



Scottish Law Commission  
*promoting law reform*

| (SCOT LAW COM No 217)

# Report on Unincorporated Associations

report



**Scottish Law Commission**  
*promoting law reform*

# Report on Unincorporated Associations

Laid before the Scottish Parliament by the Scottish Ministers

November 2009

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ISBN: 9780108882395

Printed in the UK for The Stationery Office Limited on behalf of the Queen's Printer for Scotland.

11/09

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

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

<sup>2</sup> As at 28 September 2009.

# SCOTTISH LAW COMMISSION

*Item No 7 of our Seventh Programme of Law Reform*

## **Report on Unincorporated Associations**

To: Kenny MacAskill MSP, Cabinet Secretary for Justice and  
The Rt Hon Jim Murphy, Secretary of State for Scotland

We have the honour to submit our Report on Unincorporated Associations.

(Signed)

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GEORGE GRETTON  
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HECTOR L MACQUEEN  
COLIN TYRE

Malcolm McMillan, *Chief Executive*  
28 September 2009

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# Part 1 Introduction

## Unincorporated associations in Scotland

1.1 There are a very large number of unincorporated associations in existence in Scotland. The Scottish Council for Voluntary Organisations (SCVO) estimated in July 2009 that there are approximately 45,000 voluntary organisations in Scotland, the majority of which are unincorporated associations.<sup>1</sup> 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 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".<sup>2</sup>

1.2 Charities account for approximately 23,300 of the 45,000 organisations which make up Scotland's Third Sector. In their report "Scottish Charities 2008",<sup>3</sup> 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.<sup>4</sup> However, the small number which are incorporated as companies are largely those which generate the highest income. 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. 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.

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<sup>1</sup><http://www.scvo.org.uk/scvo/Information/ViewInformation.aspx?al=t&page=&all=&from=DSR&Info=1623&TCID=27&PageName=Facts>.

<sup>2</sup> The "Third Sector" consists of non-governmental organisations whose purpose is the furthering of social, environmental or cultural objectives (the first and second sectors being the private and public sectors). Within government, the Office of the Third Sector is a part of the Cabinet Office whose function is "to support the environment for a thriving third sector (voluntary and community groups, social enterprises, charities, co-operatives and mutuals), enabling the sector to campaign for change, deliver public services, promote social enterprise and strengthen communities". For further information, see the website of the Office of the Third Sector: [http://www.cabinetoffice.gov.uk/third\\_sector.aspx](http://www.cabinetoffice.gov.uk/third_sector.aspx).

<sup>3</sup> Office of the Scottish Charity Regulator, "Scottish Charities 2008" -

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

<sup>4</sup> *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.

1.3 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 characteristic of having defined, not-for-profit objects.

### **The legal status of unincorporated associations**

1.4 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 personality<sup>5</sup> 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. We discuss the problems encountered by unincorporated associations in more detail in Part 2 below, but these may be summarised as follows:

- They have no capacity to enter into contracts. Contractual responsibilities must be undertaken by individual office-bearers or, possibly individual association members.
- They cannot be held liable for wrongful acts committed by their representatives while acting on behalf of the association. Liability rests upon the individual personally responsible for the loss sustained, but it is not clear whether liability – possibly beyond the value of the association's funds – also rests upon office-bearers or the whole association membership.
- A member cannot sue for damages for injury sustained as a consequence of a wrongful act committed by an office-bearer or fellow member while acting on behalf of the association. This, it has repeatedly been asserted, would be tantamount to the injured member suing himself.
- They cannot own property. Title must instead be taken in the name of individual members or office-bearers as trustees, necessitating further transfers when such members or office-bearers die or cease to participate in the association's activities.

1.5 Yet the full picture is not so clear-cut. Much statutory regulation proceeds upon the (strictly false) assumption that an unincorporated association has some form of existence in law. A wide variety of statutory criminal offences may be committed by associations as well as by their officers. Associations are liable to various taxes in much the same way as

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<sup>5</sup> In this Report we have used the term "legal personality" as it is more familiar than the term "juristic personality" which, strictly, may be more correct.

corporate bodies. Statutes in the employment and pensions law field refer to individuals as being the employees of unincorporated associations. An unincorporated association may be sequestrated. The non-existence of such associations as a matter of law is often quietly ignored.

1.6 The legal status of not-for-profit associations has been addressed in a variety of ways by jurisdictions outside the United Kingdom. Many Commonwealth jurisdictions have provided a corporate vehicle designed to be suitable for such associations. Some continental European systems provide for legal personality to be acquired by registration in a public register or by expression of intention in the association's constitution. In the United States, a model Act produced by the National Conference of Commissioners on Uniform State Laws provides for legal personality to be accorded to associations fulfilling certain specified criteria. By failing to make any statutory provision according some form of legal status to not-for-profit associations, the UK jurisdictions have fallen conspicuously behind other major legal systems.

### **Background to this Report**

1.7 The law relating to unincorporated associations is included in our current Programme of Law Reform. The topic was suggested to us in the preliminary consultation about the possible content of the Programme and, during the subsequent consultation process which preceded the Programme's publication, the suggestion that this area of law was in need of reform received widespread support from a variety of organisations and individuals.

1.8 Discussion Paper No 140 on *Unincorporated Associations* was published on 3 December 2008. Prior to its publication, we held informal meetings with representatives of a number of organisations, including OSCR, SCVO, the University of Dundee Charity Law Research Unit, the Church of Scotland, and the Institute of Chartered Accountants of Scotland, and with individuals who have an interest and expertise in this field.<sup>6</sup> The consultation period ran until 6 March 2009. There were forty-seven responses to the Discussion Paper from a variety of consultees including voluntary and not-for-profit organisations, faith organisations, a political party, individuals, non-departmental public bodies, non-ministerial departments, professionals, local authorities and academics.<sup>7</sup> SCVO assisted us in publicising the paper widely within the Third Sector and also facilitated three well-attended focus group meetings in Edinburgh, Glasgow and Inverness. In addition, we sought information from local authorities by way of a questionnaire regarding the nature and extent of their contact with unincorporated associations. Ten local authorities replied. We are very grateful to all of those who responded to the Discussion Paper and the questionnaire, and to those with whom we have discussed our proposals. We are particularly grateful to SCVO for their help in publicising the consultation process, which resulted in us receiving a large number of responses from organisations throughout the Third Sector.

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<sup>6</sup> A list of the individuals with whom we have held discussions prior to and since publication of the Discussion Paper is at Appendix C.

<sup>7</sup> Lists of the consultees who submitted a response to the Discussion Paper and of the local authorities who replied to the questionnaire are at Appendix C.

## Summary of our recommendations

1.9 In Part 3 of our Report we address the principle of whether legal personality should be attributed to unincorporated associations, and recommend that it should be accorded to associations which satisfy certain conditions. The main conditions are that the association should have at least two members; that its objects do not include making a profit for its members; and that it has adopted a constitutive document containing certain minimum specified provisions. Those provisions are the name of the association; the purpose for which it exists; the criteria for membership; the procedure for election or appointment of those managing the association; the powers and duties of its office-bearers (if any); the rules for distribution of its assets on dissolution; and the procedure for amendment of the constitutive document. We recommend that unincorporated associations with separate legal personality be given the label "Scottish Association with Legal Personality" (abbreviated in our Report to "SALP") to distinguish them from associations which do not. We discuss but reject the possibility of making acquisition of legal personality dependent upon registration in a public register. We then discuss whether associations should be required to opt into or opt out of treatment as a separate legal entity, and recommend that all associations fulfilling the statutory conditions should be treated as having legal personality unless they resolve to opt out. We conclude that there is no need to provide a statutory model constitution for SALPs, nor a statutory default rule for distribution of assets on dissolution. Finally, we recommend that a SALP should lose its separate legal personality if any of the statutory conditions cease to be fulfilled.

1.10 In Part 4 we address the consequences of attribution of separate legal personality to an unincorporated association. We note that an individual will not incur personal liability, whether contractual, delictual or otherwise, by reason only of acting as an office-bearer or member of a SALP. We recommend that a SALP should be capable of incurring liability to one of its members for loss or damage caused by the wrongful act or omission of another member while acting on behalf of the association. Since a SALP will have the capacity to acquire property, including heritable property, we make certain recommendations to ensure that the official address of a SALP which owns heritable property is publicly available. We make recommendations with regard to the statutory requirements for execution of documents on behalf of a SALP. We confirm that a SALP will have capacity to sue and be sued in its own name. Finally, we recommend that provision be made for the unusual situation in which an association loses separate legal personality without being dissolved.

1.11 In Part 5 we discuss the protection of parties who have contractual or other dealings with a SALP. We recommend that a SALP be obliged to disclose its name and official address on documents and publications and that certain documents be made publicly available on application to that address. Breach of these requirements would result in re-imposition of personal liability on those responsible for the association's management. We recommend that the rule regarding *ultra vires* actings which currently applies to charitable companies should apply to SALPs. We propose some minor amendments to the Bankruptcy (Scotland) Act 1985 to ensure that a creditor does not lose the right to sequester a SALP and have any gratuitous alienations set aside if the SALP is dissolved. We discuss whether some form of legislative disincentive is required to discourage large associations from remaining unincorporated but conclude that there is no need for such legislative intervention.

1.12 Part 6 contains a discussion of cross-border issues which would arise if legislation attributing legal personality to unincorporated associations were to be enacted for Scotland but not for other jurisdictions within the United Kingdom. We note that a statutory test is required to determine which associations are Scottish and therefore capable of becoming SALPs. We recommend that in order to be a SALP, an association must meet two conditions: firstly, it must have an official address in Scotland and, secondly, its management must be carried on wholly or mainly in Scotland.

1.13 In Part 7 we deal with transitional issues. Acquisition of separate legal personality by an association in existence when the legislation takes effect will not result in automatic transfer of contractual or property rights to the SALP. So far as heritable and certain other property is concerned, a conveyance or other transfer from the persons holding title on behalf of the association will be required in order to vest ownership in the SALP. We recommend that legislative provision be made to ensure that acquisition of legal personality is not treated as a change of employer for the purposes of employment and pensions legislation. In order to afford an opportunity to any association whose members wish to opt out of treatment of the association as a separate legal entity before the legislation takes effect, we recommend a transitional period of six months between the passing of the Act and its entry into force.

#### **Alternative proposal: a new corporate vehicle**

1.14 In Part 5 of the Discussion Paper, we proposed a different approach to the problems raised by the current law relating to unincorporated associations, namely the provision by statute of a new corporate vehicle which would be designed to be suitable for the full range of not-for-profit organisations. There was no support for this proposal and we explain briefly in Part 8 of this Report why we have rejected this alternative approach.

#### **Impact assessment**

1.15 An assessment of the impact of our recommendations is set out in Appendix B to this Report. It makes use of evidence obtained during our consultation process regarding the impact of our proposals, and has been prepared with the benefit of advice from the Scottish Government's Justice Analytical Services Division. We attempt to assess the costs and benefits of three options: namely (1) the status quo; (2) our preferred option of attribution of separate legal personality with a right of opt-out; and (3) attribution of separate legal personality only to those unincorporated associations who opt in. We conclude that attribution of separate legal personality subject to a right to opt out is the most appropriate and cost effective way to ensure that the recommendations apply to and benefit the greatest number of unincorporated associations for whom the recommendations are primarily intended.

#### **Legislative competence and compliance with Convention and Community law**

1.16 A draft Bill which would give effect to our recommendations is annexed to this Report. 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 our recommendations 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 beyond the competence of the Scottish Parliament and would require to be passed by the United Kingdom Parliament. In recognition of this, our draft Bill is prepared in the style of a UK Bill rather than a Bill for the Scottish Parliament, and this Report is addressed to the Secretary of State for Scotland as well as to the Cabinet Secretary for Justice.

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

## Part 2            The need for reform

### Introduction

2.1     The term "unincorporated associations" is used to describe a very wide variety of not-for-profit organisations, clubs and associations. At one end of the scale they 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 little or nothing by way of formally-agreed rules. In *Conservative & Unionist Central Office v Burrell*,<sup>1</sup> the following definition of an unincorporated association was offered by Lawton LJ in the context of tax legislation:<sup>2</sup>

"...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."

2.2     The critical feature of unincorporated associations under Scots law, as under English law,<sup>3</sup> is that they are not recognised as having legal personality. The absence of legal personality of organisations which may have complex juristic relationships with others has created difficulties and injustices. Some of the difficulties have been creatively resolved; others remain.

### Problems arising from the current law

2.3     In Part 2 of our Discussion Paper, we outlined the current law relating to unincorporated associations, and in Part 3 we identified the following problems which arise from the treatment of associations as non-entities from a legal point of view.

#### *Contracts with third parties*

2.4     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.<sup>4</sup> 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

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<sup>1</sup> [1982] 1 WLR 522 (CA).

<sup>2</sup> *Ibid* at 525.

<sup>3</sup> We are not aware of any material differences between the law of Scotland and the law of England and Wales regarding unincorporated associations. In this Report we cite decisions from England and Wales, and also Privy Council judgments in appeals from other Commonwealth jurisdictions, as representing the law of Scotland where, as is often the case, no Scottish authority exists.

<sup>4</sup> Equally, the association cannot itself acquire any contractual rights, which vest instead in individuals.

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.<sup>5</sup>

2.5 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*,<sup>6</sup> 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. It does not resolve all of the problems which are raised by the application of employment law to not-for-profit associations. 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. Some statutes simply ignore the absence of legal personality and proceed on the basis that the association itself has employees.

2.6 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, 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*

2.7 Similar arguments arise in relation to contracts with association members. 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. Accordingly, as we noted in the Discussion Paper, 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 share in that drink in consideration of his or her payment.<sup>7</sup> 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*

2.8 There is no clear authority on the extent of liability of an association and its members to a third party in delict. 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 likelihood of an award of damages exceeding club funds is perhaps greater in the case of a delictual

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<sup>5</sup> *Wise v Perpetual Trustee Co Ltd* [1903] AC 139 (PC).

<sup>6</sup> [1999] ICR 852.

<sup>7</sup> *Carlton Lodge Club v Customs & Excise Commissioners* [1975] 1 WLR 66 (CA).

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.

2.9 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. The answer might depend 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. 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 not-for-profit organisation could give rise to unlimited personal liability for a third party claim.

#### *Liability in delict to members*

2.10 It has been consistently held in Scotland<sup>8</sup> and elsewhere in the United Kingdom<sup>9</sup> that no duty of care is owed to an association member by the management committee as representatives of the association, on the ground that the committee is not vicariously liable for duties owed by all members (including the member seeking reparation) as principals. 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.

#### *Ownership of property*

2.11 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.<sup>10</sup> In *Magistrates of Banff v Ruthin Castle Ltd*,<sup>11</sup> 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 separately transferable.<sup>12</sup>

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<sup>8</sup> See eg *Harrison v West of Scotland Kart Club* 2004 SC 615; *Milne v Duguid* 1999 SCLR 512; *Carmichael v Bearsden & District Rifle & Pistol Club* 2000 SLT (Sh Ct) 49.

<sup>9</sup> *Prole v Allen* [1950] 1 All ER 476; *Shore v Ministry of Works* [1950] 2 All ER 228; *Robertson v Ridley* [1989] 1 WLR 872 (CA).

<sup>10</sup> *Murray v Johnstone* (1896) 23 R 981.

<sup>11</sup> 1944 SC 36 at 68.

<sup>12</sup> *Livingstone v Allan* (1900) 3 F 233, concerning the analogous situation of a trustee.

2.12 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 conveyance<sup>13</sup> 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 title to heritable 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.

2.13 Difficulties may also 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 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 court<sup>14</sup> 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 capita<sup>15</sup> or, where only a single member remained, made over to that member.<sup>16</sup>

#### *Title to sue and be sued*

2.14 In the Court of Session, an unincorporated association is sued by calling the association by name together with its office-bearers or committee members as representing it.<sup>17</sup> This enables 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.<sup>18</sup> 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

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<sup>13</sup> Or a deed of assumption and resignation in the form of Schedule B to the Trusts (Scotland) Act 1921.

<sup>14</sup> Under s 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, or at common law for approval of a *cy-près* scheme.

<sup>15</sup> Cf *In Re Sick and Funeral Society of St John's Sunday School, Golcar* [1973] Ch 51.

<sup>16</sup> Cf *Hanchett-Stamford v Att-Gen* [2008] EWHC 330 (Ch); [2008] P&CR 5.

<sup>17</sup> *Bridge v South Portland Street Synagogue* 1907 SC 1351.

<sup>18</sup> Ordinary Cause Rules 1993, rule 5.7(1).

individual.<sup>19</sup> 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.

#### *Other problems identified by consultees*

2.15 Several of our consultees highlighted problems which we had not mentioned in the Discussion Paper. Whereas in the Discussion Paper we had mentioned that obtaining money to finance redundancy payments posed a significant financial risk to the management committee and the membership of unincorporated associations, the Scottish Council for Voluntary Organisations (SCVO) stated that similar problems may arise in relation to pension payments and noted that the lack of legal status may cause difficulties for associations which wish to join an umbrella organisation. The Charity Law Association commented that raising finance and assessing credit-worthiness were among the practical difficulties inherent in the current legal regime. Difficulties regarding claims under equality legislation were mentioned by the Equality and Human Rights Commission.

#### **Uncertainty and misunderstanding**

2.16 We have attempted above to set out the difficulties caused by the application of the law, as we see it, to associations which lack legal personality. In fact, the situation is rather more complicated and uncertain because the treatment of unincorporated associations as legal non-entities is not consistently adhered to by UK legislation.

#### *Statutory recognition of existence of unincorporated bodies*

2.17 In a variety of circumstances the law – especially statute law of a regulatory kind – simply proceeds upon an assumption that unincorporated associations do exist for certain purposes. For example, a "body" may be defined as including an unincorporated association.<sup>20</sup> In the Interpretation Act 1978, Schedule 1, "person" is defined as including "a body of persons corporate or unincorporate".<sup>21</sup> In most cases, statutory provisions which seek to regulate activities which may be carried on by unincorporated associations go no further than is necessary to apply legislation, drafted with companies and/or partnerships primarily in mind, to unincorporated bodies. The association's lack of legal personality is not addressed. We have already noted that the fact that an unincorporated association lacks legal personality is incompletely resolved with regard to employment law.

2.18 As regards criminal liability, an unincorporated association cannot commit a common law offence because it is not a legal entity and therefore lacks the capacity either to possess the necessary *mens rea* itself or to be attributed the *mens rea* of an individual or group of individuals. However, a very wide variety of statutory offences may be committed (without a requirement of *mens rea*) by an association and by its governing body, officers and

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<sup>19</sup> 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".

<sup>20</sup> 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).

