



SCOTLAND OFFICE

Reforming the law on Scottish unincorporated associations and criminal liability of Scottish partnerships

**A consultation produced by the Scotland Office. It is also available on
the Scotland Office website at www.scotlandoffice.gov.uk.**

This consultation begins on 17 April 2012.

This consultation ends on 2 July 2012.

About this consultation

To: Seek views on proposals to reform the law governing unincorporated associations and the criminal liability of partnerships in Scotland.

Duration: From 17/4/12 to 2/7/12

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Contents

| | |
|--------------------------------|----|
| Introduction | 2 |
| The proposals | 6 |
| Questionnaire | 27 |
| About you | 30 |
| Contact details/How to respond | 31 |
| The consultation criteria | 32 |
| Draft Bill | 33 |
| Impact Assessments | 49 |

Introduction

This paper sets out for consultation proposed reform of Scots law on two topics: non-profit making unincorporated associations and criminal liability of partnerships.

Proposals for reforming the law on unincorporated associations in Scotland were set out in a Scottish Law Commission Report and draft Bill of 2009¹ (in this paper the “2009 Report” and “2009 draft Bill”). The proposals attribute legal personality to associations where they meet certain statutory criteria.

The paper also seeks views on reform of the law on criminal liability of dissolved Scottish partnerships and their partners in line with provisions in a Scottish Law Commission Report and draft Bill of 2011² (in this paper the “2011 Report” and “2011 draft Bill”). The principal intention is to address a loophole in Scots law that allows Scottish partnerships to escape prosecution for potentially serious offences by dissolving.

Both the 2009 and 2011 Reports and the respective draft Bills are available at www.scotlawcom.gov.uk. A combined Bill (the “proposed Bill”) is set out in the Annex to this paper along with a Table showing the principal differences.

The consultation is aimed at unincorporated associations (including voluntary, community and sports associations) and business partnerships (general and limited, though not LLPs), and those with an interest or expertise in these aspects of Scots law.

Those with a particular interest in unincorporated associations can find the Commission’s proposals at page 6.

Those with a particular interest in partnerships can find the Commission’s proposals at page 25.

In 2008, the Scottish Law Commission issued a Discussion Paper on unincorporated associations³ and invited views on the options for policy reform in this area. Consultation meetings with key Scottish stakeholders with an interest were also held. However, given the length of time since the Commission’s consultation and changes to the law affecting the sector since,

¹ Scottish Law Commission (2009). *Report on unincorporated associations*, Edinburgh, Scottish Law Commission (Scot Law Com No 217), 83pp.

² Scottish Law Commission (2011). *Report on criminal liability of partnerships*, Edinburgh, Scottish Law Commission (Scot Law Com No 224), 25pp.

³ Scottish Law Commission (2008). *Discussion paper on unincorporated associations*, Edinburgh, Scottish Law Commission (Discussion paper No 140), 94pp.

it is important for the UK Government to seek confirmation of support for these proposals from those who responded to the earlier consultation – and others who may not have had or taken the opportunity to give their views previously.

There are also some specific questions arising from the 2009 draft Bill that the UK Government has decided it should take views on. This is not to question the essential policy on attributing legal personality to unincorporated associations that the Commission has arrived at. Rather our aim is to refine and fill in the necessary detail to the proposals so that the resulting provisions will successfully effect the change intended.

We also identify where and explain why we have departed from the precise form of the 2009 and 2011 draft Bills.

The 2009 Report proposes that the Bill should only apply to unincorporated associations which have an official address and the management of which is carried out wholly or mainly in Scotland.

Whilst it is recognised that such unincorporated associations may also carry out activities elsewhere than Scotland, the UK Government consider that as these proposals flow from a Report recommending changes to Scots law, it is appropriate to confine extent in this way.

As both topics relate to the reserved matter of Business Associations (within the meaning of Head C1 of Schedule 5 to the Scotland Act) it is for the United Kingdom Parliament to legislate to implement the Commission's proposals.

The Commission has indicated that it supports the consultation process and will continue to work with the UK Government to finalise a Bill that it is hoped will come before Parliament within its current term.

The 2009 Report includes an assessment of the impacts of the Commission's proposals. This Impact Assessment indicates that there are significant benefits for unincorporated associations in attaining legal personality set against minimal costs. The consultation, however, seeks to add to the evidence on the extent and quantification of costs and benefits to those affected by the proposed changes. A full Impact Assessment will be developed should the UK Government decide to take forward the proposals.

On partnerships, the Commission consulted in 2011 and we seek only to confirm that the final proposals in the Bill effectively achieve the outcome in a way that consultees would support.

Please note that the proposals in this paper on unincorporated associations will apply only to associations that are both located and managed in Scotland. The proposals on partnerships will only apply to Scottish partnerships.

Copies of the consultation paper are being sent to:

Association of British Insurers
Bishops Conference of Scotland
British Private Equity and Venture Capital Association
CBI Scotland
Charity Commission for England and Wales
Charity Law Association
Church of Scotland
Crown Office and Procurator Fiscal Service
Development Trusts Association
Equality and Human Rights Commission
Faculty of Advocates
Federation of Small Businesses
Glasgow Bar Association
Institute of Chartered Accountants in Scotland
Law Commission
Law Society of Scotland
Office of the Scottish Charity Regulator
Scottish Association of Local Sports Councils
Scottish Council for Voluntary Organisations
Scottish Government
Scottish Grant-making Trusts Group
Scottish Sports Association
Senators of the Colleges of Justice
sportscotland
Working Men's Club & Institute Union

It will also be sent to other individuals and organisations who responded to the Commission's Discussion Papers.

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in or views on the subjects covered by this paper.

The proposals

Background on Unincorporated Associations

1. The unincorporated associations which are the subject of the Commission's 2009 Report are non-profit making bodies founded by agreement between their members and formed to carry out a mutual purpose. They are varied in their activities: ranging from sports associations and childcare groups to branches of political parties, charities and religious organisations.
2. Generally, they will be constituted according to rules set out in a formal constitution and will be run by office-bearers or a management committee. An unincorporated association has no separate legal existence of its own and therefore is not, as an entity, liable or responsible itself for the actions of office-bearers, managers or members in the course of its activities.
3. There are consequences from this:
 - contractual responsibilities must be undertaken by individual office-bearers or possibly individual members;
 - the extent to which liability for wrongful acts committed by members extends beyond the association's assets or falls on individual office bearers or members is unclear;
 - a member cannot sue the membership of the association or its management committee for damages for injury caused by another member acting on behalf of the association; and
 - as they cannot own property in their own right, title to property must be taken in the name of all of the members or some or all of the office-bearers as trustees for the members of the association.

For a full explanation of the current legal position, please see Part 2 of the 2009 Report.

4. There is no statute law dealing generally with unincorporated associations. There are, though, various statutory requirements that apply to particular types of association: for example charities are regulated by the Charities and Trustee Investment (Scotland) Act 2005, political parties through Political Parties Elections and Referendums Act 2000 and friendly societies through the Friendly Societies Act 1974.

Scottish Law Commission Report and Bill 2009

5. In 2008, the Commission published their Discussion Paper on Unincorporated Associations in response to a suggestion that this area of the law was in need of reform.
6. The Commission concluded that the current legal regime was unsatisfactory and presented some serious financial risks to members of associations (of which, in many cases, they were not aware). Their Paper set out a number of propositions on how the law could be amended to establish separate legal personality for unincorporated associations.
7. Responses from interested parties to the proposals in the Discussion Paper were almost wholly supportive of the need for change. In 2009, the Commission published their Report and draft Bill setting out the following broad proposals:
 - a) Unincorporated associations which meet certain criteria should automatically be accorded separate legal personality.
 - b) Such associations should be called Scottish Associations with Legal Personality (SALPs).
 - c) However it should be possible for associations to opt out of being a SALP upon resolution of its members.
 - d) Becoming a SALP should not be dependent on any registration requirement.
 - e) Office-bearers and members of the SALP will not incur any personal liability by reason only of acting as an office bearer or member. Accordingly, SALPs will have limited liability although “culpable” individual office-bearers or members may in addition incur personal liability.
 - f) Acquisition of SALP status does not have an automatic effect on assets, liabilities, contracts and obligations of existing unincorporated associations. Separate action by the SALP would be needed to transfer such assets, liabilities, etc⁴.
 - g) The criteria for becoming a SALP are that the association should have at least two members, should be non-profit making, have an official address and be wholly or mainly managed in Scotland, and should adopt a constitutive document containing certain minimum specified conditions.

