

# **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005**

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the [Charities and Trustee Investment \(Scotland\) Act 2005 \(asp 10\)](#) which received Royal Assent on 14 July 2005. They do not form part of the Act and have not been endorsed by the Parliament.
2. The Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

### **THE ACT**

3. The Act is in 4 Parts.
4. These are:
  - Part 1 – Charities
  - Part 2 – Fundraising for benevolent bodies
  - Part 3 – Investment powers of trustees
  - Part 4 – General and supplementary.
5. Commentary explaining the provisions introduced by each Part is provided below.

### **COMMENTARY ON PARTS**

#### **Part 1: Charities**

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

6. **Section 1** establishes the Office of the Scottish Charity Regulator (OSCR). Firstly an office (or position) known as the “Office of the Scottish Charity Regulator” is established. A separate body corporate is then established. This is a body with a legal personality, known as “the Scottish Charity Regulator”. This body is then appointed to be the holder of the office that was initially established. Because the charity regulator has already commonly become known as OSCR, this is the term that is used throughout the Act to mean the officeholder.
7. **Section 1** also sets out OSCR’s general functions. These are to determine charitable status, keep a public register of charities, encourage facilitate and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary and to advise or make proposals to the Scottish Ministers on matters

relating to its functions. **Subsection (9)** gives OSCR a duty to have regard, so far as is relevant, to principles which appear to it to be best regulatory practice in performing its functions, particularly principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed.

8. **Schedule 1** deals with the detailed membership and other constitutional arrangements for the Scottish Charity Regulator, with **paragraphs 2 and 3** providing for the Regulator's members and the chair and deputy being appointed by the Scottish Ministers (after normal public appointment procedures). Certain categories of person are disqualified from being members (e.g. MSPs, MPs, MEPs, office holders of the Scottish Administration or others which may be prescribed by an Order made by the Scottish Ministers). The terms and conditions (including remuneration and allowances) of the Regulator's members may be determined by the Scottish Ministers. **Paragraph 4** allows the Regulator to appoint a chief executive and other employees, under terms and conditions which require the Scottish Ministers' approval. Although not covered by the Act, it is intended that OSCR will become a non-Ministerial office holder of the Scottish Administration (i.e. a non-Ministerial department) and that the employees will be civil servants. The formal mechanism for this will be by a section 104 order made by Westminster under the Scotland Act 1998, following enactment of this Act.
9. **Section 2** stipulates that OSCR must prepare and publish an annual report on the exercise of its functions, send a copy to the Scottish Ministers and lay a copy before the Scottish Parliament.

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

10. **Section 3** provides that OSCR must keep a public register of charities, reviewing it from time to time, and keeping it up to date. The section specifies certain information that the register must contain for each charity. This mandatory information is:
  - the name of the charity;
  - the principal office or the name and address of one of the charity trustees (unless, under subsection (4), OSCR is satisfied it is necessary to protect an individual or the charity's premises);
  - the charity's purposes; and
  - certain other information (including whether it is a designated religious charity or national collector).
11. In addition the register must include the dates of any directions or notices under the Act that have been given to the charity by OSCR until the direction or notice has been complied with, when it is to be removed.
12. The Scottish Ministers may (under **section 3(3)(f)**) make regulations to add to the mandatory information to be held on the register and OSCR may also decide (subsection 3(g)) to include other information if it sees fit.
13. **Section 4** sets out the information that must be provided to OSCR by an applicant wishing to be entered on the register. This information includes the information required to be shown on the register and also a statement of the applicant's purposes, constitution and the most recent statement of account (if there is one). As a result of section 5 the register will only hold details of organisations that OSCR considers meet the charity test (see below) and do not have inappropriate names. The Scottish Ministers may make regulations (section 6) to set out further details relating to the form of application for the register and the process by which OSCR will determine applications.
14. When the Register is initially set up, **section 99** requires OSCR to enter on it every existing Scottish Charity, i.e. all bodies recognised at that time by HM Revenue and

Customs as being eligible for charitable tax relief. Although this does not affect OSCR's power to remove a charity from the register under section 30 (section 99(2)).

## **The charity test**

15. **Section 7** sets out the charity test that must be satisfied by every body on the register. The test consists of two parts: the purposes of the body must be exclusively charitable and it must provide public benefit, either in Scotland or elsewhere. Unlike in the previous charity definition, none of the charitable purposes are assumed to provide public benefit. In addition, the body must not be able to distribute or apply any of its property for a non-charitable purpose, must be free from the control of Scottish Ministers or Ministers of the Crown, and must be non-political. However **subsection 5** allows the Scottish Ministers to disapply, by affirmative order, either or both of the first two of these criteria.
16. The charitable purposes listed in **section 7(2)** are:
- a) prevention or relief of poverty;
  - b) advancement of education;
  - c) advancement of religion;
  - d) advancement of health;
  - e) the saving of lives;
  - f) advancement of citizenship or community development;
  - g) advancement of the arts, heritage, culture or science;
  - h) advancement of public participation in sport;
  - i) the provision of recreational facilities or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities are primarily intended (this purpose is intended to preserve the charitable purpose covered by the Recreational Charities Act 1958);
  - j) advancement of human rights, conflict resolution or reconciliation;
  - k) the promotion of religious or racial harmony;
  - l) the promotion of equality and diversity;
  - m) advancement of environmental protection or improvement;
  - n) the relief of those in need by reason of age, ill-health disability, financial hardship or other disadvantage;
  - o) advancement of animal welfare; or
  - p) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Further detail is provided by **subsection 3** which clarifies that:

- the advancement of health (d) includes the prevention or relief of sickness, disease or human suffering;
- the advancement of citizenship and community development (f) includes rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;
- in (h), sport means sport which involves physical skill and exertion;

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- the provision of recreational facilities or activities (i) applies only in relation to those which are primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage or are available to members of the public at large or to male or female members of the public at large (again, this seeks to preserve the terms of the Recreational Charities Act 1958);
- the relief of those in need in (n) includes the relief given by the provision of accommodation or care; and
- the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose for the advancement of religion in (c).

### **Public benefit**

17. **Section 8** sets out certain criteria to which OSCR and the courts must have regard when determining whether a body provides public benefit as part of the charity test. The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body's functions compared to the benefit to the public. The second criterion covers the extent to which any condition (including any charge or fee) restricting persons from obtaining the benefits from a body's functions may be unduly restrictive if only a section of the public can receive those benefits.
18. **Section 9** gives OSCR a statutory duty to issue guidance, following consultation with representatives of the charitable sector and such other persons as it sees fit, on how it determines whether a body meets the charity test.