<sup>21</sup> The issue is further complicated by uncertainty as to what is meant by the expression "body corporate". Scots law recognises that a non-natural person which is not a body corporate can be a legal entity. A partnership is the obvious example. Given the wide variety of bodies corporate and unincorporate which have been created by statute, we have not found it necessary, or desirable, to offer a definition of a corporate, as opposed to an unincorporate, body.

members.<sup>22</sup> Even where the statute creating an offence makes no express reference to unincorporated associations or to their officers or members, it has been held in England by the Court of Appeal that the association itself can be prosecuted as an alternative to prosecuting all of the individual members as jointly liable.<sup>23</sup>

2.19 For most tax purposes, a company or body corporate is defined as including an unincorporated association.<sup>24</sup> Various Acts provide for notices requiring to be served on an unincorporated association to be served on a member of the governing body.<sup>25</sup> The formation, dissolution etc of unincorporated associations is excluded from the Unfair Contract Terms Act 1977 along with that of bodies corporate and partnerships.<sup>26</sup>

#### *Lack of awareness of current law*

2.20 It emerged from our public consultation that the law as it currently stands is poorly understood by individuals who are responsible for operating and managing unincorporated not-for-profit organisations. It was apparent from responses received and from the seminars in which we participated that the narrative of the current law in the Discussion Paper had come as a surprise to many people, who were unaware that associations had no legal standing and that duties and liabilities therefore rested on the committee or other members of a club or other association. Indeed, these "revelations" caused alarm in some quarters from individuals who had been unaware of the liabilities to which they had unwittingly exposed themselves.

2.21 One or two respondents to our consultation considered that the current law caused no problems and that if there was a problem, it could be resolved by educating people as to the present situation rather than by changing the law. A large majority of our consultees, agreed, however, with our preliminary view that it was unacceptable to leave the law in its present state.

#### **Comparative study**

2.22 The jurisdictions within the United Kingdom are unusual among modern legal systems in having failed to introduce any universally-applicable statutory scheme for not-for-profit associations.<sup>27</sup> The approach adopted in many Commonwealth jurisdictions, notably in Australia and New Zealand, has been to provide a corporate vehicle designed specifically for the full range of not-for-profit organisations.<sup>28</sup> Under some continental European legal systems, legal personality is acquired by registration in a public register (eg Germany, France)<sup>29</sup> or by declaration of intention to be a separate legal person (Switzerland).<sup>30</sup> The

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<sup>22</sup> For examples, see Discussion Paper, para 2.20.

<sup>23</sup> *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786.

<sup>24</sup> 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).

<sup>25</sup> Eg Companies Act 2006, s 1258(3)(c).

<sup>26</sup> S 15 (3)(a)(ii).

<sup>27</sup> Provision is made in the Companies (Audit, Investigations and Community Enterprise) Act 2004 for certain non-charitable companies to be formed as or to become a "community interest company" (CIC). There has not to date been widespread use of this new vehicle in Scotland. The Charities and Trustee Investment (Scotland) Act 2005 made provision for Scottish charities to incorporate as a "Scottish charitable incorporated organisation" (SCIO). There is parallel legislative provision in England for a "CIO". Neither the SCIO nor the CIO has yet become operative.

<sup>28</sup> See Discussion Paper, paras 5.2 – 5.5.

<sup>29</sup> See Discussion Paper, paras 4.5 – 4.9.

<sup>30</sup> See Discussion Paper, paras 4.10 – 4.11.

South African *universitas* is a common law corporate body which is recognised as a separate legal entity without any need for registration, state authorisation or declaration of intention by its members.<sup>31</sup> In the United States, the National Conference of Commissioners on Uniform State Laws (NCCUSL) has produced a model Act which automatically attributes legal personality to unincorporated associations fulfilling certain specified criteria without the need for incorporation or registration.<sup>32</sup> In our Discussion Paper we referred to the US model in some detail, and we are happy to acknowledge once again the very considerable assistance which we have derived from it in attempting to devise a suitable legislative scheme for Scots law.

## Conclusions

2.23 We have concluded that it is not satisfactory to leave the law in its present state. The criticisms which we have made of the current law can, in our view, be addressed by conferring legal personality on unincorporated associations. We therefore proceed in this Report to make recommendations as to how best to achieve this while providing appropriate protection for the interests of persons who, voluntarily or otherwise, enter into legal relationships with such associations.

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<sup>31</sup> See Discussion Paper, para 4.17.

<sup>32</sup> See Discussion Paper, paras 4.12 – 4.16. The Uniform Unincorporated Nonprofit Associations Act was drafted in 1992 and amended in 1996. The 1996 model was ultimately adopted in 12 US states. A revised version of the model Act, the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA), significantly amended from the 1996 model, was approved by NCCUSL in July 2008 and the American Bar Association in February 2009. RUUNAA, now simply referred to as the Uniform Unincorporated Nonprofit Associations Act 2008, has, to date, been enacted in one US state and introduced in two others.

# Part 3 Attribution of separate legal personality

## Introduction

3.1 The core question in our Discussion Paper was whether unincorporated associations which meet certain specified minimum criteria should be accorded separate legal personality.<sup>1</sup> Most consultees answered this question in the affirmative. SCVO stressed that their support was conditional on the solution being "simple and inclusive, with the broadest reach possible". The Charity Law Association supported the proposal but expressed concern about the legal and practical implications of creating a situation in which an association moved in and out of legal personality. The Charity Law Research Unit, University of Dundee School of Law, agreed with our view that the primary beneficiaries of any change in the law should be small organisations for whom incorporation in any of the available forms (including the Scottish Charitable Incorporated Organisation format when it becomes available<sup>2</sup>) is likely to be unduly burdensome.

3.2 There were few dissenting views. One or two consultees were concerned about conferring legal personality on associations which did not desire it. Two consultees considered the existing option of incorporation to be sufficient. Others who expressed reservations in response to this question did so on the basis that attribution of legal personality should be optional and we address these comments below.

3.3 We sought comment on two alternative approaches: firstly, to accord separate personality only for certain purposes specified by statute (such as capacity to contract)<sup>3</sup> or, secondly, to grant unincorporated associations certain legal capacities (such as capacity to contract) without attributing legal personality to them.<sup>4</sup> The latter approach would be similar to that which has been taken throughout the United Kingdom in the past with regard to trade unions and employers' associations.<sup>5</sup> There was no support for the first of these alternative approaches and very little for the second, although some considered that the latter might be acceptable if the more radical approach of attributing legal personality were ruled out. Most consultees agreed with our provisional view that neither of these approaches would resolve all of the problems with the current law which we have identified and that they could lead to confusion. We have therefore rejected these two possibilities.

3.4 We regard the overall response to the core question as an endorsement of our provisional view that the appropriate route for reform of this area of law is to devise a statutory scheme for attribution of separate legal personality for all purposes to unincorporated associations. Nevertheless, important policy issues remain to be addressed. There was a division of opinion among consultees as to whether associations should be

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<sup>1</sup> Discussion Paper, para 4.29.

<sup>2</sup> See para 2.22, fn 27 above.

<sup>3</sup> Discussion Paper, paras 4.15 and 4.29.

<sup>4</sup> Discussion Paper, paras 4.48 and 4.49.

<sup>5</sup> For a further discussion, see Discussion Paper, paras 2.24 and 2.25.

required to opt into or opt out of legal personality. Many consultees were concerned about difficulties which may be created for persons who have business dealings with associations, such as knowing whether a particular association is a legal entity, where to find it, how to sue it, and so on. Some consultees agreed with our comment that attribution of legal personality should not operate as a disincentive to incorporation of large organisations for whom existing corporate vehicles are suitable. In addressing some of these concerns, there is a potential conflict between the desire of the voluntary sector for a legal regime with no new regulatory impact on the one hand and the need to protect the interests of parties having voluntary or involuntary dealings with associations on the other. We have given further thought to all of these issues in making the recommendations contained in this Report. In principle, however, we recommend as follows:

**1. Unincorporated associations which satisfy certain statutory conditions should be accorded separate legal personality.**

(Draft Bill, clause 1(1))

**Criteria for attribution of separate legal personality**

3.5 We noted earlier the definition of an unincorporated association suggested for income tax purposes by Lawton LJ in *Conservative & Unionist Central Office v Burrell*.<sup>6</sup> This definition seems to us to contain many of the ingredients of the definition of an association to which treatment as a separate legal entity is appropriate. In particular, we consider that such an entity should satisfy the following conditions:

- It has two or more members
- The members have come together for common purposes which are not business purposes.

3.6 There will, however, be informal arrangements with a not-for-profit purpose which would satisfy these conditions but for which treatment as a legal entity would clearly not be appropriate.<sup>7</sup> Some minimum qualification criterion is required in order to ensure that loose arrangements among individuals which have some not-for-profit purpose are not accidentally and inappropriately swept into the new scheme of separate personality. In the Discussion Paper, we listed a variety of criteria which could be used to determine whether or not an association has separate legal personality. Some of these were wholly objective in nature, such as a minimum number of members, minimum asset value or minimum annual income or turnover. As an alternative, we suggested (again drawing on the definition used in *Conservative & Unionist Central Office v Burrell*) that the criterion for treatment as a separate legal entity should be adoption of a constitutive document containing certain specified minimum provisions.

3.7 There was little support for use of any of the wholly objective criteria which we had suggested. We had expressed a preliminary view<sup>8</sup> that use of purely objective criteria would be arbitrary and would be likely to exclude many small associations which would benefit from

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<sup>6</sup> [1982] 1 WLR 522 (CA): see para 2.1 above.

<sup>7</sup> For example, four individuals who meet on a regular basis to play golf.

<sup>8</sup> Discussion Paper, para 4.22.

the attributes of legal personality. Our consultees agreed, pointing out that it would be unsatisfactory for an association frequently to move in and out of separate personality. It was noted in particular that most sporting organisations have few, if any, assets, a low turnover, and a fluctuating membership, so that none of the objective criteria would be workable.

3.8 On the other hand, there was unanimous support among those consultees who favoured according separate personality to unincorporated associations for making such treatment dependent upon adoption of a constitutive document containing minimum specified provisions. The advantages identified include the fact that most organisations already have a constitution and therefore can obtain legal personality with minimum disruption, and the fact that encouraging the adoption of a constitution in suitable terms is a desirable end in itself. The adoption of a constitution may be regarded as the clearest evidence of the intention of association members to create what the Charity Law Research Unit described as the (not-for-profit) "associative reality" which merits treatment as a separate entity. Eligibility for such treatment would therefore be available to small associations with no funds or income, but would not extend to loose groupings of individuals who carry on an activity together but who have seen no need to adopt any rules to regulate their relationship.

3.9 We therefore recommend:

**2. An unincorporated association should be treated as a legal entity separate from its members if it satisfies the following conditions:**

- (a) it has at least two members;**
- (b) it has adopted a constitutive document containing specified minimum provisions; and**
- (c) its objects as set out in the constitutive document do not include making a profit for its members.**

(Draft Bill, clause 1(2)(a), (d), (e) and (f))

3.10 Additional conditions are needed to restrict the application of the proposed legislation to Scottish unincorporated associations, and to provide for the possibility of contracting out of treatment as a separate legal entity. These further conditions are discussed below.<sup>9</sup>

### **Minimum provisions required in constitutive document**

3.11 In the Discussion Paper,<sup>10</sup> we suggested that the required minimum provisions might include the following:

- Name
- Address in Scotland

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<sup>9</sup> Paras 6.1 – 6.8 and paras 3.27 – 3.34 respectively.

<sup>10</sup> Para 4.23.

- Objects
- Criteria for membership
- Provision for appointment and/or election of office-bearers and committee members
- Duties and scope of authority of office-bearers and committee members
- Formalities for alteration of the constitution
- Provision for disposal of assets on dissolution.

Suggestions for other minimum provisions made by consultees included the following:

- Financial and banking procedures
- Provision for financial reporting
- Formalities for winding up the association
- Rules for conduct of meetings.

It was suggested that specification of an address is unnecessary so long as it is clear that the association's activities are to be carried on in Scotland, especially as small associations are likely to change their address quite regularly. A view was expressed that there is no need for the scope of authority of office-bearers to be detailed, and that a statement that they have authority to exercise all the powers of the association is sufficient.

3.12 We consider that a distinction should be drawn between, on the one hand, those provisions which are regarded as essential in order for the association to be treated as a separate legal entity and, on the other hand, a rather longer list of provisions which would be included in a well-drafted constitution. The Charity Law Research Unit observed:

"...We think the principal value of the constitutive document should be evidential, and suggest that the required provisions should be the minimum consistent with establishing the existence of an unincorporated association under the present law.

...On the view that legal personality is a legal fiction which attaches to a social reality, such as a (for-profit) partnership, here it would attach to the (non-profit) "associative" reality evidenced by the constitutive document. The importance of the document would lie in its disclosure to third parties (on enquiry) of the essential features of the reality behind the legal fiction."

Adopting this approach would mean that the list of minimum provisions required would be short. We agree with this approach and with the underlying principle enunciated by the Charity Law Research Unit. It would accord with the observations by SCVO that "the tens of thousands of small UAs which have taken the step of agreeing a written constitution should not have to amend their constitution in order to benefit", and that any organisation registered as a charity by OSCR should automatically qualify.

3.13 Having considered the responses of consultees, it seems to us that the following are the minimum provisions required to evidence the "associative reality" of a not-for-profit organisation:

- Name
- Objects
- Membership criteria
- Procedure for election/appointment of those responsible for the organisation's management, including office-bearers, if any
- Statement of the scope of authority of office-bearers (which may consist of no more than authority to exercise all the powers of the association)
- Procedure for amendment of the constitution
- Provision for distribution of assets on dissolution.

3.14 We wish to emphasise that we agree with the view expressed by many of our consultees that a well-drafted constitution would deal with a much broader range of matters than these, including rules for the conduct of meetings and the association's financial arrangements. These, however, are not in our view required as evidence of the association's existence as a social reality and we do not therefore consider that they should be included in the minimum statutory requirements for treatment as a legal entity. Model constitutions containing a full range of provisions can be accessed online, and we note in particular that any constitution drafted using the SCVO's online model constitution would include all the matters in the above list.

3.15 We therefore recommend as follows:

- 3. One of the conditions for attribution of separate legal personality should be that a body has adopted a constitutive document which includes the following matters:**
  - (a) the name of the body;**
  - (b) the purpose for which it exists;**
  - (c) the criteria for membership;**
  - (d) procedures for election or appointment of those managing the body (including office-bearers, if any);**
  - (e) powers and duties of office-bearers (if any);**
  - (f) distribution of the assets of the body in the event of dissolution;**  
**and**

**(g) procedure for amendment of the constitutive document.**

(Draft Bill, clause 1(2)(e), (4))

**Evidence of adoption**

3.16 One consultee (North Lanarkshire Council) suggested that the minimum statutory requirements should include the date of adoption of the constitution. We note that the SCVO's online model constitution provides for inclusion of this information. This is in a sense the equivalent of a company's date of incorporation and would enable those dealing with the association to identify the date at which it became a legal entity simply by perusing its constitution. Requiring every association to include the date of adoption in its constitution as a requirement for treatment as a separate legal entity could, however, give rise to transitional problems. Many associations will have constitutions which do not contain this information. Some will have existed for such a long time that a requirement to include the date of adoption of a constitutive document would be both pointless and impossible to satisfy.

3.17 We agree that it is desirable, at least as regards constitutions adopted after the date of entry into force of our proposed legislation, that the date of adoption should be publicly available. We think, however, that it is unnecessary to impose a requirement that this information be included in the constitution itself. We make recommendations below<sup>11</sup> regarding documents and information which must be kept and made available on request. That information includes a written record of the date of adoption of the constitution if it was adopted after the coming into force of our proposed legislation.

**Name**

3.18 It follows from what has already been said that if the draft Bill annexed to this Report is enacted, there will in future be some unincorporated associations which have separate legal personality and some which do not. It seems to us to be necessary to attach a new "label" to those associations which are separate legal entities in order that they may be referred to in a way which distinguishes them from those associations which are not. In our draft Bill,<sup>12</sup> and in this Report, we refer to an unincorporated association which has separate legal personality as a "Scottish Association with Legal Personality", or "SALP". We recommend:

- 4. Unincorporated associations with legal personality should be given the name "Scottish Association with Legal Personality" to distinguish them from associations which do not have legal personality.**

(Draft Bill, clause 1(5))

**Registration as a requirement for treatment as a separate legal entity**

3.19 We invited comment in the Discussion Paper on whether attribution of legal personality should be dependent upon registration in a new public register.<sup>13</sup> We noted that

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<sup>11</sup> Paras 5.3 to 5.10.

<sup>12</sup> Draft Bill, cl 1(5).

<sup>13</sup> Discussion Paper, paras 4.5 – 4.9 and question 7(a) at para 4.29.

some European systems operate in this way and that there appeared to be little practical difference between systems in which legal personality is described as being acquired by registration and those systems (such as those of New Zealand, all Australian states and territories and most Canadian provinces) in which legal personality is described as being acquired by incorporation. We suggested that a requirement for registration as a prerequisite of legal personality might 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.

3.20 On the other hand, we observed that 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 also be necessary to avoid dual registration of those associations which are charities and already registered by OSCR.

3.21 Most of the local authorities who responded to the Discussion Paper considered that treatment as a separate legal entity should be optional and that registration in a public register should be required. The argument was stated thus by North Lanarkshire Council:

"Registration would provide a simple and accessible way for third parties to check whether an association has legal personality. It would also give the associations the freedom to decide for themselves whether they want to acquire legal personality, and hence the associated benefits or disadvantages that come with it."

3.22 The majority of our consultees were, however, against a system of registration. The responses which we received from voluntary organisations and their representatives reiterated the point made to us prior to publication of the Discussion Paper, and again at the SCVO focus group meetings, that any reform which imposed an administrative burden on associations would be unwelcome. In our view a regime with burdensome features which encouraged organisations to opt out would defeat the whole purpose of the reform. As SCVO put it:

"The financial and bureaucratic ramifications of creating a register could be hugely counterproductive, putting off large numbers of the smaller groups who are the target of this policy initiative."

3.23 We acknowledge the experience of local authorities in dealing with unincorporated associations and we understand why they, in particular, would find it useful to have a readily available source of information as to the status of an organisation which might, for example, be applying to them for financial assistance. However, to introduce the requirement to register in a public register (even an already-existing register such as the Books of Council and Session) would be likely to result in the exclusion from the new legislative scheme of a large number of small organisations who are either unaware of the registration requirement or are unwilling to go to the trouble and (possibly minimal) cost of registering. Our aim is to devise a statutory regime which contains no disadvantages for small organisations when

compared with the current law. We do not consider that a regime which requires registration as a pre-requisite for treatment as a separate legal entity would fulfil that aim.

3.24 Most of the reasons for requiring registration of an association as a condition for treatment as a separate legal entity are concerned with the information requirements and protection of third parties who have dealings with the association. We recognise the force of these concerns. However, we consider that they can be addressed in a number of ways which we discuss in Part 5 of this Report below, without the need to impose a registration requirement.

3.25 It will, of course, remain open to a SALP which considers registration in a public register to be desirable to choose to incorporate as a company limited by guarantee (whether or not as a community interest company) or, in due course, as a SCIO. We have considered whether, in these circumstances, statutory provision should be made for continuity of the association's personality before and after incorporation. Our conclusion is that such provision would not be appropriate. Specific and detailed statutory regimes apply to companies incorporated under the Companies Acts and to SCIOs, and we think that an entity which by incorporation becomes subject to one of those regimes should be recognised by the law as a different legal person from the SALP which existed prior to incorporation.