⁴ Employment is an exception. Clause 7 of the proposed Bill provides for continuity of employment on acquisition and loss of SALP status.

- h) A SALP should lose its separate legal personality if any of the conditions (at g above) cease to be fulfilled or where (under c above) it resolves not to become or continue as a SALP. Where this occurs, but the association does not dissolve, it will continue as an unincorporated association.
- i) A SALP will be obliged to disclose its name and official address on documents and publications; and will have to provide certain documents upon application to that address.
- j) Where a SALP owns heritable property, its official address is required to be publicly available and notified to the Keeper.
- k) A SALP may incur liability to one of its members for loss or damage caused by the wrongful act or omission of another member while acting on behalf of the association.

A number of other incidental and consequential changes are also proposed and contained within the 2009 draft Bill.

- 8. The proposals mentioned above set the framework for the 2009 draft Bill. Their combined effect is that unincorporated associations (which meet the minimum conditions) would become SALPs by operation of law, rather than in consequence of a registration requirement. Accordingly, the default position would be that qualifying unincorporated associations will become SALPs unless they opt out. This approach follows a tried and tested US model which has been adopted in a number of US states.⁵
- 9. Before discussing elements of the Commission's proposals in greater detail, it is appropriate to highlight that general approach. It provides the structure into which the detailed proposals fit. Responses to the Commission's consultation on that approach offered differing views⁶ on how the correct balance could be struck between avoiding unnecessary burdens on unincorporated associations whilst enabling transparency and protection for third parties which transact with them.

Changes since 2009

- 10. Since the Commission's consultation, there have been developments such as SCIOs⁷ becoming operational and the Scottish Government has

⁵ The Uniform Unincorporated Nonprofit Association Act 2008.

⁶ 2009 Report paragraphs 3.20 – 3.22 and 3.27.

⁷ Scottish Charitable Incorporated Organisation, established under the Charities and Trustee Investment (Scotland) Act 2005, sections 49 – 64.

introduced a Bill in the Scottish Parliament setting out its proposals in relation to land registration⁸.

11. Some of the clauses in the proposed Bill differ from those in the 2009 draft Bill. These differences arise mainly in consequence of simplifying drafting. However, a change has been made to the functions of the Keeper of the Registers of Scotland in relation to SALPs which own heritable property.⁹ Having considered the Scottish Government's proposals for land registration, it is not thought that requiring the Keeper to archive updates of official addresses for SALPs is a good fit and so this element of the 2009 draft Bill has been omitted.

Question 1

Do you support the general approach of the Commission's proposals - attribution of separate legal personality to qualifying unincorporated associations, that separate legal personality should not be dependent on any registration requirement, that unincorporated associations should be able to opt out of becoming a SALP, and that SALPs will have limited liability although "culpable" office bearers and members will continue to incur personal liability for their wrongful actings?

Discouraging incorporation?

12. Non-profit making associations have a choice under existing law as to whether to remain unincorporated and therefore without legal personality, or to incorporate so as to have the benefits of limited liability. A number of vehicles for incorporation are available, including SCIOs, CICs¹⁰, Industrial and Provident Societies and Friendly Societies. However, not all of these vehicles are available to all unincorporated associations, as eligibility for each type varies (for example SCIO is only an option for Scottish charities). In each case, a greater degree of regulation applies: in particular in respect of requirements to register documents, either with the Office of the Scottish Charity Regulator or Companies House.

⁸ The Land Registration etc. (Scotland) Bill, introduced into the Scottish Parliament in December 2011.

⁹ Clause 5(4) – (8) 2009 draft Bill.

¹⁰ Community Interest Companies, established under the Companies (Audit, Investigations and Community Enterprise) Act 2004, Part 2.

13. The UK Government recognises the benefits of incorporation and registration for associations and third party interests (creditors, employees, etc.): limited liability for members, increased transparency, certainty and clarity around employment-related liabilities. It is thought these benefits are particularly important for larger associations.
14. But it is also recognised that a requirement to register for example could impose an undue administrative burden on unincorporated associations. Even if registration was voluntary, many smaller associations may opt not to register and so would not benefit from the proposed reforms. Additionally a registration requirement would need to be funded either from fees or public funding (the former possibly also operating as a dis-incentive to register)¹¹. And the UK Government would not want to impose requirements which deter small unincorporated associations from acquiring legal personality.
15. The UK Government will introduce regulation only as a last resort and seeks to avoid it being onerous or bureaucratic. SALPs are a means of delivering benefits similar to incorporation but with less of a burden.
16. Nonetheless, the UK Government does not wish to unwittingly encourage existing incorporated associations to dis-incorporate where incorporation is appropriate. The policy intent of the Bill is to attribute legal personality to organisations which currently do not have it; not offer a vehicle for larger organisations to avoid necessary regulation. Additionally the UK Government supports the aim of the Commission as set out in the 2009 Report¹², namely to devise a statutory regime which contains no disadvantages for small organisations – the main target group of the Report.
17. The Commission considered whether some form of legislative disincentive was required to ensure large associations remained incorporated. It concluded that this was not required and so the Bill contains no provision on this¹³.
18. At the time of publication of the 2009 Report, Chapter 7 of the Charities and Trustee Investment (Scotland) Act 2005 (which provided for creation of SCIOs) had been enacted but not commenced. The 2009 Report was produced in the knowledge that SCIOs would become available to charities but came to the view that, given its main target of small organisations and the large number of charities which are unincorporated

¹¹ See 2009 Report, paragraphs 3.19 – 3.26 for examination of potential registration requirement.

¹² See 2009 Report, paragraph 3.23.

¹³ See 2009 Report, paragraphs 5.23 – 5.27.

associations, the benefits of being a SALP should not be withdrawn from small charities. The UK Government supports that view.

19. However, as SCIOs have been operational since 1st April 2011 there is now some experience of SCIOs in practice (albeit over quite a short period) which was not the case at the time of the 2009 Report. We note that take-up of SCIO status by new charities applying to OSCR since April 2011 is running at about 20% of all applications to OSCR¹⁴. It is therefore appropriate to ascertain views on whether the case as made out in the 2009 Report¹⁵ still holds. In light of those factors, we wish to reopen the question as to whether there should be a restriction on who can acquire SALP status.

20. Options considered by the Commission were:

Requiring registration for associations meeting certain criteria.

Criteria proposed were: ownership of heritable property, ownership of assets generally in excess of a specified value, or annual turnover in excess of a specified amount.

Disqualification of certain large associations from the benefit of limited liability, so that individual members would remain liable in certain circumstances (the example given is for the members of an association with assets (or turnover) in excess of a specified threshold being liable as cautioners for the debts for which the association becomes liable in the year in which the threshold is exceeded).

A further option is:

Restricting by size those associations that can be attributed legal personality as SALPs so that only the smallest associations are eligible.

The criteria might be based on number of members, turnover or value of assets.

21. It is recognised that any of these options presents difficulties for ascertaining when an association has or does not have legal personality, as membership, turnover, etc. can fluctuate depending on the association's activities and interests.

Question 2

¹⁴ Office of the Scottish Charity Regulator, Press Release, 30 December 2011, <http://www.oscr.org.uk/news-and-events/latest-news/charities'-new-legal-form-takes-full-effect/>

¹⁵ See comments in 2009 Report, para 5.23 that SALPs are complementary to SCIOs and not a substitute for them.