### **Charity names and status**

19. **Section 10** sets out the circumstances when a body's (including SCIOs – see **section 49**) name may be considered to be objectionable. These are to ensure that an applicant's, charity's or proposed SCIO's name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.
20. Under **section 11** a charity must inform OSCR at least 42 days before it wishes to change its name, and unless OSCR directs the charity not to do so within 28 days, permission is deemed to have been granted. OSCR may refuse to the change only if it considers the proposed name falls within the circumstances describes in section 10 as objectionable.
21. If a charity considers that another charity has a name too similar to its own, it can ask OSCR to review the names (**section 12**). If satisfied that there may be confusion, OSCR must direct either or both of the charities to change its name and must remove from the register a charity which refuses.

### **References to charitable status**

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

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23. Under **section 13(2)**, bodies on the Register which are established under the law of Scotland, or are managed or controlled in Scotland may use the terms “Scottish Charity” or “registered Scottish charity” to describe themselves. This provision aims to distinguish those charities which are directly registered with OSCR and based in Scotland from those which may be based elsewhere but also operate here.
24. A large number of “foreign” charities (i.e. registered outside Scotland) may only have relatively minor operations in Scotland, such as sending a newsletter or information to Scottish members, awarding a grant to a body in Scotland or merely advertising in a newspaper which may also be seen in Scotland. Under **section 14**, as long as they are registered elsewhere, do not occupy premises or carry out activities in an office, shop etc. in Scotland, these bodies may operate in Scotland using the term “charity” without having to register with OSCR only if they also refer to the territory where they are registered as charities. Hence such a body might, for example, refer to itself factually as a “charity registered in England and Wales” a “French charity” or a “charity recognised by the HM Revenue and Customs” in Northern Ireland.
25. It is intended that all charities will have to clearly label their main documents to show that they are a charity and are registered (with names as set out above). **Section 15** confers powers on the Scottish Ministers to make regulations requiring this and setting the detailed provisions about which documents must state a charity’s name etc. This will allow the Scottish Ministers to vary the documents to be labelled over time as different forms of communication or finance are introduced or to exempt certain charities or types of charity from some of these requirements. Initially, after allowing sufficient time for existing stocks of documents to be used up, it is expected that charities will have to label documents such as cheques, credit cards and annual reports, headed notepaper, raffle tickets and other advertising material etc.

## **Changes**

- “26 Many changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity’s status on the Scottish Charity Register. **Section 16** lists those changes requiring OSCR’s consent as those amending the charitable purposes in its constitution, amalgamating with another body, winding up or dissolving. If the change is to amend its purposes, the charity must give OSCR 42 days notice of the proposed change and may not carry out the change without OSCR’s consent. For the other changes, unless OSCR is willing to consent to the changes it must, within 28 days of being informed of the charity’s proposals, either refuse consent to the change or direct the charity not to make the change for a set period (up to 6 months) whilst it makes a determination. If neither of these actions is taken, OSCR is considered to have consented to the proposal.
27. Several other types of change which a charity may wish to make to its organisation may be made without OSCR’s consent (**section 17**), but the charity must inform OSCR within 3 months of the action being taken. These changes include: a change to the charity’s principal office or name of charity trustee specified on the register, other changes to details on the register, changes to its constitution (apart from its purposes), any amalgamations, winding up or dissolving actions taken by the charity (following OSCR’s agreement). Similarly OSCR must be informed of changes within 1 month following orders by the court to wind up or put the charity into administration or appoint a receiver.

## **Removal from the Register**

28. **Section 18** requires OSCR to remove a charity from the Scottish Charity Register within 28 days of receiving an application from the charity itself requesting this, and to confirm in a notice that this has been done.
29. Under **section 30(1)**, one of the regulatory actions available to OSCR upon completion of inquiries about a charity is that it must remove a charity from the register if it is

satisfied that the charity no longer meets the charity test. If OSCR, following inquiries into a charity, gives a direction to the charity to take certain steps, but the charity fails to comply, OSCR must remove the charity from the register.

30. However, even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively “locked” for charitable uses. **Section 19** protects such assets, ensuring that several provisions of the Act continue to apply to them, despite the charity’s removal from the register. The following provisions continue to apply:
- **Sections 28 and 29:** power of OSCR to make inquiries about charities (i.e. the body holding the protected assets), and to obtain documents and information;
  - **Sections 31(1) to (3), and (5) to (9):** powers of OSCR following inquiries;
  - **Section 32:** notices and directions under section 31;
  - **Section 33(2) to (5):** reports on inquiries;
  - **Section 34(1) to (3), (5)(a) to (c) and (f) to (h), (7) and (10)(b):** powers of Court of Session;
  - **Section 37:** on charging expenses for a transfer scheme; and
  - Chapter 6: **sections 44 and 45** on charity accounts.
31. These provisions allow OSCR to continue to oversee the use of the locked assets even though the body holding them is no longer a charity. It can investigate and take action if required. It can ensure that the body continues to prepare accounts showing how the assets are being used.
32. Under **section 19(4)**, OSCR may apply to the Court of Session for a scheme to transfer the locked assets of a charity removed from the register to another charity. A transfer scheme may only be approved if the Court is satisfied that it is needed to protect the assets or secure their proper application for the original purposes, and that such a transfer is the better way for this to be achieved. **Section 19(8)** allows the Scottish Ministers to exclude certain property which they specify in an affirmative order from this section. The Scottish Ministers would have to have made an order specifying either items or types of property or property owned by particular persons which come under this description. This would, for instance, allow the Scottish Ministers to ensure that national assets owned by a charity removed from the Register could not be transferred to other bodies, potentially being lost to the nation.

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

#### **Co-operation**

33. **Section 20** provides a statutory duty for OSCR to seek to secure co-operation with other relevant regulators, which are defined in **subsection 2** as public bodies or office-holders with functions that are similar to those of OSCR, or conferred on them to allow them to regulate persons for other purposes. This provision is intended to ensure that where possible the burden of dual or multiple regulation on the same body by several regulators is minimised.
34. **Subsection (3)** requires OSCR and any other regulator which has been authorised (under section 38(2)) to carry out OSCR’s functions to co-operate with each other so far as is consistent with their proper functions.
35. **Subsection (4)** emphasises that there is no requirement for either party co-operating in relation to this section to share information with anyone that they are prevented from disclosing by any other law. Hence no information that is restricted from disclosure by the Data Protection Act may be disclosed by one regulator to another.



## **Public access to Register**

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

## **Power of OSCR to obtain documents and information**

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

## **Entitlement to be given information by charities**

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

## **Sharing information**

39. **Section 24** sets out provisions to allow OSCR to disclose information to other public bodies or officeholders (e.g. regulators) and for them to disclose information to OSCR for purposes connected with their functions. **Subsection (1)** permits OSCR to disclose information to any public body or office holder. **Subsections (2) and (3)** allow several Scottish public bodies to disclose information to OSCR to assist it in its functions. **Subsection 4** provides that such disclosures are subject to any obligations as to secrecy or other restriction on disclosure of information however imposed.
40. **Section 25** allows the Scottish Ministers to designate any public body or officeholder, whether in Scotland or not, such that OSCR may provide information to them (**subsection (3)(a)**) or may designate any Scottish public authority to allow it disclose information to OSCR (**subsection (3)(b)**), without any obligation as to secrecy or other restriction on disclosure of information. This section also removes restrictions on disclosing information to OSCR by a charity trustee, independent examiner or auditor of a charity's accounts. Under **section 26**, it is an offence (with a penalty set at level 5 (currently £5000) or imprisonment up to 6 months on summary conviction) to provide false or misleading information to OSCR knowingly or to alter, conceal or destroy it deliberately.

