITIONS
SECTION 3.	RELATION TO OTHER LAW
SECTION 4.	GOVERNING LAW
SECTION 5.	LEGAL ENTITY; PERPETUAL EXISTENCE; POWERS
SECTION 6.	OWNERSHIP AND TRANSFER OF PROPERTY
SECTION 7.	STATEMENT OF AUTHORITY AS TO REAL PROPERTY
SECTION 8.	LIABILITY
SECTION 9.	ASSERTION AND DEFENSE OF CLAIMS
SECTION 10.	EFFECT OF JUDGMENT OR ORDER
SECTION 11.	APPOINTMENT OF AGENT TO RECEIVE SERVICE OF PROCESS
[SECTION 12.	SERVICE OF PROCESS
SECTION 13.	ACTION OR PROCEEDING NOT ABATED BY CHANGE
[SECTION 14.	VENUE
SECTION 15.	MEMBER NOT AGENT
SECTION 16.	APPROVAL BY MEMBERS
SECTION 17.	MEETINGS OF MEMBERS; VOTING, NOTICE, AND QUORUM REQUIREMENTS
SECTION 18.	DUTIES OF MEMBER
SECTION 19.	ADMISSION, SUSPENSION, DISMISSAL, OR EXPULSION OF MEMBERS
SECTION 20.	MEMBER'S RESIGNATION
SECTION 21.	MEMBERSHIP INTEREST NOT TRANSFERABLE
SECTION 22.	SELECTION OF MANAGERS; MANAGEMENT RIGHTS OF MANAGERS
SECTION 23.	DUTIES OF MANAGERS
SECTION 24.	NOTICE AND QUORUM REQUIREMENTS FOR MEETINGS OF MANAGERS
SECTION 25.	RIGHT OF A MEMBER OR MANAGER TO INFORMATION
SECTION 26.	DISTRIBUTIONS PROHIBITED; COMPENSATION AND OTHER PERMITTED PAYMENTS
SECTION 27.	REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT OF EXPENSES
SECTION 28.	DISSOLUTION
SECTION 29.	WINDING UP AND TERMINATION
SECTION 30.	MERGERS
[SECTION 31.	TRANSITION CONCERNING REAL AND PERSONAL PROPERTY
SECTION 32.	UNIFORMITY OF APPLICATION AND CONSTRUCTION
SECTION 33.	RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT
SECTION 34.	SAVINGS CLAUSE
SECTION 35.	REPEALS
SECTION 36.	EFFECTIVE DATE

REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

PREFATORY NOTE

An unincorporated nonprofit association (UNA) is a nonprofit organization that is not a charitable trust or a nonprofit corporation or any other type of association organized under statutory law that is authorized to engage in nonprofit activities. A UNA is, thus, a default organization. As such, it is the nonprofit equivalent of a general partnership, which is the default for profit organization.

In the United States UNAs are governed by a hodgepodge of common law principles and statutes governing some of their legal aspects. Many of the existing statutes are designed to ameliorate some of the legal problems that arise from the basic common law concept that UNAs are merely aggregates of individuals and not legal entities. Under the traditional common law aggregate theory, for example, a UNA could not hold or convey property in its own name or sue or be sued in its own name. These statutes are for the most part (California is a notable exception) not comprehensive or integrated.

NCCUSL promulgated the Uniform Unincorporated Nonprofit Association Act (UUNAA) in 1996. UUNAA, which has been adopted in 12 states, deals with only a limited number of issues—tort and contract liability of members, owning and conveying of property and suits by and against a UNA.

In 2005, NCCUSL decided that UUNAA needed to be updated and made more comprehensive and entered into a joint project with the Uniform Law Conference of Canada and the Mexican Center on Uniform Laws to create a harmonized legal framework for UNAs in the United States, Canada and Mexico. The Drafting Committee for this project developed a Statement of Principles that each participating country has used as the basis for its UNA statute. The Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA) is the American version of this harmonization project.

RUUNAA governs all UNAs that are formed or operate in a state that adopts the Act. UNAs are often classified as public benefit, mutual benefit or religious organizations and may or may not be tax-exempt. There are probably hundreds of thousands of UNAs in the United States including unincorporated nonprofit philanthropic, educational, scientific and literary clubs, sporting organizations, unions, trade associations, political organizations, churches, hospitals, and condominium and neighborhood associations. Their members may be individuals, corporations, other legal entities or a mix.