3.26 We recommend:

5. **Registration in a public register should not be a requirement for treatment of an unincorporated association as a separate legal entity.**

#### **Opting into or out of treatment as a separate legal entity?**

3.27 The next question to be addressed is whether associations which satisfy the conditions for qualification as a SALP should be accorded separate legal personality unless they choose to opt *out* of it or, alternatively, whether it should be an additional condition for treatment of an association as a separate legal entity that it has opted *into* such treatment: for example, by an appropriate expression of intention in its constitutive document. In the Discussion Paper,<sup>14</sup> we referred to this as a choice between automatic and optional acquisition of separate legal personality. On reflection, we think that use of this terminology was misleading. We did not suggest in the Discussion Paper that treatment as a separate legal entity would be compulsory for associations which satisfy the statutory conditions. The question is rather whether the "default" position should be attribution or non-attribution. Responses to the Discussion Paper indicate a narrow majority in favour of the former.

3.28 Among those consultees who favoured opt-in were the Charity Law Association, who were concerned about an association's status being appropriately publicised, and considered that this required *inter alia* wording in the constitution which made clear that the association had adopted separate personality. The concern of others (including OSCR, the Faculty of Advocates and **sportscotland**) was to avoid the attribution of separate personality to organisations which did not want it. The Church of Scotland considered that the more modest reform achieved by requiring opt-in was preferable as the reform might have unintended consequences, and because it could be difficult to design a "one size fits all" solution. The Institute of Chartered Accountants of Scotland proposed a hybrid solution

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<sup>14</sup> Paras 4.18 – 4.29.

under which charities would acquire legal personality on registration by OSCR, whereas other associations could acquire it by expression of intention in a constitutive document. The advantage of this solution would be to maximise the certainty – for the association itself and for others – as to whether separate legal status had been acquired.

3.29 Arguments in favour of attribution of personality as the default position focused mainly upon ensuring that the reform affects those associations who are most likely to benefit from it. This was the view expressed by, among others, SCVO, the Charity Law Research Unit and the judges of the Court of Session.

3.30 We have concluded, on balance, that attribution of legal personality subject to a right to opt out is the appropriate way to ensure that the reform affects – and benefits – those associations for whom it is primarily intended. Having regard to (i) the difficulties and anomalies created by the present law; (ii) the strong public support for reform of the law; (iii) the equally strong public support for treating associations as separate entities; and (iv) our own view that treatment as a separate legal entity will be obviously beneficial to voluntary organisations and clubs, we do not consider that there is a strong argument for according such treatment only to those who take a positive step to opt in (although there is equally no reason to prohibit an organisation from opting out if it so desires). Having concluded, however, that treatment as a separate entity is to be the default position, we recognise that it is important to ensure:

- that the new regime applies only to associations which will in fact benefit from it; and
- that introduction of the new regime does not bring disadvantages which do not exist under the current law and which would reduce or even outweigh the benefits which we propose to confer by attribution of legal personality.

The first of these requirements has been addressed above.<sup>15</sup> The second requirement seems to us to require two issues arising out of the consultation responses to be addressed, namely: (a) protection of other parties' interests; and (b) compliance cost. We discuss protection of other parties' interests in Part 5 below. Given that we have rejected the idea of requiring registration as a requirement for treatment as a separate legal entity, we do not consider that attribution of legal personality will result in any significant cost to an association which meets the statutory requirements, regardless of whether the association chooses to accept that status or decides to opt out of it.<sup>16</sup>

3.31 We therefore recommend:

- 6. Attribution of legal personality to an association which satisfies the statutory conditions should not be dependent upon exercise by the association of an option to be treated as a separate legal entity.**

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<sup>15</sup> Paras 3.5 – 3.15.

<sup>16</sup> An assessment of the impact of our recommendations is at Appendix B.

## Methods of opting out

3.32 If, as we have concluded, treatment as a separate entity should be the default position, it is necessary to make provision for any association whose members do not wish to be treated as a legal entity to opt out of such treatment. We consider that the opt-out should be effected by an appropriate statement either in the association's constitution or in some other document recording a resolution of the membership (as opposed to the management), such as a minute of a general meeting. The formal requirements for the resolution, such as whether something more than a simple majority is necessary, would be a matter for the association itself to prescribe.

3.33 There are, of course, other means by which an association could effectively opt out of treatment as a separate legal entity: for example, by adopting a constitution which does not contain the minimum provisions required to satisfy the statutory conditions for a SALP, or simply by not adopting a written constitution at all. Taken together with formal opt-out by a written statement in the constitution or elsewhere, these possibilities seem to us to be sufficient to ensure that no grouping of individuals could find themselves treated as a separate legal entity against their will.

3.34 We therefore recommend:

7. **The members of an association may opt out of treatment as a separate legal entity by a resolution, recorded in writing, to the effect that the association is not to have legal personality.**

(Draft Bill, clause 1(2)(g), (3))

## Statutory default governance rules

3.35 We concluded at paragraph 3.9 above that the adoption of a constitution containing certain minimum specified provisions should be one of the conditions to be satisfied for attribution of separate legal personality. We now address the different question of whether there is a need for the legislation to include default governance rules for associations with separate legal personality. This gives rise to two separate issues. Firstly, is there a need for legislation to include a set of model management rules<sup>17</sup> for unincorporated not-for-profit organisations, which would apply to all associations in the absence of agreement to the contrary? Secondly, even if there is no need for a full model constitutive document, is there a need for a statutory default rule for distribution of assets on dissolution of the association? We address each of these issues in turn.

### *A statutory model constitutive document?*

3.36 In the Discussion Paper we expressed concern that it would be difficult to devise a set of model management rules which would suit the wide range of associations which will fall within the scope of our proposed legislation.<sup>18</sup> We stated our inclination to leave it to individual associations to decide what is needed by way of governance rules, but we did ask consultees whether they considered that there was a need for provision of a set of minimum

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<sup>17</sup> Equivalent to the model articles now prescribed for different types of company by the Companies (Model Articles) Regulations 2008 (SI 2008/3229).

<sup>18</sup> Discussion Paper, paras 4.62 and 4.63.

statutory default governance rules for associations with separate legal personality and, if so, what were the rules which required to be provided by statute.

3.37 Of the consultees who responded to these questions, just over half considered that a set of minimum statutory default governance rules for associations with separate legal personality was unnecessary. A substantial minority, however, saw some merit in the suggestion. Some considered that governance rules should be among the minimum provisions which must be included in a constitutive document so as to obtain separate legal personality, thereby equating the minimum provisions and the statutory default rules. OSCR suggested that the default rules need not be detailed or complex and could cover matters such as governance failure, amendment of the constitution, quorum requirements, ability to appoint new members, dissolution and transfer of assets. Burness LLP suggested a mechanism whereby the members could reassert control in the event of a "rogue" management committee taking steps which were contrary to the best interests of the organisation.

3.38 We have considered these views, but we remain of the opinion stated in the Discussion Paper that, given the difficulty in providing a set of statutory default governance rules which would be suitable for all associations, it would not be appropriate to attempt to devise one. To attempt to combine minimum requirements for legal personality with default governance rules would in our view require too many minimum requirements to be prescribed and would result in many organisations failing to meet the requirements. While a statutory model would no doubt be useful to many associations, there already exist readily available models for use by a variety of different types of not-for-profit organisations. The Commission's view is that it is unnecessary, and could lead to confusion, to provide another one in either primary or secondary legislation. It is worth noting that most of the default rules regarded by OSCR as desirable are in fact included among our proposed minimum requirements for legal personality. We therefore recommend:

**8. There is no need to provide a statutory model constitutive document for associations with separate legal personality.**

*A statutory default rule for distribution of assets on dissolution?*

3.39 We noted in the Discussion Paper that in the absence of agreement or statutory provision to the contrary, the assets of an association with legal personality which is not a charity would fall to be distributed among members at the time of dissolution, presumably on a per capita basis.<sup>19</sup> 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. As regards an association which is registered as a charity, its constitution must not allow it to

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<sup>19</sup> Para 4.43.

distribute or apply any of its property for a purpose which is not a charitable purpose, or it will fail the "charity test".<sup>20</sup>

3.40 We asked whether there was a need for a statutory "default" rule governing the distribution of an association's assets on dissolution and, if so, whether that rule should provide for distribution of the assets equally among members or, alternatively, for application of the funds for a public benefit purpose similar to the objects of the association.<sup>21</sup> We received a variety of responses. Of the consultees who responded to this question, almost three-quarters considered that a statutory default rule governing the distribution of an association's assets on dissolution was necessary or at least desirable. A small number favoured a default rule providing for the distribution of the assets equally among members. OSCR observed that such a rule would be in keeping with the current law in relation to non-charitable companies and unincorporated associations and that associations which are charities would in any event have restrictions imposed on them in respect of the destination of their assets by the Charities and Trustee Investment (Scotland) Act 2005 and by their constitutions. A larger number thought that the statutory default rule should provide for the application of the assets for a public benefit purpose similar to the objects of the association. Others who were in favour of a default rule considered that it should take account of both possibilities, providing either for distribution for public benefit or among members. The remaining consultees did not think that a statutory rule was necessary. Some considered that it would be preferable, as a condition of acquiring legal personality, that the constitutive document should have an appropriate provision for the distribution of assets on dissolution thus obviating the need for a statutory default rule. The Charity Law Research Unit noted that while they agreed with the commentary in the Discussion Paper that the default position would be distribution equally among members, this would not be so where the association had objects which would be (non-charitable) public purposes under the law of public trusts, in which case the association would be a "quasi-trustee" for its own objects.

3.41 The divergence of opinion among consultees is demonstrative of the inherent difficulty in providing a default rule which is suitable for all SALPs. We have concluded that there is no need for a statutory default rule governing the distribution of a SALP's assets on dissolution. We have already recommended that a clause in the association's constitutive document which determines the distribution of its assets on dissolution should be one of the minimum provisions required in order to obtain legal personality.<sup>22</sup> We agree with those consultees who considered (as we pointed out at paragraph 4.44 of the Discussion Paper) that such a requirement would obviate the need for a statutory default rule, leaving distribution on dissolution to be governed by the constitution, which will no doubt take account of matters such as the nature of the association's objects and the source of its funds. We bear in mind the point made by OSCR and others that a charity has no choice but to provide in its constitution for distribution of assets on dissolution for charitable purposes. It should also be borne in mind that where the association is insolvent, the distribution of its assets is prescribed by law. We accordingly recommend:

**9. There is no need for a statutory default rule governing the distribution of a SALP's assets on dissolution.**

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<sup>20</sup> Charities and Trustee Investment (Scotland) Act 2005, s 7.

<sup>21</sup> Discussion Paper, para 4.47.

<sup>22</sup> See para 3.15 above.

## Multi-tiered organisations

3.42 In the course of our preliminary consultations prior to publishing the Discussion Paper, a number of representatives suggested to us that special provision might be needed for multi-tiered organisations with management and decision-making functions at more than one level. We therefore asked whether there was a need to make special statutory provision for such organisations.<sup>23</sup>

3.43 Most of the consultees who responded to this proposal considered that there was no need for any special statutory provision for multi-tiered organisations. The Legal Questions Committee of the Church of Scotland, a multi-tiered organisation, commented that there might be a need for a provision entitling a central governing body to determine whether a local part of the organisation may seek legal personality. It was noted that this might assist in regulating matters when a local part of the organisation becomes involved in a dispute with the central body, and would assist in securing internal order as far as the incurring of obligations is concerned. The Committee also warned that the interaction of any new statutory provisions with current charity legislation needed careful examination. A constituent body within the Church might be an association with separate personality but not a charity (or vice versa). McGrigors LLP emphasised that personality should not be withheld from an association simply because it operated within a multi-tiered organisation.

3.44 We agree with the majority of consultees that a special statutory provision for multi-tiered organisations is unnecessary. We do not consider there to be any difficulty in principle with a situation where some or all of the members of an association with separate legal personality are themselves associations with separate legal personality. Furthermore, as we are proposing the adoption of a constitutive document containing certain minimum provisions as the threshold criteria for obtaining separate legal personality, with the possibility of express opt-out, a multi-tiered organisation will be afforded a degree of discretion as to which elements of the organisation will acquire separate legal personality and which will not. We therefore recommend:

**10. There is no need for special statutory provision for multi-tiered organisations.**

### Loss of legal personality without dissolution

3.45 In this Report, as in the Discussion Paper, we draw a distinction between loss of legal personality on the one hand and dissolution on the other. This distinction perhaps requires a little more explanation. By "dissolution" we mean a situation in which the SALP ceases to have any factual existence: in other words, the members have agreed, in accordance with the procedure specified in the association's constitutive document that the association is to be wound up and its assets disposed of, again in accordance with the terms of the constitution.<sup>24</sup> It is, however, possible in theory that a SALP could lose its separate personality in circumstances in which it is not being wound up with its assets being disposed of or distributed. In the Discussion Paper,<sup>25</sup> we suggested certain circumstances in which an

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<sup>23</sup> Discussion Paper, para 4.66.

<sup>24</sup> Which, depending upon the nature of the association, may mean application of the association's assets for a charitable or other public purpose or, alternatively, distribution equally among members.

<sup>25</sup> Paras 4.50 – 4.56.

association might lose its legal personality (ie cease to be treated as a separate legal entity) without being "dissolved" in the sense in which we are using that expression. These were as follows:

- Breach of minimum qualification conditions
- Express agreement by members
- Inactivity
- Loss of "identity".

3.46 The first two suggestions above received support from consultees. Our preliminary view that inactivity should not of itself result in loss of personality was also supported. Most consultees were, however, against the idea of an association becoming a different person by changing its "identity". The Church of Scotland observed:

"The Committee considers that, if it continues to be the same legal person, its "identity" remains. ...Any attempt to link the identity of an organisation to its membership, its address or its activities would be sure to lead to difficulties in determining how much change was sufficient to change identity."

The Charity Law Research Unit saw no more difficulty with a radical change of objects than where a natural person changes their life purposes by major career change or gender reassignment.

3.47 Other circumstances suggested by consultees in which personality could be lost were:

- Lack of a general meeting of members for, say, three years or more
- Significant disregard of constitution/objects
- Engagement by the association in criminal activity
- Membership falling below a certain number, eg below two
- Use of association assets for personal gain.

3.48 We have concluded in the light of the responses that legal personality should be lost in the following circumstances:

- Breach of minimum qualification conditions (including amendment of a constitutive document in such a way that it no longer contained the minimum required provisions).
- Express agreement by members.

- Reduction in number of members to one so that the "associative reality" disappears.<sup>26</sup>

However, we now think that loss of legal personality could be expressed in a more general manner. In our draft Bill,<sup>27</sup> we list the conditions which must be satisfied before an association qualifies as a SALP, ie before it has legal personality. It seems logical to provide that legal personality is lost in the event that any of these conditions ceases to be satisfied. This covers the three eventualities just mentioned. Legal personality would also be lost if the association ceased to have an official address in Scotland; if its management came to be wholly or mainly carried on outside Scotland; or if it ceased to have not-for-profit purposes. The consequences of loss of legal personality by an association which continues to carry on its not-for-profit activities are discussed below.<sup>28</sup>

3.49 We remain of the view that there is no need to provide specifically for inactivity; there is no obvious mischief in an association lying dormant for a period of time. Existing legislation concerning, eg, dormant bank accounts deals appropriately with unused funds of an inactive association. We are not persuaded that legal personality should be lost in any of the other circumstances suggested by consultees. Criminal activity and *ultra vires* activities would carry their own sanctions and do not need to be reinforced by loss of personality. We are also persuaded that it is not desirable to provide for legal personality to be lost due to a change of "identity", and that this would be apt to cause confusion and uncertainty.

3.50 We therefore recommend:

- 11. A SALP should cease to have legal personality if any of the statutory conditions which must be satisfied for legal personality ceases to be satisfied.**

(Draft Bill, clause 10(1))

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<sup>26</sup> In this situation, unlike the others, the association would be dissolved as well as losing its legal personality.

<sup>27</sup> Cl 1(2).

<sup>28</sup> Paras 4.28 – 4.32.

## **Part 4           Consequences of attribution of legal personality**

### **Introduction**

4.1     In this Part of the Report we outline what we envisage as being the consequences of the attribution of legal personality to a SALP. We address separately, in Part 5 below, the various protections which are offered, by our recommendations or by the existing law, to persons who have voluntary or involuntary dealings with an association which has legal personality.

### **Contractual obligations**

4.2     One of the most significant consequences of attributing legal personality to an association is that it will be capable of being a party to contracts, including contracts with its members, and will be liable, both to members and to third parties (including its staff), for breach of contract. Where a representative of an association properly discloses his agency status prior to entering into a contract, the rights of the other contracting party will in the normal situation 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 is 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.

4.3     That does not, however, mean that there will be no circumstances in which an individual member or committee member may incur personal liability. Where the conduct of an individual purporting to act on behalf of a SALP is in some way wrongful, it is appropriate that that individual should incur personal liability. In particular, a member or committee member will incur personal liability:

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

In such cases, the other party to the contract will remain in the same position, in terms of protection from the consequences of a breach of contract, as he is under the present law. Personal liability would also be incurred under the general law of agency by an individual who failed to disclose to the other party to the contract that he was contracting as an agent and not as a principal.

4.4 We recommend that the consequences, so far as contractual obligations are concerned, of attribution of separate personality to an association should be given statutory expression as follows:

**12. An office-bearer or member of a SALP does not incur personal contractual liability by reason only of acting as such office-bearer or member.**

(Draft Bill, clause 2(c))

### **Delictual obligations**

4.5 Similarly, with regard to delictual obligations, an association member will remain liable for his own wrongful acts or omissions. The practical change from the current law is that if he is an employee of the association, or otherwise acting on behalf of the association when he committed the wrongful act, then the association will also be liable. On the other hand, members of the association who have not personally committed any wrongful act or omission will cease to be co-principals in relation to the liability, with the following consequences.

4.6 Firstly, there is no risk of unlimited personal liability being imposed on all members. Instead, the pursuer has a direct right of action against the association and its assets. Thus, for example, a third party who is injured as a result of slipping on a wet floor during a fund-raising event organised by a charity which is a SALP will have a right of action against the association if the accident was caused by the negligence of an individual employed by or acting on behalf of the association. The third party will 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.

4.7 Secondly, it will cease to be arguable that where a member sues the association in delict he is suing *inter alia* himself. So, for example, in a situation such as that which occurred in *Prole v Allen*,<sup>1</sup> where 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, the plaintiff would not be disqualified from suing the club as vicariously liable for the negligence of the club steward who failed to light the steps. 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*,<sup>2</sup> in which a member of a karting club was injured when his kart collided with an unprotected wall, the club would be liable for the negligence of a person acting on its behalf who failed adequately to protect competitors from injury on collision with the wall. The pursuer would not be disqualified from suing on the ground that he was a co-principal. The individual or individuals concerned might, once again, remain personally liable.