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

### **Inquiries about charities etc.**

41. **Section 28** gives powers to OSCR to make inquiries about charities, other bodies or a person appearing to represent themselves as, or as acting for, a charity, for either general or particular purposes. Under **subsection (3)**, OSCR may direct a person or body in regard to its inquiries, not to undertake specified activities for a period of up to 6 months. **Subsection 6** provides that it is an offence to fail to comply with such a direction without reasonable excuse and **subsection (7)** sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

### **Power of OSCR to obtain information for inquiries**

42. Under **section 29**, OSCR may require, by notice, any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session. **Subsection (4)** prevents OSCR from disclosing any information or explanation obtained under this section except for the purposes of its inquiries. **Subsection (5)** allows OSCR to pay a person expenses reasonably incurred in providing information under subsection 1. **Subsection (6)** provides that it is an offence to fail to comply with a notice without reasonable excuse and sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

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

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

### **Other powers of OSCR following inquiries**

44. **Section 31** sets out further powers which OSCR may use following inquiries which have been made under **section 28**. If it appears to OSCR that there has been misconduct (which **section 106** defines as including mismanagement) in the administration of a charity or that it is necessary for action to be taken to protect a charity's property or ensure that property is used for charitable purposes, OSCR may (**subsection (4)**) suspend a charity trustee, agent or employee. However, subsection (10) prevents OSCR from suspending a person if it considers the person has acted honestly and reasonably in relation to the misconduct concerned and ought fairly to be excused. This is intended to ensure that OSCR only takes proportionate action in relation to any misconduct of which it becomes aware. Alternatively OSCR may (**subsection (6)**) give a direction to restrict the transactions or the payments that may be made in the administration of the body without OSCR's consent. This is intended to protect the assets of a charity or a body that was representing itself as a charity. OSCR may also (**subsection (7)**) direct a financial institution (i.e. bank) or person holding property for a charity not to part with it without OSCR's consent. This will allow OSCR to ensure that assets raised for charitable purposes are not removed from a charity or body, protecting them for use for those purposes.
45. Where it appears to OSCR, following inquiries, that a body has been falsely representing itself to be a charity, it may direct (**section 31(5)**) the body or person to stop doing so.
46. Where it appears to OSCR, following inquiries, that a person has been claiming to act for a charity, it may (**section 31(8)**) direct the person to stop representing itself as a charity and to pay to the charity or body any assets that it had collected. OSCR may also direct a bank to pay sums collected for the charity or not to part with the property without OSCR's consent. This will ensure that OSCR has powers to require any assets raised in the name of a charity to be passed on to that charity.
47. **Section 32** provides details concerning the making and delivery of directions and notices in **section 31**. The maximum period for which OSCR may make directions is 6 months and if longer term action is considered necessary, OSCR may apply to the Court of Session for it to take action under **section 34**. **Subsection (5)** provides that it is an offence to fail to comply with a section 31 direction from OSCR, with the maximum penalty on summary conviction being level 5 on the standard scale (currently £5000) or maximum of 6 months imprisonment, or both.



## **Reports on inquiries**

48. Under **section 33**, if OSCR takes direct action following inquiries under **section 28** it must prepare a report about the inquiry and send a copy to the person in respect of whom the inquiry was made and publish it as it sees fit. Under **subsection (1)(b)** OSCR must also (unless it has previously prepared a report on the subject of those inquiries) prepare a report if it is requested to do so by the person of whom the inquiries were made. A report prepared under this section by OSCR may relate to two or more inquiries, meaning that for instance, OSCR may prepare a single report on the results of inquiries into a group of charities or on an annual monitoring exercise involving all charities. It is assumed that such reports will be published on the OSCR website. OSCR may also prepare reports about other inquiries it makes under **section 28**. In preparing these reports, **subsection (4)** provides that OSCR must not identify the name of any person except those in respect of whom the inquiry is made or publish any particulars that could identify any person unless OSCR is satisfied that it is required to avoid impairing the effectiveness of the report.

## **Powers of Court of Session**

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

## **Transfer schemes**

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

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

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

## **Delegation of functions**

53. **Section 38** allows OSCR to delegate certain of its regulatory functions to other regulators with devolved powers, hence the reference to a Scottish public authority with either mixed functions or no reserved functions. It may only delegate those functions relating to the supervision of charities in **sections 28 to 35** (except **section 30**) (i.e. inquiries about charities, obtaining information and powers following inquiries). Where

OSCR's functions are delegated, **subsections (9 and 10)** ensure that the information-sharing provisions provided by **sections 24, 25** and 26 and also the duty for auditors etc. to report matters (under **section 46** to OSCR, also apply to the body to which the functions are delegated.

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

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

55. **Sections 39 and 40** provide a new regime allowing charities (which do not otherwise have the power in their own constitutions to reorganise themselves) to do so by seeking OSCR's approval. Currently this process normally has to be undertaken by applying to the Court of Session.
56. Under **section 39**, OSCR may approve a reorganisation scheme of a charity as long as certain conditions are satisfied. These conditions are that the charity's purposes have been fulfilled as far as possible, can no longer be given effect to, are no longer charitable purposes, no longer provide an effective means of using its property or that part of the charity's constitution is no longer desirable. In addition, OSCR must be satisfied that the reorganisation will allow the charity's resources to be better used for its charitable purposes. Under **sections 39(2) and (3)**, the Scottish Ministers may make regulations setting out the detailed procedures relating to OSCR's dealing with charity reorganisations.
57. It is also worth noting that **section 42(4)** ensures that the new provisions do not prevent the Court of Session applying a *cy pres* scheme to reorganise a charity should it wish. This would normally be at the request of the charity or another person. **Section 42(5)** prevents charities established by Royal Charter, warrant or other enactment from using the provision in **sections 39 and 40**. However, a charitable endowment (either educational or non-educational) established under the Education (Scotland) Act 1980 may make use of the reorganisation provisions (**sections 42(6) and (7)**).

### **Endowments**

58. **Section 43** provides that educational and non-educational endowments that are also charities will be covered by the reorganisation provisions in this part of the Act, rather than the regime set out in Part VI of the Education (Scotland) Act 1980. However, section 104 of that Act, which requires a register of educational endowments to be maintained by the Scottish Ministers (in fact currently by the Student Awards Agency for Scotland on the Scottish Ministers' behalf) continues to apply.