RUUNAA deals with the following basic issues: (1) definition of the types of organizations covered; (2) the relation of the act to other existing laws; (3) the recognition that a UNA is a legal entity and the legal implications flowing from this status, including the ability of a UNA to own and dispose of property and to sue and be sued in its own name; (4) the contract and tort liability of a UNA and its members and managers; (5) internal governance, fiduciary duties, and agency authority; and (6) dissolution and merger.

RUUNAA is not nearly as comprehensive as the American Bar Association Model Nonprofit Corporation Act (ABA Model Act) promulgated in 1952 and most recently revised in 2008, some version of which has been adopted in most states. RUUNAA merely provides a basic legal framework for UNAs and is not intended to be a substitute for organizing a

UNA as a nonprofit corporation under state law.

RUUNAA was drafted with small informal associations in mind. These informal organizations are likely to have no legal advice and so fail to consider legal and organizational questions, including whether to incorporate. The act provides better answers than the common law for a limited number of legal problems. Its answers are more in accord with the expectations of those participating in the work of a UNA and third parties dealing with a UNA than the common law.

To the extent an enacting jurisdiction decides to retain statutes dealing with specific kinds of nonprofit associations, this act will supplement existing legislation. Many states have statutes on special kinds of unincorporated nonprofit associations, such as churches, mutual benefit societies, social clubs, and veteran's organizations. A state electing to adopt this act will need to examine carefully its existing statutes to determine which it wants to repeal, which to amend, and which to retain.

It should be noted, too, that many of the provisions are intended to be supplemented by a jurisdiction's existing law. For example, section 7 which provides for the filing of a statement of association authority, does not provide details concerning the filing process. It leaves to other law such details as whether the filing officer returns a copy marked "filed" and stamps the hour and date thereof, and the amount of the filing fee.

Finally, most jurisdictions regulate solicitations and other activities of charitable organizations regardless of their organization form and allow for exemption from most state and local taxes. These statutes will be applicable to all UNAs formed or operating in a state that adopts RUUNAA. It may be necessary in some states to modify the language of these existing statutes to be certain that they apply to UNAs after RUUNAA is enacted.

REVISED UNIFORM UNINCORPORATED NONPROFIT ASSOCIATION ACT

SECTION 1. SHORT TITLE. This act may be cited as the Revised Uniform Unincorporated Nonprofit Association [Act.]

SECTION 2. DEFINITIONS. In this [act]:

(1) "Established practices" means the practices used by an unincorporated nonprofit association without material change during the most recent five years of its existence, or if it has existed for less than five years, during its entire existence.

(2) "Governing principles" means the agreements, whether oral, in a record, or implied from its established practices, that govern the purpose or operation of an unincorporated nonprofit association and the rights and obligations of its members and managers. The term includes any amendment or restatement of the agreements constituting the governing principles.

(3) "Manager" means a person that is responsible, alone or in concert with others, for the management of an unincorporated nonprofit association.

(4) "Member" means a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the unincorporated nonprofit association or in the development of the policies and activities of the association.

(5) "Person" means an individual, corporation, business trust, statutory entity trust, estate, trust, partnership, limited liability company, cooperative, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(6) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(7) "State" means a state of the United States, the District of Columbia, Puerto Rico, United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(8) "Unincorporated nonprofit association" means an unincorporated organization consisting of [two] or more members joined under an agreement that is oral, in a record, or implied from conduct, for one or more common, nonprofit purposes. The term does not include: (A) a trust; (B) a marriage, domestic partnership, common law domestic relationship, civil union, or other domestic living arrangement; (C) an organization formed under any other statute that governs the organization and operation of unincorporated associations; (D) a joint tenancy, tenancy in common, or tenancy by the entireties even if the co-owners share use of the property for a nonprofit purpose; or (E) a relationship under an agreement in a record that expressly provides that the relationship between the parties does not create an unincorporated nonprofit association.

SECTION 3. RELATION TO OTHER LAW.

(a) Principles of law and equity supplement this [act] unless displaced by a particular provision of it.

(b) A statute governing a specific type of unincorporated nonprofit association prevails over an inconsistent provision in this [act], to the extent of the inconsistency.

