

## **EXPLANATORY MEMORANDUM TO**

### **THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2006**

**2006 No. 242 (S.2)**

**1.** This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty. This memorandum contains information for the Joint Committee on Statutory Instruments.

#### **2. Description**

2.1 The Charities and Trustee Investment (Scotland) Act 2005 (“the 2005 Act”) establishes an office to be known as the Office of the Scottish Charity Regulator and establishes a body corporate to hold that office (“OSCR”). This Order provides that the office to be known as the Office of the Scottish Charity Regulator is to be regarded as one of the offices in the Scottish Administration which are not ministerial offices; allows the Commissioners for Her Majesty’s Revenue and Customs (“the Commissioners”) to pass tax information to OSCR to enable OSCR to carry out its function of regulating charities in Scotland; confers functions on the Registrar of companies and Financial Services Authority in relation to charities that are currently companies or registered societies (under the Industrial and Provident Societies Act 1965) converting to Scottish incorporated charitable organisations (“SCIOs”) (a new form of charity in Scotland established by the 2005 Act); and makes consequential amendments to reserved law.

#### **3. Matters of special interest to the Joint Committee on Statutory Instruments**

3.1 This Order is to be made in exercise of the powers conferred by sections 104, 112(1) and 113 of the Scotland Act 1998 (“the 1998 Act”). The Order is, by virtue of Schedule 7 to that Act, subject to affirmative resolution procedure in both Houses of the UK Parliament. Section 104 of the 1998 Act provides for subordinate legislation to be made in the UK Parliament, which contains provisions that are necessary or expedient in consequence of any Act of the Scottish Parliament; in this case the 2005 Act.

3.2 A section 104 Order under the 1998 Act is necessary in consequence of the 2005 Act as the Scottish Parliament does not have the legislative competence under the 1998 Act to legislate in respect of the following matters:

- deeming the office known as the Office of the Scottish Charity Regulator a non-ministerial office in the Scottish Administration (reserved by paragraph 4 of Schedule 4 to the 1998 Act),

- conferring functions on the Commissioners to disclose reserved tax information to OSCR (within the tax reservation at Section A1 of Schedule 5 to the 1998 Act).

- conferring functions on the Registrar of companies and the Financial Services Authority (exercising functions in relation to companies and registered societies respectively, which are business associations reserved by Section C1 of Schedule 5 to the Scotland Act).

## **4. Legislative Background**

4.1 The 2005 Act creates an office to be known as the Office of the Scottish Charity Regulator. The 2005 Act also establishes a body corporate to be the holder of that office (OSCR).

4.2 Section 126(8)(b) of the 1998 Act provides a power to specify a body as an office in the Scottish Administration that is not a ministerial office. However OSCR is a body corporate (section 1(2) of the 2005 Act) and it is not considered that section 126(8)(b) of the 1998 Act was intended to be used to incorporate into the collective term for the Scottish Administration offices where the holder of that office is not a natural legal person. For example, section 51(2)(a) of the Scotland Act provides that service as the holder of any office in the Scottish Administration which is not a ministerial office shall be regarded as “service in the Home Civil Service”. This would not be appropriate in the case of OSCR as a body corporate.

4.3 A section 104 order is being used therefore to deem the office known as the Office of the Scottish Charity Regulator a non-ministerial office in the Scottish Administration for the purposes of the Scotland Act. The effect of this is that the members of staff of OSCR are to be treated as members of staff of the Scottish Administration by virtue of section 126(7)(b) of the Scotland Act. The Order disapplies section 51(2) of the 1998 Act so that OSCR (a body corporate) is not serving in the home civil service.

4.4 The 2005 Act enables OSCR to share information about charities in Scotland with other bodies, including the Commissioners. This Order confers a function upon the Commissioners which permits them to share tax information, which they have acquired in the performance of their functions, with OSCR to enable or assist it to exercise its functions. Onward disclosure by a person of such information, without the Commissioners’ consent is to be a criminal offence. The penalties provided for such offences in the Order meet the limitations on the creation of criminal penalties in Orders under section 104 of the 1998 Act set out in section 113 of that Act. The Order provides defences against a charge of unlawful disclosure which are the same as those imposed on officials of the Commissioners in relation to tax information as provided for in the Commissioners for Revenue and Customs Act 2005.