What is your view on the risk of the availability of SALPs creating an incentive to avoid incorporation? Is there a case for limiting SALPs by size? If so, what would the threshold be?

Is there any case for requiring SALPs of a certain size to register – if so, which register would be appropriate or would a new register be needed, what would the criteria for registration be, and what would be the sanction for not registering?

Balancing interests of SALPs with those of other persons

22. The main advantage of the Commission's proposals for unincorporated associations is the creation of a separate legal vehicle for the association's activities, thereby reducing the exposure of office bearers, managers or members to personal liability. Therefore the proposals would result in a form of limited liability for SALPs. This effect was widely supported in the Commission's consultation¹⁶.

23. The 2009 Report¹⁷ recognises, however, that removal of liabilities from office-bearers and members of SALPs implies removal of rights from someone else, principally third parties with whom a SALP may have contractual or other dealings. Part of the proposal to ensure the correct balance is struck is the information and publicity requirements imposed on SALPs¹⁸. Clause 4 of the proposed Bill¹⁹ sets out what information SALPs should be required to disclose on their documents – that is, their name and official address in Scotland. SALPs are not to be obliged to describe themselves as a SALP²⁰.

24. In other contexts, for example companies, limited liability partnerships or SCIOs, limited liability operates in conjunction with a registration process. It is therefore easy for third parties to identify the legal status of such bodies, because independent certification exists. For the reasons referred to in the 2009 Report²¹, the Commission did not support a registration requirement. In the absence of a registration requirement, it is for the SALP itself and persons interacting with it to ascertain whether it is indeed a SALP.

¹⁶ 2009 Report paragraphs 3.1 – 3.4.

¹⁷ Paragraph 5.1.

¹⁸ See 2009 Report, paragraphs 5.3 - 5.10 and clause 3 of the 2009 draft Bill.

¹⁹ 2009 Draft Bill – clause 4

²⁰ 2009 Report, paragraph 5.5.

²¹ Paragraphs 3.19 – 3.26.

25. Those other bodies with limited liability are also subject to obligations relating to disclosure of their status on their documentation. This obligation ensures there is transparency and confidence on the part of the body and third parties dealing with it as to its legal status. For example, it is an offence to use the expression “limited liability partnership” unless the business is an LLP²². SCIOs are under a duty to disclose the fact that they are a SCIO on their documents²³.
26. The effect of the 2009 draft Bill (carried through into the proposed Bill as currently drafted) is that SALPs are permitted but not required to refer to their SALP status on their documents. It is to be expected that third parties dealing with SALPs would be certain to make enquiries in the context of high value transactions or those involving heritable property. The 2009 draft Bill envisages that a SALP would be obliged to provide its constitution if requested to do so, in such circumstances. The picture in relation to more routine transactions, where it might not be the norm to make enquiries or seek legal advice, is perhaps less clear. In those circumstances, third parties might assume, in line with obligations on other limited liability vehicles, that a statement by an association that it is a SALP is reliable. Uncertainty or doubt on these points might restrict the benefits of SALP status in practice.
27. The UK Government considers there may be a case for providing additional certainty to third parties on the legal status of a SALP. One possibility is to apply a sanction for associations which wrongly refer to themselves as being SALPs. It is expected this would ensure accurate representation of a body’s status as a SALP or non-SALP. In relation to the requirements to set out its name, official address and the duty to supply names of current office bearers and copies of constitution on request, the sanction is that the office bearers or managers of the association will become concurrently liable for any obligation undertaken whilst the failure subsisted²⁴.
28. It is expected that associations who hold themselves out to be SALPs while not being so will have done so inadvertently rather than by a deliberate attempt to mislead. It therefore might be thought that a sanction of concurrent personal liability of office bearers is appropriate: this would be consistent with other sanctions in the 2009 draft Bill (relating to requirements to set out name and official address and duty to supply constitution).

²² Limited Liability Partnerships Act 2000, schedule, paragraph 7.

²³ Charities and Trustee Investment (Scotland) Act 2005, section 52(3).

²⁴ 2009 Report, paragraph 5.9 and 2009 draft Bill, clause 3(5) and carried through into the proposed Bill as currently drafted – clause 4(7).

29. Alternatively, it might be thought to be more serious and, so, on a par with the disclosure requirements imposed on individuals and partnerships under the Companies Act 2006. Under that Act, names of the individual or partners of the business must be disclosed on certain business documents and displayed at business premises. Breach of these obligations is a criminal offence which may be committed by every officer of the business who is in default²⁵.

Question 3

Should there be any sanction, criminal or otherwise, where an association wrongly holds itself out as a SALP? If yes, what penalty would be appropriate?

Right of relief against former office-bearers/management

30. The 2009 draft Bill²⁶ imposes a duty on office-bearers or those responsible for the SALP's management to comply with new requirements to:

- set out on all documents the SALP's name and official address,
- keep copies at its official address of the SALP's constitutive document (i.e. constitution) and names of office-bearers or management committee and
- make these items available to any person, either in writing or by electronic means, within 28 days of their being requested.

31. In terms of the 2009 draft Bill, liability for any obligation undertaken during the period of non-compliance with these duties rests with both individuals who are for the time being office-bearers/management of the SALP and the SALP concurrently.

32. It is known that there can be frequent and rapid change in office-bearers of associations and it is entirely possible that, by the time a breach in compliance has been identified, those individuals responsible for the breach may have left the association. The UK Government consider that given the nature of the duty in clause 4 of the proposed Bill, collective liability of office-bearers/management along with liability on the SALP itself for obligations entered into during the period of non-compliance is appropriate. It should not be necessary to identify any particular individual who was responsible for non-compliance. Accordingly, the UK Government does not propose that former office-bearers/management

²⁵ The offence may also be committed by a body corporate. It is liable to summary prosecution, with a maximum fine of (currently) £1000 and a daily default fine of (currently) £100.

²⁶ Clause 3.

should be held liable for the breach. However, there is a question as to whether current members who assumed these posts subsequent to a breach should have a right of relief against those in post at the time of the breach.

33. Alternatively, it may be that this is properly a matter for the constitution to address on the basis that it is appropriate for SALPs to make their own arrangements for dealing with transitions of office-bearers, including making potential office-bearers aware of the consequences for them personally.

Question 4

Should current office-bearers/management have a right of relief against those in post at the time of a breach of clause 4 duty? Or should this be left to the constitution?

Multiple or vexatious requests

34. We have considered whether the requirement at clause 4 of the proposed Bill to make available certain documents to any person within 28 days of a request could possibly lead to an unreasonable burden being placed on associations. While it is expected that many will meet the requirement by making the documents available electronically (on web sites, for instance), for those without that option, multiple requests – particularly should they derive from the same individual or organisations – could be troublesome.
35. One option is to provide that a SALP is relieved from the requirement where a further request has been received from the same person within a certain period following an initial request. The Freedom of Information Act 2000²⁷ provides that “a reasonable interval” should have elapsed between two requests for the same information from the same person. An alternative is to fix the interval at, say, 28 days.
36. But the comparison is not exact. A freedom of information request could involve time-consuming examination of large volumes of documents and consideration as to whether exceptions apply whereas the duty here is to provide copies of 2 documents (3 if the constitution post-dates the coming into force of the Bill), neither or none of which should trigger any requirement to check for inappropriate or unlawful disclosure.
37. Despite this, multiple requests to a small association might constitute an administrative inconvenience; and a provision requiring that a reasonable interval must elapse between requests might at least have a deterrence value for nuisance requests.

²⁷ Section 14.

Question 5

Should the Bill include provision that will avoid multiple or vexatious requests for a SALP's documentation? Should a reasonable interval between requests be specified?