4.8 One further point deserves particular mention. In *Harrison v West of Scotland Kart Club*, it was made clear by the court 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

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<sup>1</sup> [1950] 1 All ER 476.

<sup>2</sup> 2004 SC 615.

partnership – or joint venture – does have separate legal personality, but it was held in *Mair v Wood*<sup>3</sup> 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. It is our intention that a SALP should be liable to any of its members who suffers loss or damage caused by a wrongful act committed by a fellow member acting on behalf of the association. This is probably best seen not as vicarious liability (which normally arises from an employer/employee relationship) but rather as an example of liability of a principal for the wrongful act of an agent acting within the scope of his authority. Where the association has legal personality, it is capable of being a "principal" and it is no longer necessary or appropriate to regard the members themselves as principals. The bar to legal action which was emphasised in *Harrison* accordingly disappears.

4.9 The examples above concern delictual liability arising as a consequence of negligence. Where the liability is for fraud, the position will be the same. An association member or office-bearer who commits a fraudulent act, such as deliberately misrepresenting the creditworthiness of the association to a third party, will remain personally liable for any loss which the third party sustains as a consequence of the fraudulent misrepresentation.<sup>4</sup> The association may also incur liability, but other members or office-bearers who were not parties to the fraud will not be at risk of liability.

#### **Obligations arising from unjustified enrichment**

4.10 It is possible to figure circumstances in which an obligation of redress for unjustified enrichment will arise in the course of conducting the affairs of a SALP. A simple example would be where D writes a cheque for £5,000 by way of a donation to a charity which is a SALP. In the mistaken belief that the cheque has gone missing, D writes another cheque for £5,000. Both cheques are cashed. D would be entitled to recover the money erroneously paid a second time in an action of repetition.<sup>5</sup> The action would be raised against the SALP. In contrast to the position under the present law, the office-bearers<sup>6</sup> would not incur personal liability to make repetition.

4.11 It is more difficult to envisage circumstances in which liability under the law of unjustified enrichment could attach both to a SALP and also to an individual responsible for bringing about the situation in which the liability has arisen. If the SALP has been enriched then it would seem to follow that no individual member or office-bearer has benefited from the same enrichment. It may be, however, that an individual is concurrently liable in delict. If, in the example in the previous paragraph, D had been induced to write a second cheque by a fraudulent misrepresentation by the SALP's treasurer that the first cheque had not been received, then D would have a claim in delict against the treasurer as an individual, as an alternative to a claim for repetition against the SALP. Once again, however, no personal liability would fall upon any office-bearer or member who was not a party to the fraud.

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<sup>3</sup> 1948 SC 83 at 90.

<sup>4</sup> This may be loss sustained either because the third party was induced by the fraudulent misrepresentation to enter into a contract with the association or because the third party was induced not to do so. See eg *The Laws of Scotland (Stair Memorial Encyclopaedia)* vol 11, para 719ff.

<sup>5</sup> See eg *Moore's Exrs v McDermid* 1913 1 SLT 278 (affd at 298); R Evans-Jones, *Unjustified Enrichment*, (2003), paras 6.87 – 6.96.

<sup>6</sup> And, possibly, the members.

4.12 We recommend that the consequences, so far as delictual and other obligations are concerned, of attribution of separate personality to an association should be given statutory expression as follows:

**13. (a) An office-bearer or member of a SALP does not incur personal liability by reason only of acting as such office-bearer or member.**

**(b) A SALP may incur liability to one of its members for loss or damage caused by the wrongful act or omission of another member while acting on behalf of the association.**

(Draft Bill, clause 2(b) and (c))

### **Ownership of assets**

4.13 A further consequence of attributing legal personality to a SALP will be that it can hold property in its own name, so that there will no longer be any need for assets to be held by individuals as trustees for the association.<sup>7</sup> This will 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. Of course, a SALP may still choose, if it wishes, to have assets (such as heritable property) held by trustees on its behalf. In the Discussion Paper we raised two issues concerning title to heritable property: (i) whether there was a need for publicity of the identity of the managers or members of an association owning heritage and (ii) whether there was merit in providing for registration of a "statement of authority" to transfer heritable property. We address these issues in turn.

#### *Publicity of identity of an association's managers or members*

4.14 This issue was raised in the Discussion Paper<sup>8</sup> in the context of large associations and the undesirability of removing the current incentives for such organisations to incorporate. We invited comment on whether it would be regarded as problematic that title to land could be taken in the name of, say, "The East Lothian Pictish Society" without there being any public record of the members, managers, objects or financial affairs of this landowner. One consultee<sup>9</sup> commented specifically on this issue and made the following suggestion:

"It may be, for instance, that registration of title in the name of an association should only be permitted if the document to be registered includes the name and address of at least one human person representing the associative reality behind the legal personality. Members of the public would then have no less information about the associative reality concerned than they do currently when the title of an association is held in the name of a trustee or trustees."

4.15 It is our impression that there is public appetite for information as to the identity of the owners of land in Scotland. A statutory regime which created new opportunities for concealing the identity of individuals holding interests in land indirectly would be unlikely to

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<sup>7</sup> As regards transfer of ownership of assets held on behalf of an association at the time when the new legislation enters into force, see paras 7.3 – 7.4 below.

<sup>8</sup> Para 4.58.

<sup>9</sup> Charity Law Research Unit, University of Dundee.

be welcomed. There are social and environmental reasons why the identity of physical persons responsible for the condition of land and buildings should be readily ascertainable. We see merit in imposing a statutory requirement similar to that suggested by the Charity Law Research Unit, and consider that there should be an obligation on any SALP making an application for registration of an interest in heritable property to provide the Keeper of the Registers of Scotland, together with or prior to the application, with:

- a copy of the SALP's constitution; and (if not contained in the constitution)
- details of the SALP's official address.

4.16 Imposition of these requirements ensures that the information publicly available as to the identity of individuals with an interest in land held through a SALP will not be diminished from that currently available. It is, of course, the case that information provided at the time of registration of an interest in heritable property will cease to be correct if the SALP subsequently changes its official address. In order to ensure that accurate information continues to be available, it is necessary to extend the statutory obligation by requiring the association to notify the Keeper of such a change. This obligation would constitute a new burden on associations which does not presently exist, but we consider that the advantages of requiring information which is made publicly available to be kept up to date outweigh the disadvantages. In the first place, we believe that only a minority of associations own heritable property (currently held by trustees). The requirement will therefore be restricted to SALPs of sufficient substance to own heritage. Secondly, we believe that the majority of associations which own heritable property do so in order to carry on their activities there and will probably have their official address there. Such associations will move premises only occasionally and will not be disadvantaged by an obligation to declare, on such occasions, that they have moved their official address to the premises to which they are now registering title. Only in what we believe to be unusual cases where a SALP acquires heritable property which it does not also intend to occupy as the place where it carries on its activities will there be a need to disclose details of a different address when registering title to the newly-acquired property. This, it seems to us, is where there is a public interest in being able to identify the official address, objects and office-bearers of the purchasing SALP.

4.17 One of our consultees suggested an exception to this requirement. A SALP which is registered as a charity will have had to provide all of the above information to OSCR as a condition of registration, and much of it will be recorded in the publicly accessible Scottish Charity Register. It could be regarded as unnecessary to require such an association to provide the same information again. We therefore considered whether a SALP which is a registered charity should simply be required to provide the Keeper with its charity number. We discovered, however, when drafting the Bill that it would be necessary to make statutory provision for a variety of circumstances, such as a SALP which owns heritable property losing its status as a charity, and also a SALP which had previously acquired heritable property becoming a charity. We have concluded that the relatively small number of heritable property transactions likely to be undertaken by SALPs which are charities does not justify the legislative complexity which would result from making special provision for them.

4.18 The obligation which we are proposing will require to be attended by sanctions for breach. Where a SALP has failed to provide the Keeper of the Registers of Scotland with the requisite information either prior to, or together with, its application for registration, we

consider that the appropriate sanction would be for the Keeper to refuse the application. Where, however, a SALP changes its official address, we consider that it is appropriate to treat a failure to intimate such a change to the Keeper as an offence, with penalties similar to those incurred for breach of obligations under the Business Names Act 1985.

4.19 With the exception of gratuitous dispositions, all dispositions, long leases and assignments of long leases in favour of SALPs would induce first registration in the Land Register.<sup>10</sup> For reasons of efficiency, we consider that a gratuitous disposition, lease or assignment of a lease in favour of a SALP should also be registered in the Land Register in order to be effectual.

4.20 We therefore recommend:

**14. A SALP must:**

**(a) provide the Keeper of the Registers of Scotland, together with or prior to an application for registration of an interest in heritable property in Scotland, with:**

**(i) a copy of the SALP's constitution; and (if not contained in the constitution)**

**(ii) details of the SALP's official address;**

**(b) notify the Keeper of any change of its official address.**

(Draft Bill, clause 5(1), (3) and (4))

**15. Breach of the obligation to intimate a change of official address to the Keeper of the Registers of Scotland would render the SALP, and any office-bearer or other member managing the SALP's affairs with whose consent or connivance or as a consequence of whose neglect the offence was committed, liable to a fine.**

(Draft Bill, clause 5(5) – (7))

### **Statement of authority to transfer heritable property**

4.21 In the Discussion Paper, we drew attention to the optional mechanism in the US Revised Uniform Unincorporated Nonprofit Association Act 2008 ("RUUNAA") for registration of a "statement of authority" to transfer an estate or interest in real property on behalf of a non-profit making association, and asked consultees whether there was merit in providing by statute for registration in a public register of such a statement of authority.<sup>11</sup> We did, however, suggest that the US model provision was open to the criticism that the authenticity of the "statement of authority" may itself be questionable: it might, for example, have been registered fraudulently. Most consultees who responded to this question agreed with the view expressed provisionally in the Discussion Paper that there was no merit in making such provision. We do not intend to recommend such a provision which we consider unnecessary

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<sup>10</sup> See section 2 (1) (a) (i), section 2 (1) (a) (ii) and section 2 (1) (a) (v) Land Registration (Scotland) Act 1979.

<sup>11</sup> Discussion Paper, para 4.37.

in view of the amendments to the Requirements of Writing (Scotland) Act 1995 which we recommend below.

### **Execution of documents**

4.22 At present, the Requirements of Writing (Scotland) Act 1995 makes no provision for execution of documents on behalf of an unincorporated association. The Act 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.

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

**16. (a) A document is signed on behalf of a SALP if it is signed on its behalf by:**

**an office-bearer or, if it has no office-bearer, either**

- **a person responsible for the management of the association;**  
**or**
- **a person authorised to sign the document on behalf of the association.**

**(b) Other provisions of the Requirements of Writing (Scotland) Act 1995 applicable to execution of documents on behalf of a body corporate should apply *mutatis mutandis* to execution of documents on behalf of a SALP.**

(Draft Bill, clause 7, Schedule)

### **Raising and defending legal proceedings**

4.24 An association with legal personality will have capacity to 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 SALP as a legal entity. The recommendations which we make in Part 5 of this Report concerning disclosure of a SALP's official address should ensure that a person

wishing to sue a SALP has the information necessary to effect service of any document. If, however, such a person 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 court for an order<sup>12</sup> to disclose the necessary details.

4.25 We recommend:

**17. A SALP should have the capacity to sue and be sued in its own name.**

(Draft Bill, clause 2(a))

**Regulatory and penal statutory provisions**

4.26 We consider that attribution of legal personality to SALPs will have little practical consequence with regard to the application of regulatory and penal statutory provisions to unincorporated associations. As we noted in the Discussion Paper, provisions imposing regulatory requirements or creating criminal offences often apply already to unincorporated associations as well as to their officers, and the strict legal analysis that the association has no legal status is, in practice, disregarded. In particular, we do not think that our recommendations will have any effect upon the tax treatment of associations because they are already treated for tax purposes as if they had corporate status.

4.27 So far as criminal liability is concerned, there will be two significant differences from the current law.<sup>13</sup> The first is that a SALP will become capable of committing a common law offence. An association may already be convicted of a statutory offence<sup>14</sup> and there will be no change in the law in that regard. The second difference, is that it will no longer be competent to prosecute individual members of the association simply by virtue of their being members. Criminal liability will, however, continue to be imposed upon those who are liable in terms of a particular statutory provision as an officer or member of the governing body of an association, or who are personally culpable.<sup>15</sup> This seems to us to be reasonable, and we suspect that it will make little difference to prosecution practice.

**Effect on assets and liabilities of loss of legal personality without dissolution**

4.28 We have already noted that there are circumstances, at least in theory, in which an association could lose its separate legal personality without being dissolved. For example, the members of a SALP could pass a resolution to amend its constitution with a view to opting out of separate legal personality. Separate personality could be lost accidentally if a constitution were to be amended by removal of one of the provisions necessary to satisfy the minimum statutory requirements. Another possibility is that the SALP's management ceases to be carried on wholly or mainly in Scotland.<sup>16</sup> In these circumstances, the question arises of what happens to the association's assets and liabilities on its ceasing to be a SALP.

4.29 We believe that this situation is unlikely to occur very often. However, we consider that specific provision has to be made for it and that, so far as possible, the position of an

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<sup>12</sup> Under the Administration of Justice (Scotland) Act 1972, s 1(1A).

<sup>13</sup> See para 2.18 for a brief discussion of the current law.

<sup>14</sup> See para 2.18.

<sup>15</sup> Cf *R v L* [2008] EWCA Crim 1970, [2009] 1 All ER 786.

<sup>16</sup> See para 6.8 below.

association which was, but has ceased to be, a SALP ought to be equated with that of an association which has never been a SALP. As regards the association's assets, this would mean providing by statute that on cessation of separate legal personality, and in absence of express agreement by the association members to the contrary, the assets become owned by the association's office-bearers or committee members as trustees for the association members<sup>17</sup> at the date of loss of legal personality (or, in the absence of office-bearers and committee members, by the members themselves jointly). Such provision would remove any difficulty regarding ascertainment of ownership, following loss of personality, of assets to which title has to be registered, such as land or shares, as the statute would provide the necessary link in title between the registered owner (the former SALP) and the new owners (the office-bearers as trustees for the members, or the members themselves, as the case may be). It would also avoid any risk that the property of the former SALP might be regarded as having become the property of the Crown as *bona vacantia*.

4.30 If the SALP owns property, title to which is registered in the Land Register, the transfer effected on loss of legal personality would be an off-register transfer, taking place at the moment when separate personality is lost. The Land Register would therefore become inaccurate and would require to be rectified to catch up with the reality. Rectification would take the form of replacing the name of the SALP with the names of the office-bearers, committee members or members, as the case may be.

4.31 Provision also has to be made for liabilities incurred by the SALP and still in subsistence at the date of loss of legal personality. With the disappearance of the entity, a creditor loses his right to sue it, although it would remain possible to sequester the association as an unincorporated body.<sup>18</sup> We think that it would be appropriate also to confirm by statute that the contractual, delictual and other liabilities of the former SALP would be enforceable against the office-bearers or committee members (or, in the absence of any office-bearers or committee members, the members) of the former SALP. Although as we have pointed out<sup>19</sup> the current law regarding personal responsibility for liabilities is unclear, this seems to us to be where they would probably be held to lie in most cases. Since the liability of the SALP would have been limited by the value of its assets, it is this limited liability, and not unlimited liability, which would be enforceable against the office-bearers, committee members or members, as the case may be.

4.32 We therefore recommend:

**18. Where a SALP ceases to have legal personality without being dissolved:**

**(a) any assets owned by the SALP immediately prior to loss of legal personality shall, in the absence of agreement to the contrary by the association members, be owned:**

- **by the association's office-bearers or, if there are no office-bearers, by the persons responsible for the management of the association, as trustees for the members jointly; or**

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<sup>17</sup> Jointly, not in common: see para 2.11 above.

<sup>18</sup> Bankruptcy (Scotland) Act 1985, s 6(1). See further para 5.16 below.

<sup>19</sup> See paras 2.4 – 2.10.

- **if there are no persons responsible for the management of the association, by the members jointly; and**

**(b) any liabilities of the SALP immediately prior to loss of legal personality shall become the joint and several liabilities of:**

- **the association's office-bearers or, if there are no office-bearers, the persons responsible for the management of the association; or**
- **if there are no persons responsible for the management of the association, the members.**

(Draft Bill, clause 10)

# Part 5      Protection of other parties' interests

## Introduction

5.1 One of the principal concerns regarding the current law which has led us to recommend attribution of legal personality to SALPs is the risk which presently exists of incurring contractual, delictual, criminal or other liabilities simply by being a member of an association. There is, however, another side to the coin. Removal of liabilities from association members obviously implies removal of rights from someone else. Moreover, the attachment of rights and duties to an entity which is not a natural person raises issues of identification and accessibility of information to anyone requiring to take action against it. It is therefore of critical importance that any reform of the law should not bring with it opportunities for individuals to evade liabilities which ought properly to be incumbent upon them. In this Part of the Report we make recommendations as to measures to protect the interests of persons having contractual and other dealings with associations with legal personality.

5.2 We should, however, also reiterate that nothing that we are proposing is intended to absolve individuals from liability from their own wrongful acts or omissions. As discussed in more detail in Part 4 of this Report, office-bearers and members will remain personally liable for fraud and negligence committed in the course of acting on behalf of a SALP, as well as for acting outwith their actual or apparent authority. The difference from the present law is that members who are not complicit in the wrongful conduct will no longer be at risk of liability.

## Information and publicity

5.3 It is essential that persons dealing with an organisation which is a separate legal entity have proper information as to its identity and whereabouts in case any formal action requires to be taken against it. Comparison may be drawn with section 4(1) of the Business Names Act 1985, which requires a partnership to state the names of all partners and an effective address for service of documents on business letters, orders for goods and services, and other documents.<sup>1</sup> We consider that there is a need to impose upon a SALP a statutory duty to disclose on all official documents sent or published by it, whether in paper or electronic form, its name and an address in Scotland, to which we refer as its "official address", at which service of any document relating in any way to the activities of the association will be effective.

5.4 We also consider, again in line with the provisions of the Business Names Act 1985, that the names (though not further details) of the office-bearers or committee members of a SALP should be publicly available in case any of them incurs personally any contractual,

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<sup>1</sup> Subject to s 4(3) which permits a partnership with more than 20 partners to provide a list of partners for inspection at its principal place of business instead of listing them all on business documents.

delictual, criminal or other liability. The obligation would be to keep at the association's official address, and to make available on request, the names of the association's office-bearers or, if it has no office-bearers, the persons responsible for its management.

5.5 One consultee<sup>2</sup> suggested, in addition, that there should be a statutory obligation on an association with legal personality to publicise its status at its premises and in all paper and electronic communications. We have not adopted this suggestion because the expression of an association's view as to whether it has satisfied the statutory conditions could not be conclusive evidence that it had done so. We recognise, however, that third parties should have some means of ascertaining whether the statutory conditions are met, at least so far as adoption of a constitution in appropriate terms is concerned. It therefore seems appropriate to require a SALP to keep at its official address, and to make available on request, a copy of its constitutive document.