### **Chapter 6 – Charity accounts**

#### **Accounts**

59. As under current legislation (sections 4 and 5 of the 1990 Act), **section 44** requires all charities to keep proper accounting records. Charities must also prepare an annual statement of account and report on their activities, have these audited or independently examined (depending on the size of the charity as set out in regulations made under **subsection 44(4)**) and provide a copy of the statement to OSCR. Accounting records must be retained for at least 6 years. It is expected that the standard of accounts set out in regulations will accord closely with the UK Statement of Recommended Practice for Charities an updated version of which has recently been adopted on behalf of the Accounting Standards Board.
60. The regulations on accounting will also be used to set out different requirements for different classes or type of charities. For instance, religious bodies may, as now,

be allowed to prepare accounts in a slightly different format, as long as they meet equivalent standards to other charities. Regulations will also set out the thresholds by which different sizes of charity (probably judged on the value of its income, turnover or other measure) must prepare different levels of detail in their accounts and undergo different levels of audit or examination.

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

61. **Section 45** provides that OSCR may appoint someone to prepare a statement of accounts for a charity that fails to send a copy to OSCR within the period prescribed in accounting regulations. The appointed person has powers of entry to the charity's premises, access to financial documents and can demand information from charity trustees or employees. Costs of OSCR and the appointed persons may be charged to the charity trustees. **Subsection (6)** also provides that failure to comply with an appointed person's requirements is an offence with a liability for a fine of level 3 (currently £1000) on the standard scale.

### **Duty of auditors etc. to report matters to OSCR**

62. **Section 46** provides a new duty for persons appointed to carry out an independent audit or examination of a charity's statement of account to report (in writing) immediately to OSCR any matter which they have reasonable cause to believe is likely to be of a material significance for its functions to make inquiries and take regulator action. This duty also relates to persons similarly appointed for a charity which is a company and therefore covers auditors, independent examiners and reporting accountants of all charities. **Subsection (3)** also provides a right for auditors etc. to report any matter (whether significant or not) to OSCR if the person believes that matter is likely to be relevant for any of OSCR's functions. This section therefore removes any restrictions on auditors etc. from reporting matters to OSCR and makes it a duty to report if they become aware of matters of material significance to OSCR in exercising its inquiry functions. The provisions to report matters also covers those relating to any institution or body corporate "connected" to the charity being examined. **Subsection (5)** defines that "connected" in this instance means a body being either controlled by or in which the charity has a substantial interest. **Section 105** sets out when a charity or person is considered to have control of another body (e.g. a trading arm of a charity).

### **Dormant accounts of charities**

63. **Sections 47 and 48** provide a revised regime to that set out in existing legislation (section 12 of the 1990 Act). This provides a means by which OSCR can redistribute sums of money held in charity bank accounts that have not been used for several years, so that these sums may be used for similar charitable purposes. A dormant account is defined (in **section 48(2)**) as one held in a bank and for which no payments or transactions have occurred for 5 years except a payment into the account or a transaction by the bank itself (e.g. payment of interest or bank charges). OSCR must be satisfied that the body in whose name the account has been held is a charity or was a Scottish Charity under the previous charity legislation before this Act was enacted. OSCR is also to make reasonable enquiries to try to locate a person concerned with the management or control of the body holding the dormant account before redistributing any funds. OSCR must transfer the credit in the dormant account (less any expenses etc. in compliance with regulations to be made by the Scottish Ministers under **section 48(1)**) to either a charity with similar purposes, or another charity that OSCR chooses, if it cannot tell what the purposes of the original charity were. **Section 106** includes a definition of "relevant financial institution" such that the deposit banks holding dormant accounts under consideration are those defined by the Financial Services and Markets Act 2000. It is intended that a section 104 order under the Scotland Act will be made following enactment of this Act to ensure that this definition is automatically updated as new banks become defined in that Westminster legislation.

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

### **Scottish charitable incorporated organisation**

64. **Chapter 7 (sections 49 to 64)** establish a new legal form that charities may wish to adopt. The Scottish Charitable Incorporated Organisation (SCIO) is a legal form designed specifically for charities to enable them to become a corporate body, without having to become a company or industrial and provident society. SCIOs will be regulated by OSCR.
65. **Section 49 and 50** set out the basic mandatory requirements for a charity to become a SCIO. A SCIO is a corporate body and shall have a constitution, a principal office in Scotland and more than one member. The constitution of a SCIO must state its name and purposes and contain provisions about the membership and the trustees. Unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if it is wound up. The Scottish Ministers may make regulations specifying further matters relating to a SCIO's constitution.

### **Name and status**

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

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

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

### **Conversion, amalgamation and transfer**

68. **Sections 56, 57 and 58** make provisions to allow a charity that is a company or an industrial and provident (or friendly) society to be converted to a SCIO. Such bodies cannot transfer if they have any share capital that is not fully paid up or if they have only a single member. An application for conversion must be accompanied by copies of both the resolution of the body to be converted to a SCIO and that adopting the proposed constitution of the SCIO.
69. **Section 57** imposes a duty on OSCR to consult with the Registrar of Companies or the Financial Services Authority and such other persons it thinks fit before determining an application for conversion. OSCR must grant the conversion only where a charity if converted into a SCIO can continue to meet the charity test. It must refuse the application if the SCIO's proposed name is objectionable under **section 10**, if the proposed constitution and powers of the SCIO do not meet the requirements of section 50 and any regulations under that section or if the application would be refused by virtue of regulations made under **section 6(1)**. If the converted body meets the charity test OSCR may only refuse the application on these grounds or as a result of representations from those it has consulted under **section 57(1)**. These provisions allow the previous regulator to advise OSCR of any default by the body applying.

70. Under **section 58**, if OSCR grants an application for a charity's conversion to a SCIO, as well as entering the body on the Register, it must send a copy of the body's resolutions to convert and a copy of the entry in the Charity Register to the registrar of the original body (i.e. Companies House or the Financial Services Authority). It is intended that once OSCR has confirmed that it will grant the body's application to become a SCIO, the relevant original registrar will cancel the body's entry on the original register. To require this to occur is however reserved and as such it is intended to include this in a section 104 order made in Westminster as a consequence of this Act.
- “71 **Schedule 4** (in paragraph 6) disapplies section 380 of the Companies Act 1985 in relation to the resolutions for conversion to a SCIO by a Scottish charitable company. This stops the company having to send these resolutions to Companies House before OSCR has decided whether or not to accept the application to convert.
72. **Section 59 and 60** provide for a number of SCIOs to amalgamate by application to OSCR. A resolution to amalgamate must be passed by either a two-thirds majority of those voting at a general meeting or a unanimous vote by the members of each of the SCIOs involved. If OSCR grants the application for amalgamation, it must enter the new SCIO on the register and remove the original bodies' entries and all the property, rights and liabilities of all the old SCIOs belong to the new SCIO. Similarly, **section 61** provides for a SCIO to transfer all its property, rights and liabilities to another SCIO, if OSCR confirms the application.
73. **Section 62** provides that a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. Third parties may also assume that charity trustees are authorised to act on behalf of the charity they represent in any matter. It is effectively for SCIOs themselves, and their trustees, to ensure that they have the relevant powers. This is intended to provide a level of protection to those dealing, in good faith, with SCIOs and their trustees, in a similar manner to that provided to those dealing with registered companies.
74. Under **section 64**, the Scottish Ministers may make regulations to set out further provisions on SCIOs such as the application process, the administration of SCIOs, amalgamations, transfers, the winding up, insolvency or dissolution of SCIOs, the maintenance of other registers of information on SCIOs or as they see fit.