(c) This [act] supplements the law of this state that applies to nonprofit associations operating in this state. If a conflict exists, that law applies.

SECTION 4. GOVERNING LAW.

(a) Except as otherwise provided in subsection (b), the law of this state governs the operation in this state of all unincorporated nonprofit associations formed or operating in this

state.

(b) Unless the governing principles specify a different jurisdiction, the law of the jurisdiction in which an unincorporated nonprofit association has its main place of activities governs the internal affairs of the association.

SECTION 5. LEGAL ENTITY; PERPETUAL EXISTENCE; POWERS.

(a) An unincorporated nonprofit association is a legal entity distinct from its members and managers.

(b) An unincorporated nonprofit association has perpetual duration unless the governing principles specify otherwise.

(c) An unincorporated nonprofit association has the same powers as an individual to do all things necessary or convenient to carry on its purposes.

(d) An unincorporated nonprofit association may engage in profit-making activities but profits from any activities must be used or set aside for the association's nonprofit purposes.

SECTION 6. OWNERSHIP AND TRANSFER OF PROPERTY.

(a) An unincorporated nonprofit association may acquire, hold, encumber, or transfer in its name an interest in real or personal property.

(b) An unincorporated nonprofit association may be a beneficiary of a trust or contract, a legatee or a devisee.

SECTION 7. STATEMENT OF AUTHORITY AS TO REAL PROPERTY.

(a) In this section, "statement of authority" means a statement authorizing a person to transfer an interest in real property held in the name of an unincorporated nonprofit

association.

(b) An interest in real property held in the name of an unincorporated nonprofit association may be transferred by a person authorized to do so in a statement of authority [filed] [recorded] by the association in the office in the [county] in which a transfer of the property would be [filed] [recorded].

(c) A statement of authority must set forth:

(1) the name of the unincorporated nonprofit association;

(2) the address in this state, including the street address, if any, of the association or, if the association does not have an address in this state, its out-of-state address;

(3) that the association is an unincorporated nonprofit association; and

(4) the name, title, or position of a person authorized to transfer an estate or interest in real property held in the name of the association.

(d) A statement of authority must be executed in the same manner as [a deed] [an affidavit] by a person other than the person authorized in the statement to transfer the interest.

(e) A filing officer may collect a fee for [filing] [recording] a statement of authority in the amount authorized for [filing] [recording] a transfer of real property.

(f) A document amending, revoking, or canceling a statement of authority or stating that the statement is unauthorized or erroneous must meet the requirements for executing and [filing] [recording] an original statement.

(g) Unless canceled earlier, a [filed] [recorded] statement of authority and its most recent amendment expire [five] years after the date of the most recent [filing] [recording].

(h) If the record title to real property is in the name of an unincorporated nonprofit association and the statement of authority is [filed] [recorded] in the office of the [county] in which a transfer of the property would be [filed] [recorded], the authority of the person

named in the statement to transfer is conclusive in favor of a person that gives value without notice that the person lacks authority.

SECTION 8. LIABILITY.

(a) A debt, obligation, or other liability of an unincorporated nonprofit association, whether arising in contract, tort, or otherwise:

(1) is solely the debt, obligation, or other liability of the association; and

(2) does not become a debt, obligation, or other liability of a member or manager solely because the member acts as a member or the manager acts as a manager.

(b) A person's status as a member or manager does not prevent or restrict law other than this [act] from imposing liability on the person or the association because of the person's conduct.

SECTION 9. ASSERTION AND DEFENSE OF CLAIMS.

(a) An unincorporated nonprofit association may sue or be sued in its own name.

(b) A member or manager may assert a claim the member or manager has against the unincorporated nonprofit association. An association may assert a claim it has against a member or manager.

SECTION 10. EFFECT OF JUDGMENT OR ORDER. A judgment or order against an unincorporated nonprofit association is not by itself a judgment or order against a member or manager.

SECTION 11. APPOINTMENT OF AGENT TO RECEIVE SERVICE OF PROCESS.

(a) An unincorporated nonprofit association may file in the office of the [Secretary of State] a statement appointing an agent authorized to receive service of process.

(b) A statement appointing an agent must set forth:

(1) the name of the unincorporated nonprofit association; and

(2) the name of the person in this state authorized to receive service of process and the person's address, including the street address, in this state.