5.6 Finally, as we noted earlier,<sup>3</sup> it may be important for a third party to ascertain the date upon which the association became a separate legal entity. In the case of any association in existence at the date when our proposed legislation comes into force, that will be the date. In the case of an association acquiring legal personality after the date of entry into force of the legislation, we consider that it is appropriate to require a written record of the date of adoption of the constitution to be kept at the official address and made available on request.

5.7 The official address will frequently be the home address of an office-bearer of the association. We do not envisage that he or she should have to tolerate individuals who request information attending in person to collect it. In the same way as any request must be in writing or by electronic means, we envisage that the information would be supplied by mail whether postal or electronic. We consider that a time limit of 28 days for provision of information should be imposed, and that it should be provided free of charge to the inquirer.

5.8 Bringing these requirements together, we recommend as follows:

- 19. A SALP must set out, in any document sent or published by it, its name and an address in Scotland at which service of any document relating in any way to its activities will be effective.**

(Draft Bill, clause 3(1) and (7))

- 20. A SALP must keep at that address the following:**
- (a) a copy of its constitutive document;**
  - (b) a list of the names of its office-bearers or, if it has no office-bearers, of the names of the persons responsible for its management;**
  - (c) a written record of the date of adoption of its constitutive document if it was adopted after the coming into force of this legislation,**

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<sup>2</sup> The Charity Law Association.

<sup>3</sup> Paras 3.16 – 3.17.

**and provide free of charge a copy, list or record (as the case may be) on request in writing or electronically within 28 days after such a request is made.**

(Draft Bill, clause 3(2) – (4))

5.9 The imposition of these publicity and information duties has to be accompanied by appropriate sanctions for breach. One possibility would be to adopt the approach of the Business Names Act 1985 and make it an offence to breach any of these duties. We have rejected this possibility as we regard it as undesirable to create offences which could be committed inadvertently by small associations. Nor is withdrawal of treatment as a separate legal entity an appropriate sanction: it would not be appropriate to create a situation in which an association can move in and out of existence depending upon whether it is, for the time being, in compliance with all of its statutory duties. Instead, we consider that the solution is to provide for restoration of concurrent personal liability if and for so long as those duties are not complied with. Instead of loss of legal personality by the SALP, the person or persons responsible for the failure would be liable, concurrently with the association, for obligations undertaken during the subsistence of the failure. For the avoidance of doubt, we would propose that the legislation would specify that the persons responsible for ensuring compliance are the office-bearers or, if the association has no office-bearers, the persons responsible for its management.

#### **Example**

A sports club organising a club event decides to place an order for supplies of food and drink. Despite there having been a recent annual general meeting and consequent change of office-bearers and official address, the contract is entered into using headed notepaper which has not been updated. The event takes place but the food and drink supplier is not paid. Under our proposals, liability to the supplier will rest concurrently upon (i) the club and (ii) the new office-bearers.

This approach would leave the office-bearers of an association who unwittingly fail to comply with one of the statutory duties in no worse position than they are under the present law. Our aim of ensuring that there is no disadvantage to SALPs by comparison with the position under the current law would thus be satisfied.

5.10 We therefore recommend:

- 21. In the event of a failure to ensure compliance with a SALP's obligations regarding disclosure of its address or keeping and making available documents or information on request, the office-bearers or, if the association has no office-bearers, the persons responsible for its management shall be liable concurrently with the SALP for any obligation undertaken on behalf of the SALP while the failure subsisted.**

(Draft Bill, clause 3(5) and (6))

## Application of the *ultra vires* doctrine

5.11 Like other non-natural persons, a SALP will be subject to the *ultra vires* doctrine. In the absence of statutory provision to the contrary, this would have the following consequences:<sup>4</sup>

- acts of the SALP 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 SALP's objects;
- an *ultra vires* act by the office-bearers might constitute a breach of duty to the SALP's members, exposing them to personal liability to members.

5.12 So far as companies are concerned, the first of these consequences (though not the others) is removed by section 39(1) of the Companies Act 2006<sup>5</sup> 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 charity<sup>6</sup> by the Companies Act 1989, section 112(3)<sup>7</sup> which disapplies section 39(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.

5.13 In the Discussion Paper we asked whether the statutory provisions applicable to companies should apply *mutatis mutandis* to unincorporated associations with legal personality. We asked in particular whether the qualification in relation to companies which are charities should apply either (a) to associations which are charities or (b) to all associations. Almost all consultees who answered these questions agreed that the effect of the *ultra vires* doctrine should 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. Most consultees favoured applying the qualification to associations which are charities, and a lesser number, though still a majority of those who expressed a preference, favoured applying the qualification to all associations. One consultee<sup>8</sup> considered that the qualification relating to charitable companies did not serve any useful purpose and that there would therefore be no benefit in extending it to unincorporated associations.

5.14 We agree with the majority view and consider, firstly, that the *ultra vires* doctrine should be restricted in relation to a SALP in the same way as it is in relation to acts done by a company. Secondly, we think that in the interests of consistency there is a good case for adopting the qualification of the restriction of the *ultra vires* doctrine which applies to companies which are charities, and that it should apply to all SALPs, whether registered as charities or not. We therefore recommend:

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<sup>4</sup> Cf *Palmer's Company Law*, Pt 2, para 2.603, discussing the *ultra vires* doctrine in relation to companies at common law.

<sup>5</sup> Replacing section 35(1) of the Companies Act 1985 with effect from 1 October 2009 (see SI 2008/2860, art 3(d) and Sch 1, Part 1.

<sup>6</sup> Defined as a body entered in the Scottish Charity Register; there are parallel but not identical provisions for England and Wales in the Companies Act 2006, s 42.

<sup>7</sup> As amended by the Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009/1941, art 2(1) and Sch 1, para 103 (1), as from 1 October 2009.

<sup>8</sup> Mr Stephen Phillips, Burness LLP.

**22. The validity of a SALP's actings should not be called into question on the ground that there is a lack of capacity by reason of anything in the SALP's constitutive document, provided that this will favour 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 SALP is a SALP.**

(Draft Bill, clause 8)

### **Remedies of unpaid creditors**

5.15 We have emphasised that it is important to ensure that the attribution of legal personality to unincorporated associations does not create opportunities to defeat the interests of the creditors of an association by means of distribution of its assets, whether or not the association is solvent at the time of distribution. In the Discussion Paper we invited comment<sup>9</sup> on whether an unpaid creditor of a dissolved association with separate legal personality should be entitled to recover his debt from members who have either received or benefited indirectly from a distribution of association funds or who have authorised a distribution to someone other than the members. Almost all consultees considered that a creditor should be entitled to recover from members to the extent that they have received or benefited indirectly from the distribution of association funds. One consultee<sup>10</sup> commented that:

"This is a problem we are aware of where unincorporated associations currently receive large grants of cash from, for example, lottery funding or other sources. On dissolution a creditor or grant making body should, if appropriate, be able to recover its grant from the association's funds, and from members, to the extent that they have received or benefited indirectly from the distribution of the funds in question."

#### *Gratuitous alienations*

5.16 We consider that the interests of creditors can be protected by appropriate amendment of the existing law relating to gratuitous alienations. The Bankruptcy (Scotland) Act 1985 currently allows for the sequestration of an unincorporated association,<sup>11</sup> and it follows that distributions of funds by an unincorporated association can be challenged by a creditor or the trustee in sequestration as gratuitous alienations provided certain conditions are met:<sup>12</sup>

- the alienation must have resulted in a diminution in value of the association's assets;
- the association must have been sequestrated or have granted a trust deed for behoof of its creditors which has become protected; and

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<sup>9</sup> Discussion Paper, para 4.47.

<sup>10</sup> McGrigors LLP.

<sup>11</sup> Bankruptcy (Scotland) Act 1985, s 6 (1)(c).

<sup>12</sup> Bankruptcy (Scotland) Act 1985, s 34.

- the alienation must have been completely effectual within two years prior to the sequestration of the association or the granting of the trust deed (or within five years if the person favoured was an "associate" of the association).

Where these conditions are met, the court has power to set aside the alienation or to grant decree for restoration of property or such other redress as may be appropriate.<sup>13</sup> An order for return of assets or for payment of a sum of money could therefore be made against a member or any third party (including another association) who has benefited from a distribution of association funds. There is, however, an exception for any gift made, for a charitable purpose, to a person who is not an associate of the debtor which, having regard to all the circumstances, it was reasonable for the debtor to make.<sup>14</sup>

5.17 None of these existing rules would be affected by the attribution of legal personality to associations. It would remain possible, as at present, for an unpaid creditor to petition for sequestration of the association and for the trustee then to seek to have gratuitous alienations of association assets set aside.

5.18 If, however, the SALP had been dissolved and therefore ceased to exist, it would no longer be competent to sequester it, and any proceedings purporting to do so would be null.<sup>15</sup> It follows that it would not be possible to set aside alienations of a dissolved SALP's funds to members or third parties. No doubt for this reason, section 6(1)(b) of the 1985 Act already makes provision for sequestration of a dissolved partnership. We consider that the creditors of a dissolved SALP can be similarly protected by amendment of section 6(1)(c) of the Bankruptcy (Scotland) Act 1985 to allow dissolved SALPs to be sequestered, thereby facilitating challenge of any gratuitous alienations made by them.

5.19 One consequence of applying section 34 to dissolved SALPs is that alienations to third parties such as other not-for-profit associations could be set aside whether or not they were or ought to have been aware of the creditor's claim against the distributing SALP. This, however, seems to us to be correct in principle. As previously noted, section 34(4)(c)(ii) would provide a defence for a person, or entity, which received funds for the furtherance of a "charitable" purpose, provided that it was reasonable, in all the circumstances, for the distribution to have been made. The definition of "charitable" is sufficiently wide to apply to any distribution by a SALP which is made for public benefit.

5.20 One further legislative amendment is required if section 6(1)(c) of the 1985 Act is amended to provide for the sequestration of dissolved SALPs. It is necessary to alter the definition of "associate"<sup>16</sup> to include members of a SALP within that definition as is currently the position with regard to partnerships and companies. It should be noted that this prevents any person or entity which was a member of the dissolved SALP, from raising the defence, discussed above, that the distribution was made for a charitable purpose. We regard this as appropriate since it is consistent with the general approach of the 1985 Act to the associates of debtors.

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<sup>13</sup> *Ibid* s 34(4).

<sup>14</sup> *Ibid* s 34(4)(c)(ii). "Charitable purpose" is defined broadly in s 34(5) as meaning "any charitable, benevolent or philanthropic purpose whether or not it is charitable within the meaning of any rule of law".

<sup>15</sup> W W McBryde, *Bankruptcy* (2<sup>nd</sup> Edition, 1995), para 4-40.

<sup>16</sup> Bankruptcy (Scotland) Act 1985, s 74.

5.21 We therefore recommend:

**23. The Bankruptcy (Scotland) Act 1985 should be amended as follows:**

- **section 6(1)(c) should be amended to allow a dissolved SALP to be sequestrated; and**
- **section 74 should be amended to make a SALP an associate of each of its members.**

(Draft Bill, clause 9)

*Prejudicial transactions: common law challenge*

5.22 A SALP which distributed its funds to the prejudice of its creditors could also be subject to challenge at common law. Where a debtor alienates his assets voluntarily at a time when he knows that he is or is about to become insolvent, the transaction may be set aside. The effect of setting aside is the restoration of the alienated assets (or their value) to the debtor's estate.<sup>17</sup> This remedy would be available against a SALP as it is against other debtors. The common law challenge would, however, be of limited value if the SALP, as well as being insolvent, had been dissolved. In those circumstances there would be no entity to which the alienated assets could be restored: the effect of a successful challenge would appear to be to put the assets in the hands of whoever had become entitled to the SALP's assets on dissolution, in terms of its constitution. That might be of little practical value to the creditors, who would, in such circumstances, be better advised to sequester the dissolved SALP and seek to reduce the gratuitous alienation by means of a statutory challenge.

**Large associations and avoidance of disincentive to incorporate**

5.23 The principal beneficiaries of our proposed reforms are intended to be associations at the smaller end of the scale in terms of assets and liabilities. In the case of larger associations, the company limited by guarantee affords a suitable vehicle for carrying on not-for-profit activities. The attribution of legal personality to unincorporated associations, carrying with it some of the benefits which a company obtains from limited liability, is not intended to discourage, such associations from incorporation. As regards use of the Scottish Charitable Incorporated Organisation (SCIO), once this form of incorporation becomes available for Scottish charities in due course, we see our recommendations as complementary to this new vehicle and not as a substitute for it. In the Discussion Paper we suggested that it might be appropriate to provide an incentive for large associations to continue to incorporate rather than to carry on their activities as unincorporated associations with legal personality, and we invited comment on whether an association which exceeded certain specified criteria should automatically lose its separate personality. We also discussed whether a registration requirement was needed for larger organisations.<sup>18</sup>

5.24 There was very little support among consultees for either of these suggestions. Some consultees had, of course, already expressed the view that the creation of a register

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<sup>17</sup> *Cook v Sinclair & Co* (1896) 23 R 925, Lord McLaren at 928; *W W McBryde, cit sup*, paras 12-52ff.

<sup>18</sup> Discussion Paper, paras 4.58 – 4.61.

was desirable for *all* unincorporated associations with legal personality. One or two consultees believed that there should be a greater degree of public scrutiny and accountability for large associations as they were likely to be managing and holding significant financial assets. Others, however, considered that it would be unnecessarily confusing to fragment the sector by requiring only some associations to register. Some doubted the practicability of identifying a threshold which would not lead to associations moving in and out of the registration obligation. Similar concerns were expressed regarding a scheme in which large associations which exceeded certain specified criteria would lose their legal personality.

5.25 Some consultees acknowledged the difficulty posed by the position of large associations and suggested alternative solutions. One consultee<sup>19</sup> proposed making it an offence to serve on the management committee of an unincorporated association with separate legal personality which has turnover or net assets in excess of specified thresholds where that situation persists for two financial years. The Charity Law Research Unit suggested that associations with separate legal personality should not have power to grant security or, perhaps, to borrow unsecured beyond a limit specified (and varied) by ministerial order, so that associations which were sophisticated enough to wish to make substantial or secured borrowing would have to incorporate. They did not suggest what the sanction should be for such an association which granted security or borrowed beyond the limit: the security could, perhaps, be void, or the office-bearers could incur personal liability concurrently with the liability of the association. Concern was expressed in more general terms by DTA Scotland,<sup>20</sup> who observed:

"...We are concerned that introducing limits on personal liability could result in the unincorporated association becoming the default model for the vast majority of voluntary groups, where many would in fact benefit from a more regulated structure. For example, the company limited by guarantee form offers clear benefits over and above limitations on personal liability. It can encourage a voluntary organisation to follow good practice in terms of governance and accountability, as it must comply with the relevant legislation and the rules and procedures set out in its governing document."

5.26 We acknowledge the substance of these concerns. However, we do not feel that a suitable disincentive to discourage large associations from remaining unincorporated has been identified. We agree with the majority view regarding the drawbacks of the proposals which we made in the Discussion Paper. Criminal sanctions seem to us to be disproportionate to the "mischief" which we were seeking to address. We consider that rendering a security granted by an association void because the association is a large one is similarly disproportionate, and we think that to reintroduce concurrent personal liability in such situations goes against the aims of our reform. We have concluded that this is a problem which can safely be left to the market to resolve. Lenders of large sums of money may simply refuse to lend to an association which does not have corporate status and which is not therefore required to make public the information required of companies by the Companies Acts. For those lenders who do choose to lend to a SALP, our proposals will

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<sup>19</sup> Burness LLP.

<sup>20</sup> A national body for development trusts for community regeneration in Scotland.

offer some protection by ensuring that creditors will know whom to sue and at what address. On present information, we are not persuaded that any more than this is needed.

5.27 We therefore recommend as follows:

24. **No special statutory measures are needed to encourage large not-for-profit associations to incorporate as a company limited by guarantee or otherwise.**

# Part 6            Cross-border issues

## Introduction

6.1     In this Report we are concerned only with reform of the law of Scotland. If the draft Bill annexed to this Report were to be enacted, the consequence would be that Scottish unincorporated associations would become capable of acquiring legal personality, whereas associations throughout the remainder of the United Kingdom would continue to have no such capacity. As we noted in the Discussion Paper, we see no reason why this should of itself give rise to practical difficulties. It is, however, necessary to be able to determine whether a particular association is a SALP 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. Criteria must be identified for determining whether or not an association's legal status is governed by Scots law, bearing in 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.

## Determination of applicable law

6.2     In the Discussion Paper we suggested that the choice of criterion lay between applying:

- (a)     a formal test, that is, the part of the United Kingdom in which the association 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.

We expressed a preliminary view that both tests should be met before an association would 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.

6.3     Most consultees agreed with our preliminary view. One consultee<sup>1</sup> considered that legal personality should be conferred both on associations based solely in Scotland and on those based elsewhere in the UK but who have a presence in Scotland. However, in one of the most interesting responses to this question, Lennel Tennis Club, Coldstream, favoured using the formal test only:

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<sup>1</sup> McGrigors LLP.

"We are a cross border club, with members from England and Scotland. Our premises are in Scotland, but office bearers come from both jurisdictions. If (b) prevailed, it would be difficult to establish where the management took place and this could vary from year to year. (a) has the advantage of certainty."

The circumstances of this particular association provide a useful example against which to measure our recommendations.

6.4 In company with the majority of our consultees, we remain of the preliminary view expressed in the Discussion Paper that both the formal test of official address and the factual test of place of management should be met before an association should be treated as Scottish and therefore capable of acquiring legal personality. For the vast majority of "Scottish" associations, there should be no difficulty in satisfying both tests; equally, the requirement to satisfy both should exclude associations which carry on little or no activity in Scotland. In this context we use the expression "official address" to mean the address which the association will be obliged to set out on documents sent or published by it, and at which its constitutive document and details of its office-bearers will have to be kept.<sup>2</sup>

6.5 As regards associations which carry on activities both within and outwith Scotland, we do not consider that legislation giving effect to our recommendations should confer legal personality on an association which has its principal address and/or its place of management outside Scotland but which carries on activities (charitable or otherwise) in Scotland. We do not think that "having a presence" in Scotland is sufficient to warrant the granting of legal personality by Scots law. Care must be taken to avoid purporting to confer legal personality on associations where that personality will not be recognised by the jurisdiction with which the association is most closely connected.

6.6 Finally, there is the situation of clubs such as Lennel Tennis Club whose place of management may change from year to year. We think that the scope of any difficulty created for cross-border organisations could be reduced by applying the new legislation to any association whose management takes place wholly *or mainly* (rather than just wholly) in Scotland, leaving it to the association, in the first instance, to decide whether to exercise management and control mainly in Scotland or mainly outside Scotland and, if necessary, to the court to determine where management in fact mainly takes place.