4.5 The 2005 Act establishes SCIOs as a new legal form that charities in Scotland may wish to adopt. The 2005 Act sets out the application process charities that are companies or registered societies must go through to convert into SCIOs, including making an application to OSCR. If OSCR grants the application it must notify, in the case of a company, the Registrar of companies and in the case of a registered society, the Financial Services Authority. This order confers functions on the Registrar of companies and the Financial Services Authority, to cancel the registration of applicant companies and registered societies in the respective registers.

4.6 The Order allows OSCR to exist as the holder of a non-ministerial office in the Scottish Administration to coincide with the board of OSCR being appointed in February 2006. The board will have certain functions to perform under the 2005 Act before OSCR begins its charity regulation functions in April 2006.

## **5. Extent**

5.1 This Order has UK extent.

## **6. European Convention on Human Rights**

6.1 The Parliamentary Under Secretary of State for Scotland has made the following statement under section 19(1)(a) of the Human Rights Act 1998:

In my view the provisions of the Draft Charities And Trustees Investment (Scotland) Act 2005 (Consequential Provisions) Order 2006 are compatible with the Convention rights.

## **7. Policy Background**

7.1 The 2005 Act was introduced into the Scottish Parliament on November 15<sup>th</sup> 2004, and received Royal Assent on July 14<sup>th</sup> 2005. It is anticipated that OSCR will be appointed as the holder of the Office of the Scottish Charity Regulator in February 2006 and OSCR will commence its functions in April 2006.

7.2 The 2005 Act consolidates all charity legislation in Scotland, defines charities in a new way, and provides for a new regulatory framework. OSCR will have the power to keep a register of all charities with a presence in Scotland, to supervise their operation, to monitor their accounts and to suspend their operation as a charity, if necessary. OSCR has other powers to regulate fund raising bodies which are not charities.

7.3 The order is necessary as a consequence of the creation of the office known as Office of the Scottish Charity Regulator, to deem that office a non-ministerial office in the Scottish Administration in order for it to be independent of Scottish Ministers. The idea that OSCR should be independent of Scottish Ministers follows from the report of the Better Regulation Task Force into Independent Regulators<sup>1</sup>. This concept means that although the staff of OSCR are civil servants, the office holder does not report to Scottish Ministers and is not answerable to the Scottish Executive. However, OSCR is to be treated as part of the Scottish Administration.

7.4 The Commissioners may share tax information with OSCR but are not compelled to do so. This reflects that the 2005 Act defines charity in Scotland in a new way, not by reference to qualification for tax relief, and that the Commissioners are no longer to exercise any regulatory functions over charities in Scotland. This information sharing gateway will allow OSCR to carry out its functions as the new charity regulator in Scotland.

7.5 The Registrar of companies and the Financial Services Authority are given functions to act on information given to them by OSCR to cancel the registration of companies and registered societies, respectively, so that these bodies can convert into the SCIOs created in the 2005 Act.

7.6 The amendments to reserved law in the Schedule to the Order are necessary or expedient in consequence of the 2005 Act for the new charity regulation regime in Scotland created in the 2005 Act to operate.

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<sup>1</sup> Available at [www.brtf.gov.uk/docs/pdf/independent.pdf](http://www.brtf.gov.uk/docs/pdf/independent.pdf)

## **8. Impact**

8.1 A Regulatory Impact Assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. Whilst it deals with the regulation of charities, no impact is made upon charities themselves.

8.2 There will be no impact on the public sector, as OSCR is already an agency of the Scottish Executive, and will pass in its entirety to be the holder of the new non-ministerial office in the Scottish Administration.

## **9. Contact**

Alasdair Smith at the Scotland Office, telephone 0207 270 6756 or e-mail: [alasdair.smith@scotland.gsi.gov.uk](mailto:alasdair.smith@scotland.gsi.gov.uk), can answer any queries regarding the instrument.