Loss of SALP status (without dissolution) and effect on assets and liabilities

38. The Commission considered that it was not necessary to provide for automatic transfer of rights and liabilities upon becoming a SALP, and that automatic attribution of SALP status would not vary contractual terms, delictual claims, or ownership of property entered into prior to commencement of the Bill²⁸.
39. In contrast, the 2009 draft Bill envisages automatic transfer of rights and liabilities from a SALP back to its office-bearers or managers, as trustees for the association, or, failing which, its members jointly, when it loses SALP status. This could occur if it no longer meets the statutory criteria for being a SALP or has opted out of being one.
40. It is thought loss of SALP status would usually be a conscious, deliberate decision of the association. But there could be circumstances in which SALP status could be inadvertently lost, for example, if its management ceased to be wholly or mainly carried on in Scotland²⁹. In that situation, it is unlikely the association will have taken any steps to transfer the SALPs assets or liabilities (because it might not be aware that it has ceased to meet the SALP criteria). So assets including, potentially, heritable property will have automatically reverted to the office bearers, managers or members.
41. The association may never re-acquire SALP status (by, for example, resuming management in Scotland) or it may do so. In either case, assets and liabilities will have reverted to office-bearers, etc., but there is currently no mechanism to enable them to be restored to a newly re-established SALP. It might be difficult to pinpoint the day on which the reversion took place, and, if so, who were the office-bearers, etc., at the relevant time. It would also be undesirable for matters such as insurance, contracts, or statutory licences which run in the name of the SALP to become invalid due to inadvertent loss of SALP status.
42. The UK Government thinks it would be preferable to avoid or limit the prospect of such events occurring. Alternatives might be –

²⁸ 2009 Report, paragraph 7.2.

²⁹ 2009 draft Bill, clause 1(2)(c).

- a) Provide that loss of SALP status has no effect if it is regained within a certain period; or
 - b) Provide that loss of SALP status by reason of failure to comply with only certain of the qualifying criteria, shall have no effect. The criteria which seem susceptible to inadvertent breach are those relating to having an official address in Scotland and management ceasing to be wholly or mainly carried on in Scotland.
43. A further question arises from the circumstance where there is a deliberate decision to lose SALP status (either by resolution or by changing the constitution so that it ceases to meet the SALP criteria). Should the Bill require the SALP to transfer its assets, liabilities, contracts, etc., to the office-bearers, managers or members before loss of status? The risk otherwise is that expense and inconvenience may be involved, for example, in proceeding with rectification of the Land Register (if heritable property is involved) or that office bearers, managers or members may vote for or support a loss of SALP status without having considered what the consequences for them personally might be.
44. Alternatives might be –
- a) Require a SALP to make efforts to transfer its assets and liabilities, licences, contracts, etc. into the name of office bearers, etc. before SALP status is lost; or
 - b) Provide that any resolution to lose SALP status, or alter the constitution so as to lose SALP status, shall not be voted upon until office bearers have informed the members of any consequences of so doing for the members personally.

Question 6

Is it necessary or desirable to restrict the automatic reversion of rights and liabilities upon losing SALP status without dissolving, so as to prevent inadvertent loss of assets or a breach of contractual terms or statutory licences? If so, on what basis should that be done?

It is necessary to provide that a planned loss of SALP status cannot be proceeded with unless efforts have been made to transfer assets and liabilities to the office-bearers, etc. or the membership have been made of the consequences of not doing so?

Criminal offences

NB The following section of the consultation paper presents a number of detailed points relating to the prosecution of dissolved SALPs or unincorporated associations which have lost SALP status in order to avoid any unintended loopholes in the law. It is by necessity technical and legalistic. We do not expect everyone who responds to the

consultation will wish to comment on these points. Please do skip this section if this is the case. The consultation continues at page 22.

45. In 2011, the Commission issued a Report and Draft Bill³⁰ with its proposals in relation to the criminal liability of dissolved Scottish **partnerships**. Their work followed the unsuccessful prosecution of the partnership which had operated the Rosepark Nursing Home where a fire caused the deaths of 14 residents. That partnership subsequently dissolved.
46. Scottish partnerships have separate legal personality³¹ but that legal personality is extinguished (for most purposes) automatically and immediately upon dissolution of the partnership. Where dissolution occurs, there is then no legal person left to prosecute for an offence which that legal person is alleged to have committed. Depending on the particular offence, culpable former partners may be liable to prosecution as individuals.
47. The UK Government is considering taking forward the Commission's proposals in relation to Scottish partnerships³² and at the same time is considering whether the 2011 Report has possible implications for unincorporated associations which dissolve.
48. To put the issue in context, it is useful to summarise how the Commission's proposals interact with criminal law³³. Under those proposals, a SALP will be capable of committing a common law offence, it will no longer be competent to prosecute an individual member of the association simply by virtue of their being members of that association, but criminal liability will continue to be imposed upon individuals who are liable in terms of a particular statutory offence as an officer or member or who are personally culpable.
49. These effects are carried through into the proposed Bill.³⁴ A SALP may therefore be separately prosecuted³⁵. They may be prosecuted for common law offences because they will have separate legal personality.

³⁰ Scottish Law Commission (2011). *Report on criminal liability of partnerships*, Edinburgh: Scottish Law Commission, (Scot Law Com No. 224), 25pp.

³¹ This contrasts with the position in England, Wales and Northern Ireland, where a partnership does not have legal personality separate from its members: see Section 4 of the Partnership Act 1890.

³² Part 2 of proposed Bill and Paragraphs 70-73 of this paper.

³³ 2009 Report, para 4.27

³⁴ See for example clause 3.

³⁵ As SALPs will continue to be unincorporated associations, they will be prosecutable via sections 70 and 143 of the Criminal Procedure (Scotland) Act 1995.

They may be prosecuted for statutory offences where such offences are capable of being committed by unincorporated associations³⁶. Most existing statutory offences which provide for the prosecution of unincorporated associations also provide that individuals who were “culpable” of the offence, are also liable to prosecution as individuals.

50. Where a SALP has dissolved (and so ceases to exist as both a SALP and as a unincorporated association), it is thought no prosecution for either statutory or common law offences committed by the association could proceed successfully, because there is no association, (whether with legal personality or not) to raise criminal proceedings against.
51. Given the wide range of activities which unincorporated associations carry out, there could be situations in which such associations might potentially commit very serious offences. Given that potential, it could be as much of a gap in the law to allow SALPs to escape prosecution by dissolving, in the same way as it is for partnerships to do so.
52. It is useful to consider how the law treats the prosecution of other bodies which have ceased to exist.

Unincorporated associations (which are not SALPs) may only be prosecuted for statutory offences³⁷ and may not (generally) be prosecuted after having dissolved³⁸.

Partnerships which have dissolved cannot in general be successfully prosecuted. This is the gap which the Commission’s 2011 Report seeks to fill. The 2011 draft Bill provides that a dissolved partnership is capable of being prosecuted and fines arising from the prosecution are enforceable against the assets of individuals who were partners prior to dissolution³⁹.

Statutory offences may also impose liability on partners as individuals if they are personally culpable of the relevant offence.

In relation to **companies**, it is possible for an application to be made to court to restore the company to the Register. The position is similar in relation to **Limited Liability Partnerships**.

³⁶ As SALPs remain unincorporated associations, those offences will continue to apply.

³⁷ Because UAs cannot form the criminal intent (or *mens rea*) necessary for commission of common law offences.

³⁸ Although the exact terms of the particular offences would need to be examined.

³⁹ Clause 14(5) and (8).