(c) A statement appointing an agent must be signed and [acknowledged] [sworn to] by a person authorized to manage the affairs of the unincorporated nonprofit association and by the person appointed as the agent. By signing and [acknowledging] [swearing to] the statement the person becomes the agent.

(d) An amendment to or cancellation of a statement appointing an agent to receive service of process must meet the requirements for executing of an original statement. An agent may resign by filing a resignation in the office of the [Secretary of State] and giving notice to the association.

(e) The [Secretary of State] may collect a fee for filing a statement appointing an agent to receive service of process, an amendment, a cancellation, or a resignation in the amount charged for filing similar documents.

[SECTION 12. SERVICE OF PROCESS. In an action or proceeding against an unincorporated nonprofit association, process may be served on an agent authorized by appointment to receive service of process, on a manager of the association, or in any other manner authorized by the law of this state.]

SECTION 13. ACTION OR PROCEEDING NOT ABATED BY CHANGE. An action or proceeding against an unincorporated nonprofit association does not abate merely because of a change in its members or managers.

[**SECTION 14. VENUE.** Unless otherwise provided by law other than this [act], venue of an action against an unincorporated nonprofit association brought in this state is determined under the statutes applicable to an action brought in this state against a corporation.]

SECTION 15. MEMBER NOT AGENT. A member is not an agent of the association solely by reason of being a member.

SECTION 16. APPROVAL BY MEMBERS.

(a) Except as otherwise provided in the governing principles, an unincorporated nonprofit association must have the approval of its members to:

- (1) admit, suspend, dismiss, or expel a member;
- (2) select or dismiss a manager;
- (3) adopt, amend, or repeal the governing principles;
- (4) sell, lease, exchange, or otherwise dispose of all, or substantially all, of the association's property, with or without the association's goodwill, outside the ordinary course of its activities;
- (5) dissolve under section 28(2) or merge under section 30;
- (6) undertake any other act outside the ordinary course of the association's activities; or
- (7) determine the policy and purposes of the association.

(b) An unincorporated nonprofit association must have the approval of the members to do any other act or exercise a right that the governing principles require to be approved by members.

SECTION 17. MEETINGS OF MEMBERS; VOTING, NOTICE, AND QUORUM REQUIREMENTS.

(a) Unless the governing principles provide otherwise:

(1) approval of a matter by members requires an affirmative majority of the votes cast at a meeting of members; and

(2) each member is entitled to one vote on each matter that is submitted for approval by members.

(b) Notice and quorum requirements for member meetings and the conduct of meetings of members are determined by the governing principles.

SECTION 18. DUTIES OF MEMBER.

(a) A member does not have a fiduciary duty to an unincorporated nonprofit association or to another member solely by being a member.

(b) A member shall discharge the duties to the unincorporated nonprofit association and the other members and exercise any rights under this [act] consistent with the governing principles and the obligation of good faith and fair dealing.

SECTION 19. ADMISSION, SUSPENSION, DISMISSAL, OR EXPULSION OF MEMBERS.

(a) A person becomes a member and may be suspended, dismissed, or expelled in accordance with the association's governing principles. If there are no applicable governing

principles, a person may become a member or be suspended, dismissed, or expelled from an association only by a vote of its members. A person may not be admitted as a member without the person's consent.

(b) Unless the governing principles provide otherwise, the suspension, dismissal, or expulsion of a member does not relieve the member from any unpaid capital contribution, dues, assessments, fees, or other obligation incurred or commitment made by the member before the suspension, dismissal, or expulsion.

SECTION 20. MEMBER'S RESIGNATION.

(a) A member may resign as a member in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time.

(b) Unless the governing principles provide otherwise, resignation of a member does not relieve the member from any unpaid capital contribution, dues, assessments, fees, or other obligation incurred or commitment made by the member before resignation.

SECTION 21. MEMBERSHIP INTEREST NOT TRANSFERABLE. Except as otherwise provided in the governing principles, a member's interest or any right under the governing principles is not transferable.