## **Chapter 8 – Religious charities**

### **Designated religious charities**

75. **Section 65** allows OSCR to designate a charity that meets certain criteria as a designated religious charity. To be designated, the body's main purpose must be the advancement of religion, its main activity the regular holding of public worship, it must have been established in Scotland for at least 10 years and have a membership of at least 3,000 over the age of 16. In addition, it must have an internal organisation with supervisory and disciplinary functions over all its component parts and have a regime for keeping accounting record which OSCR considers correspond to those for other charities.
76. Designated religious charities will be exempt from certain provisions of the Act; namely that it does not need to seek OSCR's consent for certain of the changes to its constitution set out in **section 16**, OSCR may not direct the charity or its trustees to stop undertaking activities (under **section 28(3)**) nor to suspend its charity trustees (under **section 31(4)**) following its inquiries. The Court of Session may not (under **section 34(5)**) appoint a judicial factor, appoint a trustee, nor suspend a charity trustee or manager of the religious charity. Lastly, **section 69** on those disqualified from serving as a charity trustee does not apply to designated religious charities.
77. Under **section 65(5)**, OSCR may withdraw the designated status from a designated religious charity if it considers the qualifying criteria no longer apply or if, following



an investigation, OSCR considers that it is no longer appropriate for the body to hold that status.

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

## **Chapter 9 – Charity trustees**

### **Charity trustees: general duties**

79. The term “charity trustees” (which is defined in **section 106**) is used throughout the Act to describe those persons having general control and management of the administration of a charity. Depending on the form of the body, this term will generally refer to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Act and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as “charity trustees” under this Act.
80. **Section 66** sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. **Subsection (1)** requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another’s affairs. **Subsection (1) (c)** requires a charity trustee to avoid a conflict of interest which may arise between the charity and any person responsible for their appointment as a charity trustee. If such circumstances arise, the charity trustee must put the interests of the charity before those of the person responsible for their appointment. Where another duty prevents them from doing that, the charity trustee must disclose the conflicting interest to the charity and not participate in any decision of the other charity trustees with respect to the matter in question. A charity trustee has a duty to ensure that a charity complies with any requirements of this Act (**subsection (2)**). However, **subsection (3)** provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties (to act in the interests of the charity, and to ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act) is to be treated as misconduct in the administration of a charity, although OSCR must act proportionately in taking any action where it appears that misconduct has occurred. OSCR has a general duty (under **section 1(9)**) to act proportionately and only in cases in which action is needed in all its regulatory activities. In addition, (under **section 31(10)**), OSCR may not suspend a charity trustee if it considers they have acted honestly and reasonably and ought to be fairly excused. **Subsection (5)** requires all charity trustees to act collectively, taking steps that are reasonably practicable to ensure that any breach of general duty by a charity trustee is corrected by that trustee and not repeated, and also that the trustee is removed as a trustee if they have been in serious or persistent breach of those duties.

### **Remuneration**

81. **Section 67** provides that a charity trustee may not normally be paid for carrying out the duties and functions of being a charity trustee, unless specific authority for this is provided. This stems from the existing position that charities are generally understood to be voluntary organisations and that charity trustees will offer their services as such with no payment. However, under certain circumstances, it is acceptable that a charity trustee may be paid for being a trustee or for carrying out additional services on behalf

of the charity, i.e. services that another person (not a trustee) might otherwise undertake for payment. In these circumstances, and where the conditions set out in **subsection (2)** are satisfied, this “service provider” may be remunerated from the charity’s funds for those services. The conditions are that the maximum amount of the remuneration is set out in a written agreement, is reasonable, that the charity trustees are satisfied, prior to entering into the agreement that it is in the interests of the charity, that a minority of trustees are either paid in this way or connected to trustees who are, and that the constitution of the charity allows it to occur. Despite the above, **subsection (5)** ensures that a charity trustee or other service provider may receive remuneration from a charity if they are entitled to receive it under a specific authorising provision in the charity’s constitution (in force on 15 November 2004 - the day that the Bill for this Act was introduced to the Parliament), as a result of a court order, or under any enactment. This means that charities could not make changes to their constitution merely to allow payment of charity trustees before this Act came into force and that trustees may be paid if other legislation or a court order specifically allows it.

82. **Section 68** sets out definitions for terms which are referred to in parts of **section 67**, such as those who would be considered to be connected with a trustee. Such a person is defined as “connected” to a charity trustee if they are married to them, are their civil partner, are living as if married, or if they are a close family relative (i.e. a child, stepchild, parent, grandchild, grandparent, brother or sister of them or their spouse). Also an institution or body cooperate is considered to be “connected” with a charity trustee if it is controlled by them or a “connected” relative, or if they have a substantial interest the body. **Section 105** sets out when a charity or person is considered to have control of another body.

### **Disqualification**

83. **Section 69** sets out the types of person who are disqualified from serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Act, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or disqualified from serving as a Company Director. **Subsection (4)** allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice the operation of the Company Directors Disqualification Act 1986 or the Company Directors (Northern Ireland) Order 2002. Under **section 70**, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.

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

84. **Sections 71 to 78** set out a process by which most decisions by OSCR (or those which are taken on behalf of OSCR) may be challenged by those directly affected in a process that is intended to be simple and more cheaply accessible to charities than the current process which relies on the courts.
85. **Section 71** lists those decisions which must be notified to the individual or charity concerned and which may be reviewed. **Section 72** sets out the persons that must be informed about different decisions. It also provides that notices of decisions must set out the decision, the reasons for the decision and advice about when and how to seek a review. Further definition of a formal notification is given in **section 100**. **Sections 73** sets out the effect of decisions **and 74** provides that, if requested by either the person or charity affected by the decision, OSCR must carry out an internal review of the decision. OSCR will publish procedures to set out how the internal reviews will be conducted, although a review is to be carried out within 21 days of receiving the request for it.