53. Under the proposed Bill as currently drafted, dissolved SALPs will be treated in the same way as other dissolved unincorporated associations – that is they cannot be prosecuted. As SALPs are capable of committing common law and statutory offences, the inability to prosecute dissolved SALPs will affect prosecution of common law and statutory offences.
54. The arguments in support of providing that dissolved SALPs should be prosecuted are –
- it is possible that SALPs could commit offences equally as serious as those committed by partnerships, accordingly it would be equally wrong for SALPs to be able to evade prosecution by dissolving;
 - it is wrong in principle for a body to be able to evade prosecution by dissolving.
55. The arguments against providing that dissolved SALPs should be prosecuted are –
- SALPs, as with other legal bodies, operate through the individuals who run them: as it will generally remain possible to prosecute culpable office bearers, managers or members (under many statutory offences which so provide) even after dissolution, it is unnecessary to also provide that the dissolved SALP itself should be capable of being separately prosecuted ;
 - if it is to be possible to prosecute a dissolved SALP, on whom should the liability to pay any resulting fine be imposed – on office bearers or members generally? If so, it is difficult to suggest a provision which is not at odds with the principle underlying the 2009 draft Bill that office bearers, managers and members should not incur personal liability by virtue only of being in that capacity⁴⁰ .
56. The criminal liability of dissolved unincorporated associations generally was outwith the remit of the 2009 Report.
57. In summary, is the inability to prosecute dissolved SALPs a gap in the law which needs to be plugged ? Or should dissolved SALPs be treated in law no differently from other dissolved unincorporated associations? Or is the criminal liability of dissolved SALPs just one element of criminal liability of unincorporated associations generally, and which must be considered along with implications for non-SALP unincorporated associations?

⁴⁰ In relation to dissolved partnerships, the Commission proposed that liability to meet any fines resulting from prosecution of dissolved partnerships should be met from the assets of individuals who were partners at the time of dissolution.

58. If it should be possible to prosecute dissolved SALPs, should they be treated in a way similar to dissolved Scottish partnerships, or something different altogether? If treated similarly to partnerships –
- a) would making fines enforceable against non- culpable office bearers or members be an unwarranted exception to the principle of limited liability of SALPs?
 - b) alternatively, should there be a means of tracing where the assets of the SALP went on dissolution and making any fines enforceable against the current holder of those assets?

Question 7

Should provision be made in the proposed Bill to enable the prosecution of dissolved SALPs?

If yes, against whom should fines resulting from the prosecution be enforceable?

Are there any alternatives, such as making an application to court to enable a prosecution to proceed?

59. Clause 10 of the 2009 draft Bill⁴¹ makes provision for the situation where a SALP loses its separate legal personality but remains in existence as an unincorporated association. It currently makes provision in respect of civil assets and liabilities. As currently drafted, its effect would be that any liability enforceable against the SALP shall instead become enforceable against the office bearers, managers or members.
60. The Commission's intention is that the liability which transfers in this way is that which fell on the SALP itself. The 2009 Report⁴² indicates that this would mean limited liability only will become enforceable against office-bearers etc.
61. The Government is considering the implications of loss of legal personality on any criminal liabilities of the former SALP. As statutory offences are and will continue to be framed to refer to unincorporated associations; and the SALP's liability for commission of the offence would arise from its capacity as an unincorporated association, it is thought the offence will generally remain prosecutable and enforceable against the unincorporated association which has lost SALP status. In other words, the statutory

⁴¹ Clause 11 of the proposed Bill

⁴² Paragraph 4.31.

offence will have been unaffected by acquisition of SALP status, and equally it will be unaffected by loss of that status.

62. It is possible that office bearers or other individuals could be also personally liable to prosecution if they were personally culpable of the offence.
63. The discussion of prosecution of dissolved SALPs has implications for unincorporated associations which lose SALP status (although the gap in the latter is only in respect of common law crimes). Therefore consultation responses in relation to dissolved SALPs will be taken into account for this situation also.
64. However, as already set out in relation to dissolved SALPs, a further distinction needs to be drawn. A SALP is a limited liability vehicle, whereas a partnership is not. Therefore it seems consistent with the characteristic of limited liability that individual office bearers should not incur personal liability in relation to any fine imposed on a unincorporated association which committed a common law offence when it was a SALP. (Any office bearers or members who were personally culpable of the offence would in any event be liable to prosecution personally.)

Question 8

Do you consider that it should be possible to prosecute unincorporated associations which have lost SALP status for common law crimes committed by it when it was a SALP?

If so, do you consider that any fines arising out of that prosecution should be enforceable against office bearers, managers or members, and what should the extent of their liability be?

Preparatory time

65. In their Discussion Paper, the Commission invited views on the length of time needed for associations to ready themselves to become SALPs. Responses given varied dependent on whether the consultee considered it was correct or not to attribute legal personality automatically.
66. As the intention is to do so, albeit with an option to opt out, we are seeking views a second time on how long should be given between legislation being enacted and coming into force to allow associations to prepare themselves.

Question 9

What length of time is needed for associations to prepare themselves to become SALPs?

Costs and Benefits

67. The Commission's report set out the evidence that they had received from their consultation on the costs and benefits that they expected the proposals to lead to. A draft Impact Assessment has been provided as part of this consultation at page 49 which attempts to provide a best monetary estimate of the costs and benefits. The UK Government is interested in knowing whether the assumptions in the Impact Assessment are correct and seeks information on how the assessment might be improved.

68. We would also be interested to know whether all the costs and benefits have been captured.

Costs

- a) For associations without a constitutive document, or without one that met the statutory criteria, there would be a one-off cost for the creation or amendment of one. Model constitutions would be widely available and it is expected this cost would be minimal.
- b) Making documentation available upon request will involve either a one-off cost of making this available electronically or occasional costs to provide and send copies.
- c) For associations that hold heritable property, there would be requirement to provide the Keeper with a copy of their constitution and their official address.
- d) There will be costs to associations and umbrella organisations that support and guide them of familiarisation with the new provisions. We expect this not to be an onerous task and the costs minor.

Benefits

- a) Provide clarity to third parties on the identity of the party with which they are contracting. This might increase the confidence of business to deal with associations and result in more legal certainty in contractual arrangements.
- b) Personal liability would not attach to a member by fact of being a member. This would be a benefit both to an individual and the wider voluntary sector, with more people likely to volunteer to be involved as office-bearers.
- c) Associations would be able to acquire ownership of, and hold title to, property in their own name, removing the need to transfer ownership when trustees die or no longer wish to be trustees.
- d) May be some reduction in litigation with resultant savings to the court system.

- e) Requiring the adoption of a constitutive document would put in place rules to which reference can be made when problems arise; thus, improving governance and consistency.

Question 10

Does the draft Impact Assessment adequately capture the costs and benefits of the proposals? If not, can you provide information from which a better assessment can be made?

Are there any costs or benefits that have been overlooked?

Other issues

69. The UK Government is aware that, since the Commission published its report in 2009, there may have been changes in legislation or policy that have affected the unincorporated association 'sector'. We are therefore interested to know whether there are any issues arising from the proposals that we should be aware of.

Question 11

Are there any other issues arising from the proposals on unincorporated associations we should be aware of?

Criminal liability of Scottish partnerships

70. In 2004, a fire at the Rosepark Nursing Home in Uddingston led to the tragic deaths of 14 of its residents. The Home had been run by a partnership, of which members of the Balmer family were the partners, but the partnership was subsequently dissolved. It was alleged that there had been breaches of duties imposed on an “employer” under the Health and Safety at Work, etc. Act 1974. A Scottish partnership has legal personality separate from that of its members. In this case, that separate legal person (rather than the individual partners) had been the “employer”. An attempt to prosecute the dissolved partnership failed, because the legal person had ceased to exist and could not therefore be prosecuted. Attempts to prosecute the former partners also failed.

71. As a result of this, the Scottish Law Commission considered options for addressing the apparent loophole in the law and consulted on these in May 2011. The Commission reported back in December 2011 and recommended that:

- It should be competent to prosecute a Scottish partnership in relation to an offence allegedly committed prior to dissolution, notwithstanding the dissolution of that partnership.
- This targeted measure to address the dissolution issue should have effect pending the introduction of more comprehensive reform of the law of partnership.
- It should be provided that it remains competent to prosecute a Scottish partnership in respect of an offence allegedly committed prior to a change in membership of the partnership, notwithstanding that change in membership.
- There should be a time limit of five years following the dissolution of a Scottish partnership (or, as the case may be, a change of membership) during which prosecution will remain competent notwithstanding the dissolution (or, as the case may be, the change of membership).
- Any provision requiring a fine levied upon a Scottish partnership to be paid from the partnership assets should not apply to fines levied upon a partnership which has been dissolved.
- It should be provided in statute, for the avoidance of doubt, that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a Scottish partnership is not affected by the dissolution of that partnership or a change in its membership.