SECTION 22. SELECTION OF MANAGERS; MANAGEMENT RIGHTS OF MANAGERS. Except as otherwise provided in this [act] or the governing principles:

- (1) only the members may select a manager or managers;
- (2) a manager may be a member or a nonmember;
- (3) if a manager is not selected, all members are managers;
- (4) each manager has equal rights in the management and conduct of the association's

activities;

(5) all matters relating to the association's activities are decided by its managers except for matters reserved for approval by members in section 16; and

(6) a difference among managers is decided by a majority of the managers.

SECTION 23. DUTIES OF MANAGERS.

(a) A manager owes to the unincorporated nonprofit association and to its members the fiduciary duties of loyalty and care.

(b) A manager shall manage the unincorporated nonprofit association in good faith, in a manner the manager reasonably believes to be in the best interests of the association, and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances. A manager may rely in good faith upon any opinion, report, statement, or other information provided by another person that the manager reasonably believes is a competent and reliable source for the information.

(c) After full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty by a manager may be authorized or ratified by a majority of the members that are not interested directly or indirectly in the act or transaction.

(d) A manager that makes a business judgment in good faith satisfies the duties specified in subsection (a) if the manager:

(1) is not interested, directly or indirectly, in the subject of the business judgment and is otherwise able to exercise independent judgment;

(2) is informed with respect to the subject of the business judgment to the extent the manager reasonably believes to be appropriate under the circumstances; and

(3) believes that the business judgment is in the best interests of the unincorporated nonprofit association and in accordance with its purposes.

(e) The governing principles in a record may limit or eliminate the liability of a manager to the unincorporated nonprofit association or its members for damages for any action taken, or for failure to take any action, as a manager, except liability for:

- (1) the amount of financial benefit improperly received by a manager;
- (2) an intentional infliction of harm on the association or one or more of its members;
- (3) an intentional violation of criminal law;
- (4) breach of the duty of loyalty; or
- (5) improper distributions.

SECTION 24. NOTICE AND QUORUM REQUIREMENTS FOR MEETINGS OF MANAGERS. Notice and quorum requirements for meetings of managers and the conduct of meetings of managers are determined by the governing principles.

SECTION 25. RIGHT OF MEMBER OR MANAGER TO INFORMATION.

(a) On reasonable notice, a member or manager of an unincorporated nonprofit association may inspect and copy during the unincorporated nonprofit association's regular operating hours, at a reasonable location specified by the association, any record maintained by the association regarding its activities, financial condition, and other circumstances, to the extent the information is material to the member's or manager's rights and duties under the governing principles.

(b) An unincorporated nonprofit association may impose reasonable restrictions on access to and use of information to be furnished under this section, including designating the information confidential and imposing obligations of nondisclosure and safeguarding on the recipient.

(c) An unincorporated nonprofit association may charge a person that makes a demand under this section reasonable copying costs, limited to the costs of labor and materials.

(d) A former member or manager is entitled to information to which the member or manager was entitled while a member or manager if the information pertains to the period during which the person was a member or manager, the former member or manager seeks the information in good faith, and the former member or manager satisfies subsections (a) through (c).

SECTION 26. DISTRIBUTIONS PROHIBITED; COMPENSATION AND OTHER PERMITTED PAYMENTS.

(a) Except as otherwise provided in subsection (b), an unincorporated nonprofit association may not pay dividends or make distributions to a member or manager.

(b) An unincorporated nonprofit association may:

(1) pay reasonable compensation or reimburse reasonable expenses to a member or manager for services rendered;

(2) confer benefits on a member or manager in conformity with its nonprofit purposes;

(3) repurchase a membership and repay a capital contribution made by a member to the extent authorized by its governing principles; or

(4) make distributions of property to members upon winding up and termination to the extent permitted by section 29.

SECTION 27. REIMBURSEMENT; INDEMNIFICATION; ADVANCEMENT OF EXPENSES.

(a) Except as otherwise provided in the governing principles, an unincorporated nonprofit association shall reimburse a member or manager for authorized expenses reasonably incurred in the course of the member's or manager's activities on behalf of the association.

(b) An unincorporated nonprofit association may indemnify a member or manager for any debt, obligation, or other liability incurred in the course of the member's or manager's activities on behalf of the association if the person seeking indemnification has complied with Sections 18 and 23. Governing principles in a record may broaden or limit indemnification.