6.7 In the Discussion Paper we proposed that the association's official address (in Scotland) should be stated in its constitutive document or other formal agreement among members. It was pointed out to us by some of our consultees that this requirement would be impracticable as the official address of many associations will change more frequently than the terms of the constitution. We agree, and accordingly our recommendation does not require a SALP's official address to be set out in any particular document.<sup>3</sup>

6.8 We therefore recommend:

**25. A Scottish Association with Legal Personality must satisfy the following conditions:**

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<sup>2</sup> See para 5.3 above.

<sup>3</sup> See, however, our recommendations at para 5.8 above regarding disclosure of a SALP's address in official communications etc.

- (a) It must have an official address in Scotland; and**
- (b) Its management must be carried on wholly or mainly in Scotland.**

(Draft Bill, clause 1(2)(b) and (c))

# Part 7 Transitional issues

## Introduction

7.1 Under our recommendations, legal personality will be conferred on all associations which meet the statutory criteria and which do not opt out of such treatment. This change in the law gives rise to a number of transitional issues which we address in this Part of the Report.

## Contractual and other obligations

7.2 The acquisition of legal personality will not have retrospective effect. Contracts entered into prior to the change by the office-bearers or other representatives of an association will not be transferred as a matter of law to the association on its becoming a SALP. Rights and obligations which have arisen in delict or under the law of unjustified enrichment prior to commencement of the new legislation will remain the rights and obligations of the individuals concerned. So, for example, where prior to commencement an association has opened a bank account with credit facilities, the persons liable to the bank for repayment of any debt will remain unchanged unless and until a new arrangement is entered into between the SALP and the bank. Similarly, where a lease of office equipment such as a photocopier has been entered into prior to commencement by representatives of the association, the obligations will not be transferred automatically to the SALP but will remain the obligations of the contracting parties unless and until the contract is varied by agreement. Actions raised after commencement but relating to events occurring before commencement will require to be raised or defended in the name of the appropriate individuals as representing the association.

## Ownership of property

7.3 At present, the property of an unincorporated association is normally held in trust for it by its office-bearers or other members. It is possible, however, that corporeal moveable property may not be so held, in which case it is owned by the members jointly.<sup>1</sup> When the new legislation comes into force, ownership will not pass automatically to the new legal entity. It will, however, become competent for the SALP to own property and therefore it will be possible for the trustees – or the members, as the case may be – to transfer ownership of property to it. The means by which ownership is transferred will depend upon the general law applicable to particular types of property and does not require to be the subject of special provision.

7.4 We recommend:

- 26. (a) Where a right in property is held in trust for the members of an association which acquires legal personality, the trustees may transfer the right to the SALP.**

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<sup>1</sup> See para 2.11 above.

**(b) Where a right in property is held jointly by the members of an association which acquires legal personality, the members may transfer the right to the SALP.**

(Draft Bill, clause 4)

### **Continuity of employment**

7.5 We noted earlier<sup>2</sup> that the Employment Appeal Tribunal have applied a pragmatic but intellectually unsatisfactory solution to the problem, under the current law, of identifying who is the employer of individuals working for an unincorporated association: namely, that the contracts of employment of such individuals are entered into with the association's management committee and its members for the time being. A different approach is taken under various statutory provisions, which merely refer to employees of unincorporated associations without suggesting that this description is in any way problematic. Under the new law, any difficulty will disappear because the SALP will have legal capacity.

7.6 A question arises, however, as to whether an association's acquisition of legal personality constitutes a change of employer. This would have various undesirable consequences. For example:

- The Transfer of Undertakings (Protection of Employment) Regulations 2006<sup>3</sup> ("TUPE Regulations") are applicable where a "relevant transfer" has occurred. "Relevant transfer" includes the transfer of an undertaking where there is a transfer of an economic entity which retains its identity. Upon the occurrence of a relevant transfer, the employee's contract of employment with the transferor is automatically given the same effect as it would have had if it had been entered into with the transferee.<sup>4</sup> There is, however, a duty imposed on both the transferor employer and transferee employer to inform and consult representatives of the affected employees.<sup>5</sup> If the acquisition of legal personality constituted a relevant transfer, these duties of information and consultation would require to be respected by all associations with employees.
- Under pensions legislation, various consequences are triggered when an employer ceases to employ any persons. These may include an immediate obligation to fund any pension scheme deficit at full buy-out value.<sup>6</sup> If the implication to be drawn from acquisition of legal personality was that employment by a previous employer (ie the management committee and its members) had ceased, substantial liabilities could be created in circumstances in which, from the point of view of the pension scheme, there has been no real change.

7.7 Our view is that problems such as these do not arise because acquisition of legal personality will not constitute a change of employer. We noted earlier that the Interpretation Act 1978<sup>7</sup> defines a person as including a body of persons corporate or unincorporate, and

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<sup>2</sup> Para 2.5.

<sup>3</sup> SI 2006/246, implementing Council Directive 2001/23/EC of 12 March 2001 (the "Acquired Rights Directive").

<sup>4</sup> Transfer of Undertakings (Protection of Employment) Regulations 2006, reg 4(1).

<sup>5</sup> *Ibid* reg 13.

<sup>6</sup> Pensions Act 1995, s 75.

<sup>7</sup> Sch 1.

that this is consistent with the many statutory provisions which proceed on the assumption that unincorporated associations are employers.<sup>8</sup> A purposive construction of the Acquired Rights Directive leads, in our view, to the same conclusion. For the avoidance of any doubt, however, we recommend as follows:

**27. The Bill introducing SALPs should contain:**

- **a statement to the effect that a change of employer does not occur when an association acquires or loses legal personality; and**
- **confirmation that acquisition or loss of legal personality does not break continuity of employment for the purposes of the Employment Rights Act 1996.**

(Draft Bill, clause 6)

**Commencement date**

7.8 Legal personality will be conferred on every association in existence at the commencement date of the new legislation which meets the statutory conditions and which has not resolved in writing to opt out. It will, of course, remain open to any association which has not opted out prior to commencement to decide to opt out at any future time, though not with retrospective effect. The issue is whether associations should be allowed time to decide whether to opt out prior to the legislation coming into force. In the Discussion Paper, we asked<sup>9</sup> whether a transitional period should be allowed for opting out of treatment as a separate legal entity and, if so, how long that period should be.

7.9 Almost all consultees agreed that there should be a transitional period. There was less unanimity on the appropriate duration of the transitional period. OSCR suggested that if the main reason for the transitional period is to allow associations which do not want legal personality to opt out, then one year should be sufficient to allow them to decide and act on this within a normal AGM cycle. North Lanarkshire Council suggested 18 months for much the same reasons, during which there could be an information campaign as to the consequences of acquiring legal personality.

7.10 We think that a balance has to be struck between, on the one hand, allowing sufficient time for those associations who wish to opt out before commencement to do so and, on the other hand, making available the advantages of separate legal personality to those associations who do not wish to opt out of it. We doubt whether there will be many associations for which treatment as a separate entity will be disadvantageous and we therefore do not expect many to opt out. Accordingly, we have concluded that a shorter period than a year would be sufficient to allow those associations which do wish to opt out to arrange the necessary meeting of their members. We consider that a period of six months is sufficient. The benefits of treatment as a separate legal entity will thus become available sooner to what we expect to be the very large majority of associations who do not opt out. We therefore recommend:

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<sup>8</sup> Eg Pensions Act 2008, ss 45, 47 concerning pension scheme membership for jobholders.

<sup>9</sup> Discussion Paper, para 6.12.

- 28. There should be a transitional period of six months between the passing of the Act and its entry into force.**

(Draft Bill, clause 13(2))

## Part 8            A new corporate vehicle?

8.1     In Part 5 of the Discussion Paper we discussed a different approach to the problems raised by the current law which would consist of providing a new corporate vehicle designed to be suitable for not-for-profit organisations, so that associations which hold property, engage employees and undertake substantial contractual commitments are encouraged to incorporate and thereby acquire legal personality. We noted that this was the approach adopted in many other jurisdictions, including Australia, New Zealand, most Canadian provinces and many states within the United States. The German system of acquisition of legal personality by registration is similar. We also noted that a variety of corporate vehicles already exist in Scotland, including companies limited by guarantee and community interest companies, and that these will be complemented in due course by the SCIO.<sup>1</sup> In contrast to the American Bar Association model,<sup>2</sup> however, there is no vehicle in Scotland designed specifically for member-interest (as opposed to charitable or public benefit) not-for-profit clubs and associations.

8.2     We expressed a preliminary view<sup>3</sup> that there is no real need or demand for a new corporate vehicle in Scotland, and that the comparative models which we examined did not offer significant advantages over corporate forms which are either already available in Scotland, such as the company limited by guarantee, or which will become available when the SCIO secondary legislation is brought into force. However, we invited comment on whether there was a need for a new statutory corporate vehicle in Scots law for not-for-profit associations and, if so, whether it should be designed for use by any not-for-profit association which is not a charity capable of being registered as a SCIO or for member-interest associations only.

8.3     Most of the consultees who responded to this question concluded that there was no need for a new statutory corporate vehicle in Scots law for not-for-profit associations. OSCR considered that the introduction of a new statutory corporate vehicle would create confusion in an area which is already complex. One or two consultees suggested that there might be a need for a statutory corporate vehicle for larger organisations only.

8.4     We agree with the majority view, and do not consider that there is currently any need or demand for a new statutory corporate vehicle for not-for-profit associations. We are not persuaded that such a vehicle would provide any significant advantage over either the existing corporate forms available to associations or our proposal to attribute separate legal personality to unincorporated associations which adopt a constitution containing certain

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<sup>1</sup> For further details of existing corporate vehicles, see Discussion Paper, para 2.28.

<sup>2</sup> Discussion Paper, paras 5.3 – 5.4.

<sup>3</sup> Discussion Paper, para 5.12.

minimum provisions. We therefore make no recommendation with regard to the creation of such a vehicle.

## Part 9 List of recommendations

1. Unincorporated associations which satisfy certain statutory conditions should be accorded separate legal personality.

(Para 3.4; Draft Bill, clause 1(1))

2. An unincorporated association should be treated as a legal entity separate from its members if it satisfies the following conditions:

- (a) it has at least two members;

- (b) it has adopted a constitutive document containing specified minimum provisions; and

- (c) its objects as set out in the constitutive document do not include making a profit for its members.

(Para 3.9; Draft Bill, clause 1(2)(a), (d), (e) and (f))

3. One of the conditions for attribution of separate legal personality should be that a body has adopted a constitutive document which includes the following matters:

- (a) the name of the body;

- (b) the purpose for which it exists;

- (c) the criteria for membership;

- (d) procedures for election or appointment of those managing the body (including office-bearers, if any);

- (e) powers and duties of office-bearers (if any);

- (f) distribution of the assets of the body in the event of dissolution; and

- (g) procedure for amendment of the constitutive document.

(Para 3.15; Draft Bill, clause 1(2)(e), (4))

4. Unincorporated associations with legal personality should be given the name "Scottish Association with Legal Personality" to distinguish them from associations which do not have legal personality.

(Para 3.18; Draft Bill, clause 1(5))

5. Registration in a public register should not be a requirement for treatment of an unincorporated association as a separate legal entity.

(Para 3.26)
6. Attribution of legal personality to an association which satisfies the statutory conditions should not be dependent upon exercise by the association of an option to be treated as a separate legal entity.

(Para 3.31)
7. The members of an association may opt out of treatment as a separate legal entity by a resolution, recorded in writing, to the effect that the association is not to have legal personality.

(Para 3.34; Draft Bill, clause 1(2)(g), (3))
8. There is no need to provide a statutory model constitutive document for associations with separate legal personality.

(Para 3.38)
9. There is no need for a statutory default rule governing the distribution of a SALP's assets on dissolution.

(Para 3.41)
10. There is no need for special statutory provision for multi-tiered organisations.

(Para 3.44)
11. A SALP should cease to have legal personality if any of the statutory conditions which must be satisfied for legal personality ceases to be satisfied.

(Para 3.50; Draft Bill, clause 10(1))
12. An office-bearer or member of a SALP does not incur personal contractual liability by reason only of acting as such office-bearer or member.

(Para 4.4; Draft Bill, clause 2(c))
13. (a) An office-bearer or member of a SALP does not incur personal liability by reason only of acting as such office-bearer or member.  
  
(b) A SALP may incur liability to one of its members for loss or damage caused by the wrongful act or omission of another member while acting on behalf of the association.

(Para 4.12; Draft Bill, clause 2(b) and (c))

14. A SALP must:
- (a) provide the Keeper of the Registers of Scotland, together with or prior to an application for registration of an interest in heritable property in Scotland, with:
    - (i) a copy of the SALP's constitution; and (if not contained in the constitution)
    - (ii) details of the SALP's official address;
  - (b) notify the Keeper of any change of its official address.

(Para 4.20; Draft Bill, clause 5(1), (3) and (4))

15. Breach of the obligation to intimate a change of official address to the Keeper of the Registers of Scotland would render the SALP, and any office-bearer or other member managing the SALP's affairs with whose consent or connivance or as a consequence of whose neglect the offence was committed, liable to a fine.

(Para 4.20; Draft Bill, clause 5(5) – (7))

16. (a) A document is signed on behalf of a SALP if it is signed on its behalf by:
- an office-bearer or, if it has no office-bearer, either
- a person responsible for the management of the association; or
  - a person authorised to sign the document on behalf of the association.
- (b) Other provisions of the Requirements of Writing (Scotland) Act 1995 applicable to execution of documents on behalf of a body corporate should apply *mutatis mutandis* to execution of documents on behalf of a SALP.

(Para 4.23; Draft Bill, clause 7, Schedule)

17. A SALP should have the capacity to sue and be sued in its own name.

(Para 4.25; Draft Bill, clause 2(a))

18. Where a SALP ceases to have legal personality without being dissolved:
- (a) any assets owned by the SALP immediately prior to loss of legal personality shall, in the absence of agreement to the contrary by the association members, be owned:
    - by the association's office-bearers or, if there are no office-bearers, by the persons responsible for the management of the association, as trustees for the members jointly; or
    - if there are no persons responsible for the management of the association, by the members jointly; and

(b) any liabilities of the SALP immediately prior to loss of legal personality shall become the joint and several liabilities of:

- the association's office-bearers or, if there are no office-bearers, the persons responsible for the management of the association; or
- if there are no persons responsible for the management of the association, the members.

(Para 4.32; Draft Bill, clause 10)

19. A SALP must set out, in any document sent or published by it, its name and an address in Scotland at which service of any document relating in any way to its activities will be effective.

(Para 5.8; Draft Bill, clause 3(1) and (7))

20. A SALP must keep at that address the following:

- (a) a copy of its constitutive document;
- (b) a list of the names of its office-bearers or, if it has no office-bearers, of the names of the persons responsible for its management;
- (c) a written record of the date of adoption of its constitutive document if it was adopted after the coming into force of this legislation,

and provide free of charge a copy, list or record (as the case may be) on request in writing or electronically within 28 days after such a request is made.

(Para 5.8; Draft Bill, clause 3(2) – (4))

21. In the event of a failure to ensure compliance with a SALP's obligations regarding disclosure of its address or keeping and making available documents or information on request, the office-bearers or, if the association has no office-bearers, the persons responsible for its management shall be liable concurrently with the SALP for any obligation undertaken on behalf of the SALP while the failure subsisted.

(Para 5.10; Draft Bill, clause 3(5) and (6))

22. The validity of a SALP's actings should not be called into question on the ground that there is a lack of capacity by reason of anything in the SALP's constitutive document, provided that this will favour 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 SALP is a SALP.

(Para 5.14; Draft Bill, clause 8)

23. The Bankruptcy (Scotland) Act 1985 should be amended as follows:
- section 6(1)(c) should be amended to allow a dissolved SALP to be sequestrated; and
  - section 74 should be amended to make a SALP an associate of each of its members.
- (Para 5.21; Draft Bill, clause 9)
24. No special statutory measures are needed to encourage large not-for-profit associations to incorporate as a company limited by guarantee or otherwise.
- (Para 5.27)
25. A Scottish Association with Legal Personality must satisfy the following conditions:
- (a) It must have an official address in Scotland; and
  - (b) Its management must be carried on wholly or mainly in Scotland.
- (Para 6.8; Draft Bill, clause 1(2)(b) and (c))
26. (a) Where a right in property is held in trust for the members of an association which acquires legal personality, the trustees may transfer the right to the SALP.
- (b) Where a right in property is held jointly by the members of an association which acquires legal personality, the members may transfer the right to the SALP.
- (Para 7.4; Draft Bill, clause 4)
27. The Bill introducing SALPs should contain:
- a statement to the effect that a change of employer does not occur when an association acquires or loses legal personality; and
  - confirmation that acquisition or loss of legal personality does not break continuity of employment for the purposes of the Employment Rights Act 1996.
- (Para 7.7; Draft Bill, clause 6)
28. There should be a transitional period of six months between the passing of the Act and its entry into force.
- (Para 7.10; Draft Bill, clause 13(2))

# Appendix A

## Unincorporated Associations (Scotland) Bill

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Schedule—Amendment of Requirements of Writing (Scotland) Act 1995

# Unincorporated Associations (Scotland) Bill

Draft

of a

**BILL**

to

Make provision about unincorporated associations in Scotland.

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:--

## *Scottish Association with Legal Personality*

### **1 Scottish Association with Legal Personality (“SALP”)**

- (1) An unincorporated body has legal personality separate from that of its members if the conditions mentioned in subsection (2) are satisfied.
- (2) The conditions are that—
  - (a) the body has two or more members,
  - (b) it has an official address in Scotland (“official address” being construed in accordance with section 3(1)),
  - (c) its management is carried on wholly or mainly in Scotland,
  - (d) it has a constitutive document,
  - (e) in the constitutive document there are set out matters which include those mentioned in subsection (4),
  - (f) its objects (as set out in the constitutive document) do not include the making of a profit for its members, and
  - (g) there is no resolution of its members that it is not to have legal personality separate from that of its members.
- (3) To have effect for the purposes of subsection (2), any such resolution as is mentioned in paragraph (g) of that subsection must be a resolution recorded in writing.
- (4) The matters are—
  - (a) the name of the body,
  - (b) the objects for which the body exists,
  - (c) the criteria for membership of the body,

- (d) procedures for the election or appointment of those managing the body (including procedures for the election or appointment of its office-bearers, if any),
  - (e) the powers and duties of the office-bearers (if any),
  - (f) provision for the distribution of the assets of the body in the event of its dissolution, and
  - (g) procedures for amending the constitutive document.
- (5) An unincorporated body which, by virtue of subsection (1), has legal personality is to be known as a Scottish Association with Legal Personality (any body so known being in this Act referred to as a “SALP”).
- (6) The Secretary of State may, by order made by statutory instrument, amend subsection (4) so as to make further or different provision as to matters required to be set out in the constitutive document of a SALP.

#### NOTE

Subsection (1) provides that an unincorporated association fulfilling the conditions listed in subsection (2) is recognised as a legal entity distinct from its members. This has the effect that, unlike other unincorporated associations, such an association may perform juristic acts such as entering into contracts or acquiring property in its own name. It implements recommendation 1.