## **Scottish Charity Appeals Panel**

86. **Section 75** requires the Scottish Ministers to appoint individuals to serve on a Scottish Charity Appeals Panel, a new tribunal to be set up to provide an independent appeal mechanism for decisions made by OSCR. **Schedule 2** sets out further details of the Appeals Panel. **Schedule 4** adds the Panel to the list of bodies in Part 2, Schedule 1 of the Tribunals and Inquiries Act 1992 and hence the Panel will be under the jurisdiction of the Scottish Committee of the Council for Tribunals. Following open advertising, the Scottish Ministers will appoint individuals to be available to serve on the Panel. The number of Panels will depend on the caseload, but each panel will consist of 3 persons, and the chair at least will have been a solicitor or advocate for at least 5 years. It is intended that administrative support for the panel will be provided by the Executive. The Scottish Ministers will also establish procedural rules for the Panel.
87. Following an internal review of a decision by OSCR, a person who requested the review may (**section 76(1)**) appeal the decision to the Panel, within 28 days of being notified of the review decision. The Panel will consider the appeal and may under **subsection (5)**, either confirm a decision by OSCR, quash OSCR's decision (and direct it to take such other action as the Panel prescribes), or remit the decision to OSCR for reconsideration, with the Panel's reasons. Under **section 77**, if a decision is remitted to it by the Panel, OSCR must, within 14 days, either confirm, vary, reverse or revoke its decision and give its reasons.

## **Appeals to Court of Session**

88. Under **section 78**, either the person requesting an appeal or OSCR may seek to have the appeal considered by the Court of Session. The Court may confirm or quash the decision. A decision by OSCR, or by a person to whom OSCR's functions are delegated by virtue of **section 38**, to suspend a charity trustee, agent or employee (under **section 31(4)**) can be appealed by that person directly to the Court of Session (rather than the Panel).

## **Part 2: Fundraising for Benevolent Bodies**

### **General**

89. **Part 2** regulates fundraising not just for bodies on the Scottish Charity Register, but for all benevolent bodies and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are actually charities or not. This means that many bodies which may have charitable purposes but do not provide a sufficient level of public benefit or may have chosen not to be restricted by the added regulation which falls upon charities, may, for instance, undertake public collections or fundraise (as long as they are transparent and do not claim to be charities).
90. **Section 79** sets out a number of definitions which relate to Part 2. **Section 80** also clarifies that any reference to representation or solicitation in Part 2 refers to any manner of representation, e.g. oral, written or in a statement published in a newspaper, film or radio or television programme.

### **Control of fundraising**

91. **Sections 81 and 82** give benevolent bodies greater control over those fundraising on their behalf. **Section 81** requires professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf. Regulations under **section 83** can set out the requirements of this agreement. Any agreement which does not meet these requirements is only enforceable against the body through the courts. Professional fundraisers and commercial participators are entitled to remuneration or expenses as set out in the agreement.

92. **Section 81** also gives benevolent bodies (and OSCR on behalf of charities) the right to seek an interdict preventing a professional fundraiser or commercial participator fundraising on the body's behalf, if they are doing so without an agreement or outwith an agreement in the prescribed format.
93. **Section 82** allows benevolent bodies to seek an interdict preventing anyone, other than a professional fundraiser or commercial participator (who would be covered by **section 80**), from fundraising on their behalf if they object to the methods of fundraising, if the person is not a fit and proper person to fundraise or if the body does not want to be associated with the venture.
94. **Section 83** provides the Scottish Ministers with powers to regulate fundraising through secondary legislation in a number of ways. This section will be used to make regulations setting out a requirement for professional fundraisers, paid charity fundraisers, commercial participators and possibly volunteers, to make a statement to potential donors regarding their remuneration or the amount of the donation that will go to the benevolent body. Regulations under this section will also cover the form of contract between professional fundraisers or commercial participators and benevolent bodies, as well as circumstances under which donations may be refunded. The Scottish Ministers have agreed to allow the sector time to develop a scheme of self regulation, however, powers under **section 83** may be used to further regulate benevolent fundraising if it was felt necessary.

### **Public benevolent collections**

95. **Sections 84 to 92** set out a local authority led system for licensing public benevolent collections which replaces the provisions for the licensing of public charitable collections under section 119 of the Civic Government (Scotland) Act 1982. The provisions are very similar to those in the 1982 Act. The main changes are the extension of the definition of public benevolent collections in **section 84** to include collections of promises of money (such as direct debits), as well as collections of cash; clarification of the definition of public place under **section 84** and the inclusion of powers under **section 91** to regulate the collections of goods.
96. **Section 85** requires organisers (unless exempted by **subsection (2)**) of public benevolent collections (collections of cash or promises of money in a public place, or from house to house or business to business) to apply to the relevant local authority for permission to collect. Organisers are exempt if they are designated as a designated national collector (under **section 87**), if the collection is in a public meeting, takes place on land occupied by the organiser to which the public have access either by virtue of an enactment or with the implied or express consent of the occupier of the land, or if the collection is by an unattended receptacle in a public place. An organiser of a public benevolent collection held without a local authority consent is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale (currently £1,000) (unless the collection satisfies the exemption conditions). **Section 86** requires local authorities to make any necessary enquiries before they either give permission to collect (with or without conditions), or refuse permission on a number of grounds. Local authorities may also withdraw permission already granted. Regulations under **section 86** may remove the duty on local authorities to undertake background checks for certain types of applications.
97. Under **section 87**, OSCR may designate charities who meet certain criteria as designated national collectors. This establishes a regime similar to the current provision under the 1982 Act by which the Scottish Ministers (now OSCR acting on their behalf) may designate bodies collecting in a number of local authority areas as "exempt promoters". In the new regime, OSCR may specify the criteria to be met for the purposes of obtaining and retaining designated national collector status, and are required to consult certain persons beforehand. Collections by designated national collectors must

be notified to the relevant local authority, who may prohibit the collection if it is likely to cause undue public inconvenience.

98. **Section 88** sets out a process for organisers of public benevolent collections to appeal against a local authority decision. Further procedures for public benevolent collections will be set out in regulations made under **section 90**.
99. **Section 89** gives OSCR powers to protect funds raised in a public charitable collection and **section 92** requires local authorities to consider guidance issued by OSCR in relation to public benevolent collections.
100. **Section 91** allows the Scottish Ministers to regulate the collections of goods from the public for charitable, benevolent or philanthropic purposes through secondary legislation. These regulations could include a requirement to notify local authorities about the collection, and can create offences for non-compliance.

### **Part 3: Investment Powers of Trustees**

101. **Sections 93 to 95** amend the Trusts (Scotland) Act 1921 to provide an extension to the investment powers of trustees (of all trusts, whether charities or not).