(c) If a person is made or threatened to be made a party in an action based on that person's activities on behalf of an unincorporated nonprofit association and the person makes a request in a record to the association, a majority of the disinterested managers may approve in a record advance payment, or reimbursement, by the association, of all or a part of the reasonable expenses, including attorney's fees and costs, incurred by the person before the final disposition of the proceeding. To be entitled to an advance payment or reimbursement, the person must state in a record that the person has a good faith belief that the criteria for indemnification in subsection (b) have been satisfied and that the person will repay the amounts advanced or reimbursed if the criteria for payment have not been satisfied. The governing principles in a record may broaden or limit the advance payments or reimbursements.

(d) An unincorporated nonprofit association may purchase insurance on behalf of a member or manager for liability asserted against or incurred by the member or manager in the capacity of a member or manager, whether or not the association has authority under this [act] to reimburse, indemnify, or advance expenses to the member or manager against the

liability.

(e) The rights of reimbursement, indemnification, and advancement of expenses under this section apply to a former member or manager for an activity undertaken on behalf of the unincorporated nonprofit association while a member or manager.

SECTION 28. DISSOLUTION.

(a) An unincorporated nonprofit association may be dissolved as follows:

(1) if the governing principles provide a time or method for dissolution, at that time or by that method;

(2) if the governing principles do not provide a time or method for dissolution, upon approval by the members;

(3) if no member can be located and the association's operations have been discontinued for at least three years, by the managers or, if the association has no current manager, by its last manager;

(4) by court order; or

(5) under law other than this act.

(b) After dissolution, an unincorporated nonprofit association continues in existence until its activities have been wound up and it is terminated pursuant to section 29.

SECTION 29. WINDING UP AND TERMINATION. Winding up and termination of an unincorporated nonprofit association must proceed in accordance with the following rules:

(1) All known debts and liabilities must be paid or adequately provided for.

(2) Any property subject to a condition requiring return to the person designated by the donor must be transferred to that person.

(3) Any property subject to a trust must be distributed in accordance with the trust agreement.

(4) Any remaining property must be distributed as follows:

(A) as required by law other than this [act] that requires assets of an association to be distributed to another person with similar nonprofit purposes;

(B) in accordance with the association's governing principles or in the absence of applicable governing principles, to the members of the association per capita or as the members direct; or

(C) if neither subparagraph (A) nor (B) applies, under [cite the unclaimed property law in this state.]

SECTION 30. MERGERS.

(a) In this section:

(1) "Constituent organization" means an organization that is merged with one or more other organizations including the surviving organization.

(2) "Nonsurviving organization" means a constituent organization that is not the surviving organization.

(3) "Organization" means an unincorporated nonprofit association, a general partnership, including a limited liability partnership, limited partnership, including a limited liability limited partnership, limited liability company, business or statutory trust, corporation, or any other legal or commercial entity having a statute governing its formation and operation. The term includes a for-profit or nonprofit organization.

(4) "Surviving organization" means an organization into which one or more other organizations are merged.

(b) An unincorporated nonprofit association may merge with any organization that is

authorized by law to merge with an unincorporated nonprofit association.

(c) A merger involving an unincorporated nonprofit association is subject to the following rules:

(1) Each constituent organization shall comply with its governing law.

(2) Each party to the merger shall approve a plan of merger. The plan, which must be in a record, must include the following provisions:

(A) the name and form of each organization that is a party to the merger;

(B) the name and form of the surviving organization and, if the surviving organization is to be created by the merger, a statement to that effect;

(C) if the surviving organization is to be created by the merger, the surviving organization's organizational documents that are proposed to be in a record;

(D) if the surviving organization is not to be created by the merger, any amendments to be made by the merger to the surviving organization's organizational documents that are, or are proposed to be, in a record; and

(E) the terms and conditions of the merger, including the manner and basis for converting the interests in each constituent organization into any combination of money, interests in the surviving organization, and other consideration except that the plan of merger may not permit members of an unincorporated nonprofit association to receive merger consideration if a distribution of such consideration would not be permitted in the absence of a merger under Sections 26 and 29.

(3) The plan of merger must be approved by the members of each unincorporated nonprofit association that is a constituent organization in the merger. If a plan of merger would impose personal liability for an obligation of a constituent or surviving organization on a member of an association that is a party to the merger, the plan may not take effect unless it is approved in a record by the member.