Subsection (2) lists the conditions which an unincorporated association must satisfy in order to obtain separate legal personality. It implements recommendations 2, 3, 7 and 25.

Subsection (3), in conjunction with subsection (2)(g), provides that an unincorporated association may opt out of treatment as a separate legal person by means of a resolution of its members not to be so treated. It is necessary that a resolution of the type referred to in subsection (2)(g) be evidenced in writing in order to be effective, because otherwise it would not be demonstrable to third parties that an association which fulfilled the threshold criteria was not a legal person due to the members' decision not to be so treated. The quorum of members required for the passing of such a resolution is a matter to be prescribed by the association's constitutive document. (An unincorporated association could also opt out of separate legal personality by not adopting a written constitution at all or adopting a constitution which does not contain the specified minimum criteria.)

Subsection (4) lists the matters which must be included in an unincorporated association's constitutive document in order to satisfy paragraph (e) of subsection (2). It implements recommendations 2 and 3. (A well-drafted constitution would, however, deal with a broad range of other matters.)

Subsection (5) provides that an unincorporated association which has obtained separate legal personality is to be referred to as a Scottish Association with Legal Personality ("SALP"). This allows a distinction to be drawn between those unincorporated associations which are separate legal entities and those which are not. It implements recommendation 4.

Subsection (6) gives the Secretary of State power to amend, by statutory instrument, the matters which must be included in a SALP's constitutive document as listed in subsection (4).

## **2 Aspects of separate legal personality**

Without prejudice to the generality of section 1(1)—

- (a) a SALP may sue and be sued in its own name,

- (b) a SALP may incur liability to a member of the SALP for loss or injury caused by the wrongful act or omission of another of its members provided that the act or omission occurred in the course of activities engaged in by the other member on behalf of the SALP, and
- (c) an office-bearer or member of a SALP does not incur personal liability by reason only of acting as such an office-bearer or member.

#### NOTE

Clause 2 provides a non-exhaustive list of consequences of the attribution of separate legal personality to associations which fulfil the statutory conditions. It implements recommendations 12, 13 and 17.

Paragraph (a) provides that a SALP may sue or be sued in its own name without including the SALP's office-bearers or committee members as representing it. Unlike the current law applicable to unincorporated associations, the method by which a SALP sues or is sued would be the same regardless of whether an action was raised in the sheriff court or in the Court of Session.

Under the current law, each member of an unincorporated association is considered to be a co-principal in the pursuit of the purposes of the association. The association cannot therefore be held liable to a member for the acts or omissions of another member; it is considered that purporting to sue an association in such circumstances would be tantamount to suing oneself. Paragraph (b) expressly reverses this position with regard to SALPs. A SALP may therefore be held liable to a member for the acts or omissions of another member but only if those acts or omissions occurred in the course of activities engaged in on behalf of the SALP.

Paragraph (c) provides that any personal liability of office-bearers or members which arises under the current law by virtue only of membership of an unincorporated association does not arise in relation to SALPs. An office-bearer or member of a SALP will not become liable for any debt, obligation or other liability of the SALP, however arising, by reason only of acting as an office-bearer or being a member. This clause does not, however, exempt an office-bearer or member of a SALP from incurring personal liability for his or her personal wrongful acts or omissions. Nor does it prevent an office-bearer or member of a SALP from becoming liable, concurrently with the SALP, for debts, obligations or other liabilities incurred during any period when the SALP is in breach of the duties set out in clause 3.

### **3 Duties of SALP**

- (1) A SALP must—
  - (a) set out in legible characters on any document sent or published by it, and
  - (b) ensure that there is set out in legible characters on any document sent or published on its behalf by a person authorised by it to send or publish the document,
 

its name and an address in Scotland at which service of any document relating in any way to the SALP's activities will be effective (such an address being referred to in subsection (8) and in sections 1(2)(b) and 5(3)(c) and (4) as an "official address").
- (2) A SALP must keep at that address—
  - (a) a copy of its constitutive document,
  - (b) a list of the names of its office-bearers (or, if it has no office-bearers, of the names of the persons responsible for its management), and
  - (c) if the constitutive document was adopted after the coming into force of this Act, a written record of the date on which the constitutive document was adopted.

- (3) A SALP must, within 28 days after a request is made by any person that a copy, list or record kept by virtue of subsection (2) be made available, make it available to the person free of charge.
- (4) The request may be made, or the copy, list or record made available, either in writing or by electronic means.
- (5) It is for the office-bearers of a SALP (or, if it has no office-bearers, for the persons responsible for its management) to ensure compliance with this section; and in the event of a failure to ensure such compliance those office-bearers (or as the case may be those persons) are liable concurrently with the SALP for any obligation undertaken, in the course of the SALP's activities, while the failure subsisted.
- (6) For the purposes of subsection (5), it is immaterial by whom the obligation was undertaken.
- (7) Without prejudice to the generality of subsection (1), in that subsection "document" includes a document sent or published electronically.
- (8) The Secretary of State may, by order made by statutory instrument, amend subsection (2) so as to make further or different provision as to the documents to be kept by the SALP at its official address.

#### NOTE

Subsection (1) ensures that any third party interacting with a SALP can ascertain, first, its correct name and, secondly, an address at which it can be contacted. Attribution of separate legal personality to unincorporated associations means that, in the majority of circumstances, it will be the SALP which is liable for debts, obligations and other liabilities incurred in the course of the SALP's activities. It is essential, therefore, that a third party has available both the correct name and an address at which service of a document, for example a charge for payment, will be effective. Such an address is referred to as the SALP's official address. This implements recommendation 19.

Subsection (2) lists the documents which must be kept at the official address. Subparagraph (a) provides third parties with the information which they need in order to ascertain whether an entity purporting to be a SALP has fulfilled the statutory requirements for treatment as such. Subparagraph (b) provides a means by which the persons concurrently liable with the SALP in the event of a breach of the duties in subsections (1) – (3) may be identified. As the draft Bill will not affect obligations undertaken by an unincorporated association prior to obtaining separate legal personality, subparagraph (c) is necessary to ensure, by requiring a record to be kept of the date on which the association became a SALP, that the person or persons liable to fulfil such obligations may be ascertained. This implements part of recommendation 20.

Subsection (3) permits a person to request a copy of any of the documents listed in subsection (2). The SALP must comply with such a request within 28 days and bear any consequent cost. This, together with subsection (4), implements part of recommendation 20.

Subsection (4) provides that a request under subsection (3) may be made in writing or by electronic means. Such provision is necessary because, in many cases, the official address specified on documents or publications in accordance with subsection (1) will be the private address of one of the SALP's office-bearers. Subsection (4) also provides that the response to a request may be made in writing or in electronic form.

Subsection (5) imposes the duty of ensuring compliance with subsections (1) – (3) on the office-bearers or the persons responsible for the SALP's management. In the event that the SALP is not in compliance with any of subsections (1) – (3), those individuals will be liable, concurrently with the SALP, for any obligation entered into or incurred during the period of non-compliance.

## *Property*

### **4 Transfer of right in property**

- (1) Where—
  - (a) a right in property (whether heritable or moveable) is held in trust by a person for the members of an unincorporated association, and
  - (b) the association acquires legal personality by virtue of this Act,the person may transfer the right to the SALP.
- (2) Where—
  - (a) a right in property (whether heritable or moveable) is held by the members of an unincorporated association jointly, and
  - (b) the association acquires legal personality by virtue of this Act,the members may transfer the right to the SALP.

#### NOTE

Clause 4 provides that any property, heritable or moveable, held in trust for the members of an unincorporated association or any right in property held jointly by the members of an unincorporated association, may be transferred, by the person or persons in whom ownership is vested, to the SALP. While it may be regarded as unusual to enact a legislative provision which is merely permissive, it is considered that this clause is necessary to clarify the property law consequences of acquisition of separate legal personality and, in particular, to confirm that the transfer of rights in property does not occur automatically. This implements recommendation 26.

### **5 Application by SALP to Keeper of Registers of Scotland and subsequent notification of change of official address**

- (1) Subsection (3) applies to an application by a SALP to the Keeper of the Registers of Scotland for—
  - (a) registration in the Land Register of Scotland to give effect to a disposition, or
  - (b) registration of a lease, or of an assignation of a lease, in that register.
- (2) The recording in the Register of Sasines of—
  - (a) a disposition,
  - (b) a lease, or
  - (c) an assignation of a lease,in favour of a SALP has no effect.
- (3) The applicant must provide the Keeper with the information that it is a SALP; and the information must—
  - (a) be received by the Keeper with or before the application,
  - (b) be accompanied by a copy of the body's constitutive document, and
  - (c) include the body's official address (if that address is not set out in the constitutive document).

- (4) If the official address of a SALP which has had an application under subsection (3) accepted changes, the SALP must without delay notify the Keeper of the change (including in the notification the new address).
- (5) A SALP which, without reasonable excuse, contravenes subsection (4) is guilty of an offence and is liable, on summary conviction, to a fine not exceeding one-fifth of the statutory maximum.
- (6) If, after a SALP has been convicted of such an offence, the original contravention is continued the SALP is liable on a second or subsequent summary conviction of the offence to a fine not exceeding one-fiftieth of the statutory maximum for each day on which the contravention is continued (instead of the penalty which may be imposed on a first conviction of the offence).
- (7) Where such an offence is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of—
  - (a) an office-bearer of the SALP, or
  - (b) any member who was managing (or purporting to manage) the affairs of the SALP,
 the office-bearer or member, as well as the SALP, is guilty of the offence and liable to be proceeded against and punished accordingly.
- (8) The Keeper is to archive such information as is provided by virtue of subsection (3) or (4).

#### NOTE

Clause 5 implements recommendations 14 and 15. Subsection (1) provides that a SALP must comply with subsection (3) when an application is made to the Keeper of the Registers of Scotland for the registration in the Land Register of a disposition, long lease or assignation of a long lease.

Subsection (2) stipulates that sasine recording of a disposition, lease or assignation of a lease in favour of a SALP is of no effect. That is to say, the recording of a disposition in favour of a SALP does not have the effect of divesting the transferor of, and investing the transferee in, the property. Similarly, the recording of a lease, or the assignation of a lease, in favour of a SALP does not have the effect of creating or transferring a subordinate real right in the property. To be effectual, therefore, a disposition, lease or assignation of a lease in favour of a SALP must be registered in the Land Register of Scotland.

Subsection (3) provides that where a SALP makes an application to which this clause applies, it must provide, with or prior to the application, information to the Keeper of the Registers of Scotland detailing that it is a SALP and must provide therewith a copy of its constitutive document and, if not detailed in its constitutive document, its official address. Imposition of these requirements ensures that the information publicly available as to the identity of individuals with an interest in land held through a SALP will not be diminished from that currently available.

If, at any time after an application to which subsection (3) applies is made, the SALP changes its official address, subsection (4) provides that it must notify the Keeper of its new official address.

The duty set out in subsection (4) requires to be attended by penalties for breach. These are similar to the penalties incurred for breach of obligations under the Business Names Act 1985. Subsection (5) provides that where a SALP, without reasonable excuse, breaches the duty specified in subsection (4) it is guilty of an offence punishable, on summary conviction, by a fine not exceeding one-fifth of the statutory maximum. In order to prevent a breach of duty continuing after a SALP has been convicted of an offence under subsection (5), subsection (6) provides that where such a breach continues, the SALP is guilty of an offence punishable, on summary conviction, by a fine not exceeding one-fiftieth of the statutory maximum for each day the breach continues.

Subsection (7) provides that where it is proved that any of the SALP's office-bearers or, if it has no office-bearers, any of the persons responsible for its management, consented to, refrained from preventing or through their neglect caused the commission of an offence under this clause, those persons are also guilty of an offence punishable, on summary conviction, by a fine not exceeding one-fifth of the statutory maximum or, in the case of a subsequent conviction, a fine not exceeding one-fiftieth of the statutory maximum for each day the breach continues.

Subsection (8) provides that the Keeper of the Registers of Scotland will keep a record of the information to be provided under subsections (3) and (4).

### *Employment*

## **6 Continuity of employment**

- (1) A change of employer is not effected by a body's acquiring, or ceasing to have, legal personality by virtue of this Act.
- (2) In section 218 of the Employment Rights Act 1996 (c.18) (change of employer), after subsection (6) there is inserted—

“(6A) If an unincorporated body acquires legal personality by virtue of the Unincorporated Associations (Scotland) Act 2009 (asp00), that is to say, if it becomes a Scottish Association with Legal Personality (or “SALP”)—

- (a) an employee's period of employment at the time when the acquisition takes place counts as a period of employment with the SALP, and
- (b) the acquisition does not break the continuity of the period of employment.

(6B) If an unincorporated body ceases to have legal personality (that is to say, if it ceases to be a SALP) on a condition mentioned in section 1(2) of that Act ceasing to be satisfied as regards the body but is not dissolved—

- (a) an employee's period of employment at the time when the cessation occurs counts as a period of employment with the unincorporated body, and
- (b) the cessation does not break the continuity of the period of employment.”.

### NOTE

Clause 6 implements recommendation 27. It is considered that the acquisition of legal personality does not constitute a change of employer. For the avoidance of any doubt, however, subsection (1) provides that the acquisition or loss of separate legal personality is not to be considered, for any purpose, to constitute a change of employer. Subsection (2) amends section 218 of the Employment Rights Act 1996 to provide that the acquisition or loss of separate legal personality does not break the continuity of an employee's period of employment.

### *Execution of documents*

## **7 Execution of documents on behalf of SALP**

The Schedule, which contains amendments of the Requirements of Writing (Scotland) Act 1995 (c.7), has effect.

*Miscellaneous*

**8 Calling into question validity of SALP's actings**

- (1) In the circumstances mentioned in subsection (2), the validity of a SALP's actings is not to be called into question on the ground that, by reason of something in the association's constitutive document, there is a lack of capacity.
- (2) Those circumstances are, that not calling the validity of the actings into question favours—
  - (a) a person who—
    - (i) gives full consideration in money or money's worth in relation to the actings, and
    - (ii) does not know that the actings are not permitted by the document, or
  - (b) a person who does not know at the time of the actings that the SALP is a SALP.

NOTE

Clause 8 implements recommendation 22. It restricts the scope of the common law *ultra vires* doctrine in the same way as it is restricted in relation to charities which are companies incorporated under the Companies Acts. Any *ultra vires* act by a SALP is void except where the other party was unaware that the act was *ultra vires* and gave full value in respect of the act, or where the other party did not know it was transacting with a SALP. Clause 8 does not, however, relieve an office-bearer or person responsible for the management of a SALP from personal liability to the SALP's members for acting outwith the scope of his or her authority. We consider this to be a matter which should not be prescribed by statute but should be left to the SALP to decide, for example by way of provision in its constitutive document.

**9 Amendment of Bankruptcy (Scotland) Act 1985**

- (1) The Bankruptcy (Scotland) Act 1985 (c.66) is amended as follows.
- (2) In section 6(1) (which makes provision as regards entities which may be sequestrated), for paragraph (c) there is substituted—
  - “(ca) a body corporate;
  - (cb) an unincorporated body, including (without prejudice to that generality) a Scottish Association with Legal Personality and a dissolved Scottish Association with Legal Personality;”.
- (3) In section 74 (which describes when a person is an associate of another person), after subsection (3) there is inserted—
  - “(3A) A Scottish Association with Legal Personality is an associate of a person who is a member of the association.”.

## NOTE

Clause 9 implements recommendation 23. Subsection (2) amends section 6(1)(c) of the Bankruptcy (Scotland) Act 1985 to provide for the sequestration of a SALP or a dissolved SALP. An important effect of this is to extend the protection of unpaid creditors afforded by the existing law of gratuitous alienations to the unpaid creditors of dissolved SALPs; that is to say, gratuitous alienations by dissolved SALPs may be challenged under section 34 of the Bankruptcy (Scotland) Act 1985. This prevents dissolution from being utilised as a method by which a SALP and its members can escape liability to unpaid creditors. There is an exception in section 34(4)(c)(ii) for transactions in which assets were distributed for a charitable purpose to a person or entity which was not an associate of the dissolved SALP.

Subsection (3) adds a provision to section 74 of the Bankruptcy (Scotland) Act 1985 to the effect that a SALP is an associate of its members. This means that the period within which a gratuitous alienation in favour of a member may be challenged under section 34 of that Act is extended to five years from two years. It also has the result that a member of a SALP may not rely upon the defence to such a challenge provided by section 34(4)(c)(ii) of that Act.

### *Loss of legal personality*

#### **10 Loss of legal personality etc.**

- (1) This section applies where an unincorporated body—
  - (a) ceases to have legal personality on a condition mentioned in section 1(2) ceasing to be satisfied as regards the body, but
  - (b) is not dissolved.
- (2) Except in so far as its members otherwise agree, on the day on which the body ceases to have legal personality assets held by the body immediately before that day become assets—
  - (a) held in trust by its office-bearers (or if it has no office-bearers, by those managing it) for its members, or
  - (b) if it has no office-bearers and no persons manage it, held jointly by its members.
- (3) Any liability enforceable against the body but for that body having ceased to have legal personality becomes instead enforceable, jointly and severally against—
  - (a) its office-bearers,
  - (b) if it has no office-bearers, those managing it, or
  - (c) if it has no office-bearers and no persons manage it, its members.

## NOTE

Clause 10 implements recommendation 18. Subsection (1) provides that subsections (2) and (3) are applicable in the situation where a SALP has lost separate legal personality, either intentionally or accidentally, but continues to operate as an unincorporated association. This clause does not apply to SALPs which cease to have separate legal personality because the membership falls below two: the SALP would no longer fulfil the condition set out in clause 1 (2) (a) and would be dissolved. The distribution of the SALP's assets would in these circumstances be dealt with according to the provisions of the SALP's constitutive document.

Subsection (2) provides a default rule for the transfer of ownership of the SALP's assets. This removes any potential difficulty regarding ascertainment of ownership following loss of separate legal personality and avoids any risk that assets of the SALP which have not been effectually transferred prior to the loss of separate legal personality might be regarded as having become the property of the Crown as *bona vacantia*.

Subsection (3) makes provision for the situation in which a SALP loses separate legal personality at a time when it has outstanding liabilities. In such circumstances its office-bearers or, if it has no office-bearers, the persons responsible for its management, whom failing its members become jointly and severally liable for the outstanding liability to the extent that such liability was enforceable against the SALP. Unpaid creditors will receive no more than they would have done if a decree had been obtained against the former SALP itself.

### *General*

#### **11 Consequential amendments**

The Secretary of State may by order made by statutory instrument make, in any enactment (including any enactment comprised in, or in an order made under, an Act of the Scottish Parliament) such amendments, repeals or as the case may be revocations as appear to him to be appropriate in consequence of this Act.

#### **12 Orders**

An order under section 1(6), 3(8) or 11 may not be made unless a draft of the statutory instrument containing the order has been laid before, and approved by a resolution of, each House of Parliament.

#### **13 Short title, commencement and extent**

- (1) This Act may be cited as the Unincorporated Associations (Scotland) Act 2009.
- (2) This Act comes into force at the end of the period of 6 months beginning with the day on which this Act is passed.
- (3) This Act extends only to Scotland.