For further detail of the Commission's thinking behind the recommendations, see their report⁴³.

72. The UK Government has welcomed the Commission's report and is considering taking forward the recommendations above. It seeks views on whether there is support for the provisions as set out in the proposed Bill, annexed to this paper (pages 33-45).

73. Part 2 of the proposed Bill contains provisions in relation to these proposals. Although the fundamental proposals are unchanged, changes have been made in order to rationalise and simplify the drafting of a combined Bill. The changes are summarised in the Table of changes set out in the Annex to this paper.

Question 12

Are you supportive of the Commission's proposals on criminal liability of partnerships as set out in the proposed Bill?

⁴³ Scottish Law Commission, *Report on criminal liability of partnerships*, Edinburgh: SLC (Scot Law Com No 224), 25pp.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper:

Question 1

Do you support the general approach of the Commission's proposals –

attribution of separate legal personality to qualifying unincorporated associations,

that separate legal personality should not be dependent on any registration requirement,

that unincorporated associations should be able to opt out of becoming a SALP, and

that SALPs will have limited liability although 'culpable' office-bearers and members will continue to incur personal liability for their wrongful actings?

Question 2

(a) What is your view on the risk of the availability of SALPs creating an incentive to avoid incorporation? Is there a case for limiting SALPs by size? If so, what should the threshold be?

(b) Is there any case for requiring SALPs of a certain size to register – if so, which register would be appropriate or would a new register be needed, what would the criteria for registration be, and what would be the sanction for not registering?

Question 3

Should there be any sanction, criminal or otherwise, where an association wrongly holds itself out as a SALP? If yes, what penalty would be appropriate?

Question 4

Should current office-bearers and managers have a right of relief against those in post at the time of a breach of the clause 4 duty? Or should this be left to the constitution?

Question 5

Should the Bill include provision that will avoid multiple or vexatious requests for a SALP's documentation? Should a reasonable interval between requests be specified?

Question 6

(a) Is it necessary or desirable to restrict the automatic reversion of rights and liabilities upon losing SALP status without dissolving, so as to prevent inadvertent loss of assets or a breach of contractual terms or statutory licences? If so, on what basis should that be done?

(b) Is it necessary to provide that a planned loss of SALP status cannot be proceeded with unless efforts have been made to transfer assets and liabilities to the office-bearers, etc. or the membership have been made aware of the consequences of not doing so?

Question 7

(a) Should provision be made in the proposed Bill to enable the prosecution of dissolved SALPs?

(b) If yes, against whom should fines resulting from the prosecution be enforceable?

(c) Are there any alternatives, such as making an application to court to enable a prosecution to proceed?

Question 8

(a) Do you consider that it should be possible to prosecute unincorporated associations which have lost SALP status for common law crimes committed by it when it was a SALP?

(b) If so, do you consider that any fines arising out of that prosecution should be enforceable against office bearers, managers or members, and what should the extent of their liability be?

Question 9

What length of time is needed for associations to prepare themselves to become SALPs?

Question 10

Does the draft Impact Assessment adequately capture the costs and benefits of the proposals? If not, can you provide information from which a better assessment can be made?

Are there any costs or benefits that have been overlooked?

Question 11

Are there any other issues arising from the proposals we should be aware of?

Question 12

Are you supportive of the Commission's proposals on criminal liability of partnerships as set out in the draft Bill?

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

| | |
|---|---|
| Full name | |
| Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.) | |
| Date | |
| Company name/organisation (if applicable): | |
| Address | |
| | |
| Postcode | |
| If you would like us to acknowledge receipt of your response, please tick this box | <input type="checkbox"/> (please tick box) |
| Address to which the acknowledgement should be sent, if different from above | |
| | |
| | |

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

Contact details/How to respond

Please send your response by 2/7/2012 to:

Sheila Scobie
Scotland Office
Dover House
Whitehall
London SW1A 2AU

Tel: 0207 270 6738
Fax: 0207 270 6812
Email: LawReform@scotlandoffice.gsi.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in due course. The response paper will be available on-line at the Scotland Office website www.scotlandoffice.gov.uk.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Scotland Office.

The Scotland Office will process your personal data in accordance with the DPA and, in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

The consultation criteria

The seven consultation criteria are as follows:

1. **When to consult** – Formal consultations should take place at a stage where there is scope to influence the policy outcome.
2. **Duration of consultation exercises** – Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
3. **Clarity of scope and impact** – Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
4. **Accessibility of consultation exercises** – Consultation exercises should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
5. **The burden of consultation** – Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
6. **Responsiveness of consultation exercises** – Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
7. **Capacity to consult** – Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Draft Bill

Unincorporated Associations and Partnerships (Scotland) Bill

A Bill to make provision about the legal personality of certain unincorporated associations in Scotland; to make provision about the criminal liability of Scottish partnerships; and for connected purposes.

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

PART 1

SCOTTISH ASSOCIATION WITH LEGAL PERSONALITY

Scottish association with legal personality

1 Scottish association with legal personality

- (1) An unincorporated association has legal personality separate from that of its members if—
 - (a) the conditions mentioned in subsection (2) are satisfied, and
 - (b) its members—
 - (i) have resolved that it is to have separate legal personality, or
 - (ii) have not resolved that it is not to have such personality.
- (2) The conditions are that the association—
 - (a) has two or more members,
 - (b) has an official address in Scotland,
 - (c) is managed wholly or mainly in Scotland, and
 - (d) has a constitutive document which satisfies the conditions mentioned in section 2.
- (3) To have effect for the purposes of subsection (1)(b), a resolution must be recorded in writing.
- (4) An unincorporated association which, by virtue of subsection (1), has legal personality is to be known as a Scottish association with legal personality.

2 Qualifying constitutive document

- (1) The conditions referred to in section 1(2)(d) are that the unincorporated association's constitutive document sets out matters which include—
 - (a) the name of the association,
 - (b) the objects for which the association exists, being objects that do not include the making of a profit for its members,
 - (c) the criteria for membership of the association,
 - (d) procedures for the election or appointment of those managing the association (including procedures for the election or appointment of its office bearers, if any),
 - (e) the powers and duties of those managing the association (including the powers and duties of its office bearers (if any)),
 - (f) provision for the distribution of the assets of the association in the event of its dissolution, and
 - (g) procedures for amending the constitutive document.
- (2) The Secretary of State may, by order, amend subsection (1) to—
 - (a) add a matter,
 - (b) vary a matter,
 - (c) remove a matter.

Consequences of association becoming a SALP

3 Aspects of separate legal personality

- (1) A SALP may sue and be sued in its own name.
- (2) A SALP may incur liability to one of its members for loss or injury caused by the wrongful act or omission of another of its members which occurred in the course of activities engaged in by the other member on behalf of the SALP.
- (3) An office bearer or member of a SALP does not incur personal liability (civil or criminal) by reason only of acting as such an office bearer or member.
- (4) Subsection (3) is subject to any enactment to the contrary.
- (5) Subsections (1) to (3) are not exhaustive of the general proposition that a SALP has legal personality.