(4) Subject to the contractual rights of third parties, after a plan of merger is approved and at any time before the merger is effective, a constituent organization may amend the plan or abandon the merger as provided in the plan, or except as otherwise prohibited in the plan, with the same consent as was required to approve the plan.

(5) Following approval of the plan, a merger under this section is effective:

(A) if a constituent organization is required to give notice to or obtain the approval of a governmental agency or officer in order to be a party to a merger, when the notice has been given and the approval has been obtained; and

(B) if the surviving organization:

(i) is an unincorporated nonprofit association, as specified in the plan of merger and upon compliance by any constituent organization that is not an association with any requirements, including any required filings in the [office of the Secretary of State], of the organization's governing statute; or

(ii) is not an unincorporated nonprofit association, as provided by the statute governing the surviving organization.

(d) When a merger becomes effective:

(1) the surviving organization continues or comes into existence;

(2) each constituent organization that merges into the surviving organization ceases to exist as a separate entity;

(3) all property owned by each constituent organization that ceases to exist vests in the surviving organization;

(4) all debts, obligations, or other liabilities of each nonsurviving organization continue as debts, obligations, or other liabilities of the surviving organization;

(5) an action or proceeding pending by or against any nonsurviving organization may be continued as if the merger had not occurred;

(6) except as prohibited by law other than this [act], all of the rights, privileges, immunities, powers, and purposes of each constituent organization that ceases to exist vest in the surviving organization;

(7) except as otherwise provided in the plan of merger, the terms and conditions of the plan of merger take effect;

(8) the merger does not affect the personal liability, if any, of a member or manager of a constituent organization for a debt, obligation, or other liability incurred before the merger is effective; and

(9) a surviving organization that is not organized in this state is subject to the jurisdiction of the courts of this state to enforce any debt, obligation, or other liability owed by a constituent organization, if before the merger the constituent organization was subject to suit in this state for the debt, obligation, or other liability.

(e) Property held for a charitable purpose under the law of this state by a constituent organization immediately before a merger under this section becomes effective may not, as a result of the merger, be diverted from the objects for which it was given, unless, to the extent required by or pursuant to the law of this state concerning cy pres or other law dealing with nondiversion of charitable assets, the organization obtains an appropriate order of [name of court] [the attorney general] specifying the disposition of the property.

(f) A bequest, devise, gift, grant, or promise contained in a will or other instrument of donation, subscription, or conveyance that is made to a nonsurviving organization and that takes effect or remains payable after the merger inures to the surviving organization. A trust obligation that would govern property if transferred to the nonsurviving organization applies to property that is transferred to the surviving organization under this section.

[SECTION 31. TRANSITION CONCERNING REAL AND PERSONAL PROPERTY.]

(a) If, before [the effective date of this [act]], an interest in property was by terms of a transfer purportedly transferred to an unincorporated nonprofit association but under the law of this state the interest did not vest in the association, or in one or more persons on behalf of the association under subsection (b), on [the effective date of this [act]] the interest vests in the association, unless the parties to the transfer have treated the transfer as ineffective.

(b) If, before [the effective date of this [act]], an interest in property was by terms of a transfer purportedly transferred to an unincorporated nonprofit association but the interest was vested in one or more persons to hold the interest for members of the association, on or after [the effective date of this [act]] the persons, or their successors in interest, may transfer the interest to the association in its name, or the association may require that the interest be transferred to it in its name.]

SECTION 32. UNIFORMITY OF APPLICATION AND CONSTRUCTION. In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

SECTION 33. RELATION TO ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT. This [act] modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001, et seq., but does not modify, limit, or supersede section 101(c) of that act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of that act, 15 U.S.C. section 7003(b).

SECTION 34. SAVINGS CLAUSE. This [act] does not affect an action or proceeding commenced or right accrued before this [act] takes effect.

SECTION 35. REPEALS. The following are repealed: _____.

SECTION 36. EFFECTIVE DATE. This [act] takes effect _____.

Printed in the UK for The Stationery Office Limited
C4 12/08

Cover printed on 75% recycled paper
Text printed on 100% recycled paper

Published by TSO (The Stationery Office) and available from:

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www.tso.co.uk/bookshop

Mail, Telephone, Fax & E-mail

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ISBN 978-0108882272



9 780108 882272