#### **NOTE**

Subsection (2) implements recommendation 28 by providing for a transitional period of six months before the entry into force of the implementing legislation. This allows unincorporated associations which wish to opt out before commencement a reasonable period within which to take the necessary steps. Opt-out is also possible at any time after commencement.

SCHEDULE  
*(introduced by section 7)*

AMENDMENT OF REQUIREMENTS OF WRITING (SCOTLAND) ACT 1995

In the Requirements of Writing (Scotland) Act 1995 (c.7), in Schedule 2 (which, as regards subscription and signing, makes provision for special cases), after paragraph 5 there is inserted—

*“Scottish associations with legal personality*

5A (1) Except where an enactment expressly provides otherwise, where a granter of a document is a Scottish Association with Legal Personality (a “SALP”), the document is signed by the association if it is signed on its behalf by an office-bearer of the association or, if it has no office-bearer, either—

- (a) a person responsible for the management of the association; or
- (b) a person authorised to sign the document on behalf of the association.

(2) Sub-paragraph (1) above applies in relation to the signing of an alteration made to a document as it applies in relation to the signing of a document.

(3) Where a granter of a document is a SALP, section 3 of and Schedule 1 to this Act shall have effect subject to the modifications set out in sub-paragraphs (4) and (5) below.

(4) For subsection (1) of section 3 there shall be substituted the following subsections—

“(1) Subject to subsections (1A) to (7) below, where—

- (a) a document bears to have been subscribed on behalf of a SALP by an office-bearer of the association or, if it has no office-bearer, either by a person responsible for the management of the association or a person authorised to sign the document on behalf of the association;
- (b) the document bears to have been signed by a person as a witness of the subscription of the office-bearer, the person responsible for the management of the association or the authorised person (as the case may be) and to state the name and address of the witness; and
- (c) nothing in the document, or in the testing clause or its equivalent, indicates—
  - (i) that it was not subscribed on behalf of the association as it bears to have been so subscribed; or
  - (ii) that it was not validly witnessed for any reason specified in paragraphs (a) to (e) of subsection (4) below,

the document shall be presumed to have been subscribed by the office-bearer, the person responsible for the management of the association or the authorised person (as the case may be) and by the association.

(1A) For the purposes of subsection (1)(b) above, the name and address of the witness may bear to be stated in the document itself or in the testing clause or its equivalent.

- (1B)A presumption under subsection (1) above as to subscription of a document does not include a presumption—
- (a) that a person bearing to subscribe the document as an office-bearer, a person responsible for the management of the association or an authorised person was such an office-bearer or person; or
  - (b) that a person subscribing the document on behalf of the body and bearing to have been authorised to do so was authorised to do so.”.
- (5) For sub-paragraph (1) of paragraph 1 of Schedule 1 there shall be substituted the following sub-paragraphs—
- “(1) Subject to sub-paragraphs (1A) to (7) below, where—
- (a) an alteration to a document bears to have been signed on behalf of a SALP by an office-bearer of the association or, if it has no office-bearer, either by a person responsible for the management of the association or a person authorised to sign the document on behalf of the association;
  - (b) the alteration bears to have been signed by a person as a witness of the subscription of the office-bearer, the person responsible for the management of the association or the authorised person (as the case may be) and to state the name and address of the witness; and
  - (c) nothing in the document or alteration, or in the testing clause or its equivalent, indicates—
    - (i) that the alteration was not signed on behalf of the association as it bears to have been so signed; or
    - (ii) that the alteration was not validly witnessed for any reason specified in paragraphs (a) to (e) of sub-paragraph (4) below,
 the alteration shall be presumed to have been signed by the office-bearer, the person responsible for the management of the association or the authorised person (as the case may be) and by the association.
- (1A)For the purposes of sub-paragraph (1)(b) above, the name and address of the witness may bear to be stated in the alteration itself or in the testing clause or its equivalent.
- (1B)A presumption under sub-paragraph (1) above as to the signing of an alteration to a document does not include a presumption—
- (a) that a person bearing to sign the alteration as an office-bearer, a person responsible for the management of the association or an authorised person was such an office-bearer or person; or
  - (b) that a person signing the alteration on behalf of the body and bearing to have been authorised to do so was authorised to do so.”.”.

NOTE

The Schedule amends the Requirements of Writing (Scotland) Act 1995 by providing rules for the execution of documents on behalf of SALPs.

# Appendix B

## Impact assessment of recommended reforms of the law of unincorporated associations

### The current difficulties

1. From the information available, 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 are 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. The following difficulties have been identified 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, as trustees for the members of the association, 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

2. The preceding paragraph 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 unaware of the personal liabilities which they may incur by virtue of their membership. It is considered 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**

3. The current case law, as discussed in Discussion Paper No 140 on *Unincorporated Associations* ("the Discussion Paper"), is indicative of the problems which occur in practice but informal and formal consultation with various people and organisations with experience of this area has shown that these are merely the tip of the iceberg. Such difficulties arise frequently with the result that support for reforming the law is strong.

#### *Consultation*

4. The Discussion Paper was published on 3 December 2008. Prior to its publication, informal meetings were held with representatives of a number of organisations, including the Office of the Scottish Charity Regulator (OSCR), the Scottish Council for Voluntary Organisations (SCVO), the University of Dundee Charity Law Research Unit, the Church of Scotland, and the Institute of Chartered Accountants of Scotland, and with individuals who have an interest and expertise in this field. The consultation period ran until 6 March 2009. There were forty-seven responses to the Discussion Paper from a variety of consultees including voluntary and not-for-profit organisations, faith organisations, a political party, individuals, non-departmental public bodies, non-ministerial departments, professionals, local authorities and academics. SCVO assisted in publicising the paper widely within the Third Sector and also facilitated three well-attended focus group meetings in Edinburgh, Glasgow and Inverness. In addition, information was sought from local authorities by way of a questionnaire regarding the nature and extent of their contact with unincorporated associations. Ten local authorities replied. Lists of the individuals with whom discussions were held prior to and since publication of the Discussion Paper, of the consultees who submitted a response to the Discussion Paper and of the local authorities who replied to the questionnaire are at Appendix C to this Report. The responses received to the Discussion Paper, and the discussions which took place at the focus group meetings confirmed, firstly, that the current law relating to unincorporated associations is not widely understood and, secondly, that those who were aware of the consequences of the absence of legal personality of such associations were concerned about the implications regarding personal liability which result from the current law.

### **Aims and objectives**

5. The aim of the recommendations is to provide a means by which an unincorporated association or club, which does not wish to establish itself as a company (or as some other form of incorporated body), may avoid encountering the difficulties and consequent risks mentioned above. For example, unincorporated associations should be able to carry out every day activities such as entering into contracts and taking on employees unlike the current situation where 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 should not be potentially personally liable to pay damages merely by virtue of their membership. The objective is to achieve this by recommending a regime which is as simple as possible for organisations while, at the same time, providing adequate protection for third parties having voluntary and involuntary dealings with such organisations. Following consultation, it is considered that, in addition to the status quo, there are two possible options.

### **Option 1      The status quo**

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

7.      *Benefits 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.

8.      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 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.

9.      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.

10.     *Costs of Option 1:* There would be no implementation costs but costs would continue to be incurred by associations, members, third parties and the court system 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. In other words, there would be a significant cost in *not* proceeding with reform – associations and all who deal with them (including their own members) would continue to be at considerable disadvantage and risk. Many individuals may indeed be discouraged from offering their services as office-bearers of associations as a result of concerns about incurring personal liability. The current law therefore has a social cost in inhibiting the creation and development of not-for-profit organisations which would otherwise contribute to the Third Sector and therefore to the country's social well-being.

### **Option 2      Attribution of legal personality – opt out**

11.     This Option envisages that all unincorporated associations which meet minimum specified criteria and which have a constitutive document containing specified minimum provisions should be accorded separate legal personality as the default rule. Those associations which did not wish to have separate legal personality could opt out.

12. *Benefits of Option 2:* Attributing separate legal personality to unincorporated associations would sweep away all the difficulties which surround the current legal position. As a legal entity, such an association would, for example, be able to enter into contracts and sue and be sued in contract or in delict in its own name; it would be able to take on employees; it would be able to hold title to property in its own name.

13. As far as some of the particular aspects of separate legal personality are concerned, in contract for example, the other party to the contract would have the benefit of being clear about the identity of the party with whom it was contracting. This might increase the confidence of businesses to deal with clubs and result in a growth in the number of contracts between businesses and clubs. Although third parties contracting with an association would lose whatever general right they presently have to sue members and committee members personally, it would still be open to third parties to enquire as to an association's finances and to seek any personal guarantees as they saw fit before contracting to supply goods or services to the association.

14. 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 could also benefit the Third Sector as a whole 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.

15. The association would also be able to acquire ownership of, and hold title to, property in its own name thereby removing the need to transfer ownership when trustees die or no longer wish to be trustees. There would, however, be no requirement to transfer a right in property from trustees or members to the new association with separate legal personality.

16. Equally importantly, more general benefits would derive from the attribution of separate legal personality to unincorporated associations. The certainty and clarity which would result from such reform would bring substantial benefits not only to unincorporated associations and their members but to the business and legal environment. There would be certainty for office-bearers, committee members and club members in an increasingly litigious society; there would be increased public confidence which could, for example, have a positive impact on business. The clarity which the attribution of separate legal personality would bring to contracts thus possibly increasing the confidence of businesses to deal with clubs and resulting in a growth in the number of contracts between businesses and clubs has already been referred to above. As far as litigation is concerned, the volume of litigation relating to unincorporated associations is not large, particularly in the Court of Session, but it is possible that there might be some reduction in the amount and complexity of such litigation if the law is simplified and clarified by the attribution of separate legal personality to unincorporated associations thus benefiting the court system through efficiency savings. Also, the simple requirement of the adoption of a constitutive document would have the beneficial effect of putting in place written rules to which reference could be made if and when problems arose. This would assist in improving governance and consistency in the minimum constitutional requirements of unincorporated associations with separate legal personality across all sectors.

17. In addition to the abovementioned benefits, the not inconsiderable advantage of this "opt out" Option would be that those unincorporated associations which would gain from having separate legal personality would have that status automatically. In this way, the

reform would have immediate maximum positive impact focusing, in particular, on smaller unincorporated organisations operating with limited resources. Those unincorporated associations already meeting the specified criteria would not require to do anything in order to attain the benefits described above.

18. The method of ensuring that no grouping of individuals could find themselves treated as a separate legal personality against their wishes would also have the benefit of simplicity. Those not wishing to take advantage of the many benefits would be able to opt out, on a formal basis, by including in their constitutions, or in some other document recording a relevant resolution of the membership, a statement that they do not wish to be an unincorporated body with separate legal personality. Not adopting a written constitution at all or adopting a constitution which did not contain the minimum provisions required to satisfy the statutory criteria for an unincorporated association with separate legal personality would also be simple methods of opting out. Should an unincorporated association unwittingly fail to opt out of separate legal personality before the expiry of the transitional period, the members of that association would be in no worse position than under the existing law.

#### *Costs of Option 2*

19. For those already meeting the statutory criteria, there would be no initial costs. For those without a constitutive document or for those with a constitutive document which did not contain the statutory criteria, there would be the one-off cost of the adoption or amendment of a constitutive document. It is anticipated 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. The cost of the adoption or amendment of a constitutive document would therefore be negligible.

20. In order to protect the interests of any third parties having voluntary or involuntary dealings with unincorporated associations with separate legal personality, some minor costs would be incurred in complying with the following statutory duties. If such an association is sending or publishing any documents, in order to ensure that third parties have proper information as to its name and whereabouts, its name and official address must be stated on them. There will also be a duty to keep at that address, and to make available on request, a copy of the constitution, the names of its office-bearers and a record of the date of adoption of the constitution if it was adopted after the coming into force of the implementing legislation. It is not considered that compliance with these duties would be onerous or entail anything but minimal expenditure. As far as generating documents is concerned, it is envisaged that these will often be produced by electronic means; associations would not be required to incur the costs of items such as professionally printed letterheads. For the minority of unincorporated associations with separate legal personality which hold heritable property, there would be a duty to provide the Keeper with a copy of their constitution and, if not contained therein, details of their official address. Again, in the minority of cases in which these duties would apply, we anticipate that the costs would be minimal.

21. There would inevitably be some costs to umbrella organisations in dealing with enquiries about compliance with the recommendations when implemented. It is hoped that these would be able to be subsumed within their usual advisory costs. Awareness of change in this area of the law generally is something that the Third Sector might wish to address. It is not part of the recommendations but it may be that the Third Sector would

wish to alert unincorporated associations to the benefits of attaining separate legal personality by means of a programme of awareness raising and education.

22. It is understood that, at present, insurance is available to unincorporated associations albeit on the fictitious basis that such associations exist as separate entities. Implementation of Option 2 would bring the law into line with this perception and is therefore likely to be cost neutral in this regard.

### **Option 3 Attribution of legal personality – opt in**

23. 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 in an existing register such as the Books of Council and Session; or
- (b) an expression of intention in the association's constitutive document to be treated as a separate legal entity.

24. *Benefits of Option 3:* The benefits of this Option would be those benefits relating to Option 2, that is to say all the benefits which would arise from the attribution of separate legal personality. There would however be the important difference that an association would be required to take a positive step to obtain separate legal personality, rather than simply fulfilling statutory criteria as under Option 2. It is likely, therefore, that this Option would apply to a much smaller proportion of unincorporated associations than the "opt out" scheme as set out in Option 2 and hence the beneficial impact would be less.

25. The advantage of registration (Option 3(a)) would be that it would enable third parties to check the details of an association and would permit officials to check the necessary documents for compliance with the statutory criteria.

#### *Costs of Option 3*

26. The disadvantage of registration (Option 3(a)) would be the administrative burden and consequent costs which could operate as a disincentive to register thereby reducing the number of unincorporated associations which could potentially benefit from being separate legal entities. A strong message from the consultation exercise was that voluntary associations were not at all in favour of any further bureaucracy. The creation and maintenance of a register would have substantial cost implications. There would be one-off set up costs and ongoing maintenance costs which may or may not be significant. It is anticipated that such a register would require to be financed by central government and by fees charged to registering associations. Any appeal mechanism regarding the decision of the person operating the register would require funding. 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 might be possible to provide that all associations registered as charities would be treated as having separate legal personality without the need for further registration. Registration in an existing register such as the Books of Council and Session would involve registration fees charged to registering associations.

27. The disadvantage of requiring an expression of intention in the constitution to be treated as a separate legal entity (Option 3(b)) would be the consequent lack of clarity. Third parties dealing with the unincorporated association may be uncertain about the identity of the party with whom they were dealing. This would be a major disadvantage potentially having a negative effect on the ability to forge public confidence; this could have a consequent negative impact on business connections. Members and potential members might be unclear about the status of the unincorporated association and hence unclear about their liabilities or potential liabilities; such a climate would be unlikely to encourage volunteers to assist Third Sector organisations.

28. In relation to Option 3(b), there would be a one-off negligible cost relating to the drawing up of an appropriate constitutive document or amendment to a constitution. Again, it is thought 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.

29. As with Option 2, there would be the following cost in relation to Option 3(b): In order to protect the interests of any third parties having voluntary or involuntary dealings with unincorporated associations with separate legal personality, some minor costs would be incurred in complying with statutory duties. In relation to both Option 3 (a) and (b), there would be some costs to umbrella organisations in dealing with enquiries about compliance. See paragraphs 20 – 21 above.

30. As stated at paragraph 22 above, it is understood that, at present, insurance is available to unincorporated associations albeit on the fictitious basis that such associations exist as separate entities. Implementation of Option 3 would also bring the law into line with this perception and is therefore likely to be cost neutral in this regard.

### **Summary and recommendation**

31. It is considered that attribution of separate legal personality subject to a right to opt out is the most appropriate and cost effective way to ensure that the recommendations apply to and benefit the maximum number of unincorporated associations for whom the recommendations are primarily intended. Having regard to the difficulties and anomalies of the current law and the strong support for reforming the law so that unincorporated associations can have the benefits of separate legal personality, the case for according such benefits only to those who take a positive step to opt in is not regarded as a strong one.

# Appendix C

## List of consultees who submitted written comments on Discussion Paper No 140

Dr Ross G Anderson, University of Glasgow  
Association of British Insurers  
The Bishops' Conference of Scotland  
Messrs Burness LLP  
Mr Alastair Burrow, Solicitor, Glasgow  
The Charity Commission for England and Wales  
The Charity Law Association  
Charity Law Research Unit, University of Dundee  
Messrs Chiene + Tait CA  
The Church of Scotland's Legal Questions Committee  
Clyde Fishermen's Association  
Mr R Craig Connal QC, Solicitor-Advocate, Glasgow  
Mr Stephen J Cumming, Solicitor, Blairgowrie  
Development Trusts Association Scotland  
East Ayrshire Council  
Equality and Human Rights Commission  
The Faculty of Advocates  
Fife Council  
Ms Jane C Gallagher  
Golf Club Managers' Association  
Mr George Hendry  
The Institute of Chartered Accountants of Scotland  
The Law Society of Scotland, Obligations Law Sub-Committee  
Lennel Tennis Club, Coldstream  
Mr Colin McEachran QC  
Messrs McGrigors LLP  
Mountaineering Council of Scotland  
North Lanarkshire Council  
The Office of the Scottish Charity Regulator  
Orkney Islands Council  
Professor Colin T Reid, University of Dundee  
Ms Morag Ross, Advocate  
The Royal Yachting Association Scotland  
Scottish Association of Local Sports Councils  
Scottish Council for Voluntary Organisations  
The Scottish Grant-Making Trusts Group  
Scottish National Party  
Scottish Parent Teacher Council  
Scottish Pre-School Play Association  
Scottish Rowing  
Scottish Sports Association  
The Senators of the College of Justice

Shetland Council of Social Service, Council for Voluntary Services  
Mr Richard Spencer, Retired Solicitor  
**sportscotland**  
West Lothian Council  
Working Men's Club & Institute Union

#### **List of local authorities who replied to the questionnaire**

Aberdeenshire Council  
Angus Council  
Clackmannanshire Council  
Inverclyde Council  
Moray Council  
North Ayrshire Council  
North Lanarkshire Council  
Orkney Islands Council  
South Ayrshire Council  
West Lothian Council

#### **List of interested parties with whom meetings were held**

The Charity Law Research Unit, University of Dundee  
The Church of Scotland  
Ms Laura Dunlop QC  
Mr Euan Drysdale, Insurance Broker, Edinburgh  
The Institute of Chartered Accountants of Scotland  
Dr John Low, Charities Aid Foundation  
Mr James McNeill QC  
The Office of the Scottish Charity Regulator  
Mr Stephen Phillips, Solicitor, Glasgow  
Ms Morag Ross, Advocate  
The Scottish Council for Voluntary Organisations  
Mr John Stirling WS, Solicitor, Edinburgh

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ISBN 978-0108882395



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