#### **Extension of general powers of trustees**

102. **Section 4** of the Trusts (Scotland) Act 1921 is amended (by **section 93(2)**), adding a provision allowing a trustee to make any kind of investment of the trust estate (including an investment in heritable property). The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. **Subsection (2)** also provides a new wide power for trustees to acquire heritable property for any other reason. These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (**subsection (3)**). **Subsection (3)** continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act. The new general power in **subsection (2)** is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. But if trustees in existing post-1961 Act deeds or in future deeds are prohibited from making certain investments then these prohibitions will continue to apply. This is because **section 4(1)** of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

#### **Exercise of power of investment: duties of trustee**

- “**103** **Section 94** makes further amendments to section 4 of 1921 Act, adding a new section (4A) to it, to provide a number of duties that apply to trustees and must be followed before exercising the wider investment powers under **section 93(2)**.”

#### **Exercise of power of investment: power to appoint nominees**

104. **Section 94** also inserts a new section (4B) into the 1921 Act to provide for a new statutory default power to appoint nominees for the purpose of investment. This will allow trustees to transfer title to property to nominees where a trust deed is silent. This provision also sets out key elements of the duty of care to which trustees must pay particular regard in exercising the power. The existing common law duty of care trustees owe to the beneficiaries for the management of the trust, the standard of which is the prudent man acting in his own affairs, remains unaffected. Trustees should select nominees whom they reasonably believe to have the skills, knowledge and expertise to carry out this role and they must reasonably believe that the appointment is appropriate in the circumstances of the trust. The trustees will be under a duty to keep the arrangements under which the nominee operates under review. This will



include considering whether it is appropriate in the circumstances to give directions to the nominee or revoke the nominee's appointment, and to exercise these powers if necessary.

- “105 It also provides that trustees should have discretion in relation to the terms and conditions on which they appoint nominees subject to certain exclusions, unless the excluded terms and conditions are reasonably necessary. The test of what is reasonably necessary is whether the prudent man in the exercise of his own affairs would agree in the circumstances to the inclusion of such a term.

### **Declaration of power to delegate investment management functions**

106. **Section 94** also inserts a new section (4C) into the 1921 Act which is a declaratory provision on trustee powers to delegate investment and management of funds where a trust deed is silent. Trustees are not bound to perform the whole duties of the trust personally. Delegation, if properly carried out, is not a breach of trust. Trustees do have a statutory power to appoint law agents and factors and, in addition, have common law powers to appoint agents, managers and others. This provision gives a statutory default provision setting out the power to delegate management of investments and makes specific reference to the power to delegate the discretionary management of investments. This is not a new power and is already covered by the trustees' common law duty of care. Trustees should select agents with care, determine the investment policy, set guidelines, and communicate with and monitor agents.
- “107 **Section 95** introduces **Schedule 3** which makes a number of amendments consequential on **sections 93 and 94** to other legislation relating to investment powers of trustees.

## **Part 4: General and Supplementary**

### **Power of charity to participate in certain financial schemes**

108. **Section 96** provides a power, unless expressly prevented by its constitution, for every Scottish charity to participate in common investment schemes and common deposit schemes. These schemes (commonly known as common investment funds - or CIFs) may be registered with the Charities Commission only by charities registered in England and Wales. The Charities Act 1993 will have to be amended by the Home Office Charities Bill (section 23 of the Bill which was re-introduced into the House of Lords on 18 May 2005 provides for this), before Scottish charities are able to join CIFs.

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

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

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

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

### **Population of Register etc.**

111. **Section 99(1)** provides an arrangement to ensure that all existing Scottish Charities at the time that **paragraph 5(a)(ii) of schedule 4** of this Act is commenced become automatically entered by OSCR on the initial Scottish Charity Register. **Paragraph 7 of schedule 4** repeals the section of the 1990 Act which entitles a body recognised by the Inland Revenue (as eligible for tax relief through having exclusively charitable

purposes) under the Income and Corporation Taxes Act 1988 to describe themselves as a “Scottish charity”.

112. **Subsection (3)** allows the Scottish Ministers to disapply **section 3(3)** by order for up to 18 months. Disapplying **section 3(3)** allows OSCR time to gather the necessary information on each charity before having to comply with the section. Ministers can also provide, by order, that for up to 12 months an unregistered charity or type of unregistered charity may continue to refer to itself as a “charity” despite not being on the Register. This provides a period of grace to allow existing (non-Scottish) UK and “foreign” charities operating in Scotland to apply to be entered on the Register by OSCR. It also allows foreign charities that do not intend to register, a period of grace to stop referring to themselves as “charities”. The provision also ensures that any provision of the Act or of any other enactment will apply (with such necessary modifications) to such a body, as if it was entered onto the register, for so long as it is entitled to refer to itself as a “charity”.
113. **Subsection (4)** defines an unregistered charitable body as one established under the law of a country or territory other than Scotland which is entitled to refer to itself as a charity (by any means and in any language) in that country or territory.

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

114. **Section 100** sets out details relating to the giving of notices, directions and consents or requests for review, applications and decision made. The formal communications must be in writing, but may also be made by electronic means (e.g. electronic-mail etc.). **Subsection (4)** sets out the specific conditions and related timing for when a formal communication may be considered as having been made.

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

115. **Section 101** provides that when an offence under this Act is committed by a body corporate, a Scottish partnership or an unincorporated association, with the consent or connivance of a person controlling the body, the individual is also guilty of the offence and is liable to have proceedings taken against them.

#### **Ancillary provisions**

116. **Paragraph (a) of section 102** allows the Scottish Ministers to modify any enactment in order to ensure a body established by an enactment is able to meet the charity test in either, or both, of **sections 7(3) (a) or (b)** of the Act. This provision may be used if it were to be decided that an existing charitable non-departmental public body (NDPB) should remain a charity but was prevented from doing so by an enactment providing the Scottish Ministers with powers to control the distribution of the body’s assets or control of the body via a power of direction. Modifying the enactment would then ensure the body could comply with these sections of this Act.
117. **Paragraph (b) of section 102** provides ancillary powers for the Scottish Ministers to make other incidental, supplemental, consequential, transitional, transitory or saving provisions considered necessary for this Act.
118. **Section 103** sets out the procedures for the Scottish Ministers to make orders, regulations or rules by statutory instrument under the Act. Instruments are generally made by negative resolution, except orders under **section 7(5)**, **section 19(8)** and those under **section 102** which add to, replace or omit any part of the text of primary legislation, regulations under **sections 64(d)**, **83(1)** and commencement orders under **section 107(2)**. These exceptions are subject to affirmative resolution in the Parliament.
119. **Section 104** relates to **schedule 4** which contains minor and consequential amendments to other primary legislation in consequence of this Act. **Schedule 4** includes amendments to several Acts:

## **Part 1: Acts**

- **Paragraph 1 of Schedule 4** amends section 6(2) of the Recreational Charities Act 1958 by deleting the references to the Local Government (Financial Provisions etc) (Scotland) Act 1962. Section 6(2) of the 1958 Act extends part of the 1958 Act to those Scottish enactments which require “charity” to be interpreted in accordance with the law of England & Wales for tax purposes and it states that one of these enactments is the Local Government (Financial Provisions etc) (Scotland) Act 1962. However, **paragraph 2** also amends the 1962 Act to ensure that “charity” is to be interpreted in accordance with the new Scottish charity test rather than in accordance with the law of England & Wales. Therefore the references to the 1962 Act in the 1958 Act are now unnecessary;
- Paragraph 2 which amends section 4(10)(a) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 to refer to charities entered in the Scottish Charity Register to ensure that all charities on the Scottish Charity Register are eligible to receive the appropriate reduction or remission of non-domestic rates. Paragraph 5 of schedule 2 of the 1962 Act is also repealed by this paragraph to remove the cross reference to the Recreational Charities Act 1958, as bodies previously recognised as Scottish charities under that Act will in future be expected to qualify as charities (and be eligible for rates relief) under the charitable purpose in **section 7(2)(i)** of this Act.
- **Paragraph 3** which adds references to charities on the Scottish Charity Register to the Sex Discrimination Act 1975 to ensure that Act will continue to apply to charitable educational endowments following enactment of this Act;
- **Paragraph 4** which replaces the existing definition of “charitable purposes” in section 122 of the Education (Scotland) Act 1980, referring instead to this Act;
- **Paragraph 5** which replaces previous references to “Scottish Charities” and “charitable” referring instead to this Act and repeals the previous provisions on the regulation of charitable collections in section 119 of the Civic Government (Scotland) Act 1992 relating to public charitable collections;
- **Paragraph 6** disapplies section 380 of the Companies Act 1985 in relation to the resolutions for conversion to a SCIO by a Scottish charitable company. This stops the company having to send these resolutions to Companies House before OSCR has decided whether or not to accept the application to convert;
- **Paragraph 7** which repeals the existing link in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 between the recognition by the Inland Revenue of bodies eligible for tax relief and bodies eligible to describe themselves as Scottish Charities, and existing provisions on the regulation of Scottish Charities by the Scottish Ministers;
- **Paragraph 8** which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Charities Act 1992. Section 119 on the regulation of charitable collections is superseded by this Act;
- **Paragraph 9** which updates section 19(3) of the Further and Higher Education (Scotland) Act 1992 to refer to charities as defined in this Act instead of the Income Tax Acts. This section allows the Scottish Ministers to make modifications, by order, to the purposes and conditions of application for educational endowments ;
- Paragraph 10 which brings the Scottish Charity Appeals Panel within the jurisdiction of the Scottish Committee of the Council on Tribunals;
- **Paragraph 11** which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Local Government etc. (Scotland) Act 1994. This updated section 119 on the regulation of charitable collections bringing it into line with the 1994 local government reorganisations);
- **Paragraph 12** which applies the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to the Scottish Charity Regulator;

*These notes relate to the Charities and Trustee Investment (Scotland) Act 2005 (asp 10) which received Royal Assent on 14 July 2005*

- **Paragraph 13** which updates sections 34(8) and 71(8) of the Land Reform (Scotland) Act 2003 to refer to a charity as defined in this Act instead of as in the Law Reform (Miscellaneous Provisions (Scotland) Act 1990;
- **Paragraph 14** which applies the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to the Scottish Charity Regulator, ensuring that members of the Scottish Charity Regulator are appointed in accordance with the public appointments process overseen by the Commissioner for Public Appointments in Scotland;
- **Paragraph 15** which updates paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003 to refer to a charity as defined in this Act instead of as in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

### General interpretation

120. **Section 106** provides a number of general definitions of terms used throughout the Act. Reference has been made to these in the relevant sections of the commentary above.

### Short title and commencement

121. **Section 107(1)** provides for the short title to the Act. **Subsection (2)** provides that only **sections 102, 103** and this section come into force when the Act receives Royal Assent. The remaining provisions of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders.

### Parliamentary History

122. The following table sets out, for each Stage of the proceedings in the Scottish Parliament on the Bill for this Act, the dates on which the proceedings at that Stage took place, the references to the Official Report of those proceedings and the dates on which Committee Reports and other papers relating to the Bill were published, and references to those Reports and other papers.

#### PARLIAMENTARY HISTORY

##### Charities and Trustee Investment (Scotland) Act 2005 (asp10)

<i>Proceedings and Reports</i>	<i>Reference</i>
<b>Introduction</b>	
15 November 2004	Bill as introduced (SP Bill 32)
<b>Stage 1</b>	
<i>a) Communities Committee</i>	
29th Meeting, 1 December 2004	In Private
30th Meeting, 8 December 2004	cols 1473 - 1496
31st Meeting, 15 December 2004	cols 1499 - 1556
1st Meeting, 12 January 2005	cols 1558 - 1608
2nd Meeting, 19 January 2005	cols 1610 - 1650
3rd Meeting, 26 January 2005	cols 1651 - 1700
4th Meeting, 2 February 2005	cols 1702 - 1744
5th Meeting, 9 February 2005	In Private
6th Meeting, 23 February 2005	In Private

*These notes relate to the Charities and Trustee Investment (Scotland)  
Act 2005 (asp 10) which received Royal Assent on 14 July 2005*

<b><i>Proceedings and Reports</i></b>	<b><i>Reference</i></b>
1st Report, 2005 (Session 2)	Stage 1 Report on the Charities and Trustee Investment (Scotland) Bill (SP Paper 301)
<b><i>b) Finance Committee</i></b>	
34th Meeting, 21 December 2004	cols 2139 - 2156
nd Meeting, 18 January 2005	cols 2183 - 2227
3rd Meeting, 25 January 2005	In Private
4th Meeting, 1 February 2005	In Private
Report to Communities Committee, 2 February 2005	Report on Charities and Trustee Investment (Scotland) Bill
<b><i>c) Subordinate Legislation Committee</i></b>	
4th Meeting, 1 February 2005	cols 782 - 785
5th Meeting, 8 February 2005	cols 835 - 839
<b><i>d) Consideration by the Parliament</i></b>	
Stage 1 debate, 9 March 2005	cols –15095 – 15148
<b>Stage 2</b>	
<b><i>a) Communities Committee</i></b>	
12th Meeting, 20 April 2005	cols 2045 - 2092
13th Meeting, 27 April 2005	cols 2094 - 2136
14th Meeting, 4 May 2005	cols 2137 - 2170
Bill as amended at Stage 2	Bill as amended (SP Bill 32A)
<b><i>c) Subordinate Legislation Committee</i></b>	
19th Meeting, 7 June 2005	cols –1082 – 1086
23rd Report, 8 June 2005	Report on the Charities and Trustee Investment (Scotland) Bill (SP375)
<b>Stage 3</b>	
<b><i>Consideration by the Parliament</i></b>	
Stage 3 debate, 9 June 2005	cols 17820 - 17888
Bill passed, 9 June 2005	Bill as passed (SP Bill 32B)
<b>Royal Assent</b>	
14 July 2005	<a href="#">Charities and Trustee Investment (Scotland) Act 2005 (asp10)</a>