4 Duties of SALPs

- (1) A SALP must set out its name and official address, or ensure that its name and official address are set out, in legible characters on any document sent or published by it or on its behalf by a person authorised by it.
- (2) Subsection (1) applies to documents sent or published electronically as it applies to documents sent or published by other means.
- (3) A SALP must keep at its official address—
 - (a) a copy of its constitutive document,
 - (b) a list of the names of its office bearers (or, if it has no office bearers, of the names of the persons responsible for its management), and
 - (c) if the constitutive document was adopted after the coming into force of this Act, a written record of the date on which the constitutive document was adopted.
- (4) A SALP must, within 28 days after a request is made by any person that a copy, list or record kept by virtue of subsection (3) be made available, make it available to the person free of charge.
- (5) The request may be made, or the copy, list or record made available, either in writing or by electronic means.
- (6) It is for the office bearers of a SALP (or, if it has no office bearers, for the persons responsible for its management) to ensure compliance with this section.
- (7) In the event of a failure to ensure such compliance those office bearers (or as the case may be those persons) are liable concurrently with the SALP for any obligation undertaken, in the course of the SALP's activities, while the failure subsisted.
- (8) For the purposes of subsection (6), it is immaterial by whom the obligation was undertaken.
- (9) The Secretary of State may, by order, amend subsection (3) so as to make further or different provision as to the information to be kept by the SALP at its official address.

Property

5 Transfer of right in property

- (1) Where—
 - (a) a right in property (whether heritable or moveable) is held in trust by a person for the members of an unincorporated association, and
 - (b) the association becomes a SALP,

the person may transfer the right to the SALP.

- (2) Where—
- (a) a right in property (whether heritable or moveable) is held by the members of an unincorporated association jointly, and
 - (b) the association becomes a SALP,
- the members may transfer the right to the SALP.

6 Certain applications by SALP to Keeper of Registers of Scotland

- (1) This section applies to an application by a SALP to the Keeper of the Registers of Scotland to register—
- (a) a disposition,
 - (b) a lease, or
 - (c) the assignation of a lease,
- in favour of the SALP.
- (2) The applicant must provide the Keeper with the information that it is a SALP.
- (3) That information must be received by the Keeper with the application.
- (4) The application must—
- (a) be accompanied by a copy of the body’s constitutive document, and
 - (b) include the body’s official address (if that address is not set out in the constitutive document).
- (5) The recording in the Register of Sasines of—
- (a) a disposition,
 - (b) a lease, or
 - (c) the assignation of a lease,
- in favour of a SALP has no effect.
- (6) In subsection (1), “register” means register in the Land Register of Scotland.

Employment

7 Continuity of employment

- (1) A change of employer is not effected by an unincorporated association’s becoming, or ceasing to be, a SALP.

- (2) In section 218 of the Employment Rights Act 1996 (change of employer), after subsection (6) there is inserted—
- “(6A) If an unincorporated association which employs any person becomes a Scottish Association with Legal Personality (a “SALP”)—
- (a) the employee’s period of employment at the time when the association becomes a SALP counts as a period of employment with the SALP, and
 - (b) the association becoming a SALP does not break the continuity of the period of employment.
- (6B) If a SALP which employs any person ceases to be a SALP (but is still an unincorporated association and is not dissolved)—
- (a) the employee’s period of employment at the time the association ceases to be a SALP counts as a period of employment with the association, and
 - (b) the association ceasing to be a SALP does not break the continuity of the period of employment.”.

Execution of documents

8 Execution of documents on behalf of SALP

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

Miscellaneous

9 Calling into question validity of SALP’s actings

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

10 Amendment of Bankruptcy (Scotland) Act 1985

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

Loss of legal personality

11 Loss of legal personality etc.

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

Interpretation

12 Interpretation of Part 1

In this Part—

“official address” means the address in Scotland at which service of any document relating in any way to the SALP will be effective,
“SALP” means a Scottish association with legal personality.

PART 2

CRIMINAL LIABILITY OF PARTNERSHIPS

13 Offence committed before dissolution: general

- (1) This section and section 14 apply where—
 - (a) a Scottish partnership ceases to exist as a result of its dissolution, and
 - (b) an offence is alleged to have been committed by the partnership before dissolution.
- (2) The partnership may, despite its dissolution, be prosecuted for the offence.
- (3) But it is not competent to commence proceedings against the partnership by virtue of subsection (2) if a period of more than 5 years has elapsed since the dissolution.
- (4) For the purposes of subsection (3), proceedings are commenced on the date on which an indictment or, as the case may be, a complaint is served on the partnership.
- (5) The provisions mentioned in subsection (6) apply in relation to the liability of a former partner of the partnership (being liability incurred by virtue of subsection (2)) as they apply in relation to the liability of a partner of a partnership which has not been dissolved (being liability incurred by virtue of such a partnership having been convicted of an offence).
- (6) The provisions are—
 - (a) sections 4(2) (charging of individual partner on decree or diligence directed against firm) and 9 (liability of partners for debts and obligations of firm) of the Partnership Act 1890, and
 - (b) sections 70(6) (recovery where organisation sentenced to a fine: solemn proceedings) and 143(2) (corresponding provision: summary proceedings) of the Criminal Procedure (Scotland) Act 1995.

- (7) Subsection (3) is without prejudice to section 136 (time limit for certain offences) of the Criminal Procedure (Scotland) Act 1995.
- (8) In this section and in section 14—
 - “dissolution”, in relation to a partnership ceasing to exist, does not include the partnership ceasing to exist by virtue of a change in its membership,
 - “former partner” means a person who was a partner of the dissolved partnership at the time the offence mentioned in subsection (1)(b) was committed.

14 Offence committed before dissolution: proceedings against former partner

- (1) A former partner of the partnership may, despite the dissolution and irrespective of whether the partnership is prosecuted for the offence by virtue of section 13(2), be prosecuted for the offence.
- (2) Subsection (1) applies only in so far as an enactment provides that a partner may be prosecuted for an offence committed by a partnership.
- (3) But subsection (1) does not apply where the partnership has been prosecuted by virtue of section 13(2) and acquitted.
- (4) In proceedings against a former partner by virtue of subsection (1), evidence led may include evidence as to the commission of the offence by the partnership.

15 Payment of fine where partnership dissolved

An enactment, in so far as it restricts to payment out of a Scottish partnership’s assets the payment of a fine imposed on the partnership on its conviction of an offence, does not apply in the case of a partnership which has been dissolved.

16 Offence committed before change in membership: general

- (1) This section and section 17 apply where—
 - (a) there is a change in the membership of a Scottish partnership, and
 - (b) an offence is alleged to have been committed by the partnership before the change.
- (2) The continuing partnership may, despite the change in its membership, be prosecuted for the offence.

- (3) For the purposes of this section and section 17, any enactment or rule of law, by virtue of which a change in membership of a partnership results in a new partnership being constituted, does not apply.
- (4) But it is not competent to commence proceedings against the partnership by virtue of subsection (2) if a period of more than 5 years has elapsed since the change in membership.
- (5) For the purposes of subsection (4), proceedings are commenced on the date on which an indictment or, as the case may be, a complaint is served on the partnership.
- (6) Despite the change in membership, the provisions mentioned in section 13(6) apply in relation to the liability of a partner of the continuing partnership (being liability incurred by virtue of subsection (2)) as they apply in relation to the liability of a partner of a partnership which has not changed in membership (being liability incurred by virtue of such a partnership having been convicted of an offence).
- (7) Subsection (4) is without prejudice to section 136 (time limit for certain offences) of the Criminal Procedure (Scotland) Act 1995.
- (8) In this section and in section 17, “continuing partnership” means the partnership as constituted after the change in membership mentioned in subsection (1)(a).

17 Offence committed before change in membership: proceedings against former partner

- (1) A former partner of the continuing partnership may, despite the change in membership and irrespective of whether the partnership is prosecuted for the offence by virtue of section 16(2), be prosecuted for the offence.
- (2) Subsection (1) applies only in so far as an enactment provides that a partner may be prosecuted for an offence committed by a partnership.
- (3) But subsection (1) does not apply where the partnership has been prosecuted by virtue of section 16(2) and acquitted.
- (4) In proceedings against a former partner by virtue of subsection (1), evidence led may include evidence as to the commission of the offence by the partnership.
- (5) In this section, “former partner” means—
 - (a) a person who was a partner of the partnership at the time of the alleged offence,
 - (b) but who is not a partner of the continuing partnership.

18 Interpretation of Part 2

- (1) In this Part, there is a change in the membership of a partnership where—

- (a) a partner dies or, if not an individual, ceases to exist,
 - (b) a partner resigns, retires or is expelled from the partnership, or
 - (c) a person is admitted as a partner into the partnership.
- (2) In this Part, “Scottish partnership” means a partnership constituted under the law of Scotland.

PART 3

GENERAL PROVISION

19 Interpretation

In this Act, “enactment” includes an enactment comprised in, or in an instrument made under, an Act of the Scottish Parliament.

20 Consequential amendments

- (1) The Secretary of State may by order make, in any enactment, such amendments or repeals as appear to him to be appropriate in consequence of this Act.
- (2) An order under subsection (1) may make different provision for different purposes.

21 Orders

- (1) Any power of the Secretary of State to make orders under this Act is exercisable by statutory instrument.
- (2) An order under this Act may make such transitional, transitory and saving provision as the Secretary of State considers necessary or expedient in consequence of this Act.
- (3) A statutory instrument containing an order under this Act (other than one under section 22(2)) is subject to annulment in pursuance of a resolution of either House of Parliament.

22 Short title, commencement and extent

- (1) This Act may be cited as the Unincorporated Associations and Partnerships (Scotland) Act 2012.
- (2) This Act (other than this section) comes into force on such day as the Secretary of State may by order appoint.
- (3) An order under subsection (2) may appoint different days for different purposes.

- (4) This Act extends only to Scotland.

SCHEDULE
(introduced by section 8)

AMENDMENT OF REQUIREMENTS OF WRITING (SCOTLAND) ACT 1995

- 1 The Requirements of Writing (Scotland) Act 1995 is amended as follows.
2 In Schedule 2 (which, as regards subscription and signing, makes provision for special cases), after paragraph 5 insert—

“Scottish associations with legal personality

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

- (a) a person responsible for the management of the association; or
 - (b) a person authorised to sign the document on behalf of the association.
- (2) Sub-paragraph (1) above applies in relation to the signing of an alteration made to a document as it applies in relation to the signing of a document.
- (3) Where a granter of a document is a SALP, section 3 of and Schedule 1 to this Act shall have effect subject to the modifications set out in sub-paragraphs (4) and (5) below.
- (4) For subsection (1) of section 3 there shall be substituted the following subsections—

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

- (a) a document bears to have been subscribed on behalf of a SALP by an office bearer of the association or, if it has no office bearer, either by a person responsible for the management of the association or a person authorised to sign the document on behalf of the association;
- (b) the document bears to have been signed by a person as a witness of the subscription of the office bearer, the person responsible for the management of the association or the authorised person (as the case may be) and to state the name and address of the witness; and

- (c) nothing in the document, or in the testing clause or its equivalent, indicates—
 - (i) that it was not subscribed on behalf of the association as it bears to have been so subscribed; or
 - (ii) that it was not validly witnessed for any reason specified in paragraphs (a) to (e) of subsection (4) below,

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

- (i) that the alteration was not signed on behalf of the association as it bears to have been so signed; or
- (ii) that the alteration was not validly witnessed for any reason specified in paragraphs (a) to (e) of sub-paragraph (4) below,

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

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

(1B) A presumption under sub-paragraph (1) above as to the signing of an alteration to a document does not include a presumption—

- (a) that a person bearing to sign the alteration as an office bearer, a person responsible for the management of the association or an authorised person was such an office bearer or person; or
- (b) that a person signing the alteration on behalf of the body and bearing to have been authorised to do so was authorised to do so.””.

Reforming the Law on Scottish Unincorporated Associations and Criminal Liability of Scottish Partnerships Consultation Paper

Table of changes

The 2009 and 2011 draft Bills may be accessed from the Scottish Law Commission website at www.scotlawcom.gov.uk

| Proposed Bill (clause number) | Derivation in SLC 2009 Bill (Unincorporated associations) | Derivation in SLC 2011 Bill (Criminal liability of partnerships) | New provision /omitted provision | Comment |
|-----------------------------------|--|---|---|--|
| 1 | 1 | | New -Clause 1(1)(b)(ii) of proposed Bill | To cover where new unincorporated associations are formed after commencement of Bill and unincorporated associations which resolve to opt out and later want to opt in Simplification by separating out content of constitution |
| 2 | 1 | | New | Simplification by separating out content of constitution |
| 3 | 2 | | New – Clause 3(4) of proposed Bill | Alternative drafting to “without prejudice” to provide that clause 3 contains non exhaustive list of legal consequences of SALP status. Also 3(4) express reference to preserve effect of express statutory provision to the contrary |
| 4 | 3 | | | No substantive change |
| 5 | 4 | | | No substantive change |
| 6 | 5 | | Omitted - Clause 5 (4) – (8) 2009 draft Bill | Removal of obligation of SALP to notify Keeper of Land Register of change of official address, and related provision |
| 7 | 6 | | | No substantive change |
| 8 | 7 | | | No substantive change |
| 9 | 8 | | | No substantive change |
| 10 | 9 | | | No substantive change |
| 11 | 10 | | | No substantive change |
| 12 | - | | New | Drafting simplification |

**Reforming the Law on Scottish Unincorporated Associations and Criminal Liability of
Scottish Partnerships** Consultation Paper

| | | | | |
|----------|----------|---|---|---|
| 13 | | 1 | New – Clause 13(8) of proposed Bill | “Dissolution” and “former partner” are expressly defined, the latter as being a person who was a partner at the time of the relevant offence |
| 14 | | 2 | New – Clause 14(2) and (3) of proposed Bill | Prosecution of former partner where the partnership has been acquitted |
| 15 | | 3 | | No change |
| 16 | | 4 | New – clause 16(3) and (8) of proposed Bill | Clarification |
| 17 | | 5 | New – clause 17(2), (3) and (5) of proposed | Prosecution of former partner where the partnership has been acquitted Express definition of “former partner” as a person who was a partner at the time of the offence but is not partner of the continuing partnership. |
| 18 | | 6 | New – clause 18(2) of proposed Bill | Definition of “Scottish partnership” |
| 19 | - | - | New | General interpretation |
| 20 | 11 | 7 | | No substantive change |
| 21 | 12 | 8 | New – clause 21(2) of proposed Bill | Addition of power to make transitional, transitory and savings provision Change from affirmative procedure to negative procedure |
| 22 | 13 | 9 | | Change from commencement 6 months from day Act is passed to commencement on appointed day |
| Schedule | Schedule | | | No substantive change |

Impact Assessments

IMPACT ASSESSMENT: UNINCORPORATED ASSOCIATIONS

| Cost of Preferred (or more likely) Option | | | | |
|---|----------------------------|--|------------------------------|----------------------|
| Total Net Present Value | Business Net Present Value | Net cost to business per year (EANCB on 2009 review) | In scope of One-In, One-Out? | Measure qualifies as |
| £0m | £0m | £0m | Yes | Zero Net Cost |

What is the problem under consideration? Why is government intervention necessary?

An unincorporated association has no separate legal existence of its own and is not, as an entity, liable or responsible for the actions of office-bearers, managers or members in the course of its activities. The consequences from this are that: contractual responsibilities are undertaken by individual office-bearers and possibly members, which can deter members from assuming office; a member cannot sue the association for damages; third parties can find it difficult to determine who is liable for wrongful acts committed by members; title to property rests with the members or some or all of the office-bearers as trustees, which can cause difficulties if an association disbands or changes.

What are the policy objectives and the intended effects?

The objective is to establish separate legal personality for unincorporated associations. This is intended to clarify the position on who is liable for contractual responsibilities both for members and third parties. It is hoped that it will provide protection to individuals who assume responsibility as office-bearers and therefore remove the disincentive to stand for such positions. It is also intended to give third parties the right to information about an association that they contract with.

What policy options have been considered, including any alternatives to regulation?

The proposals for reform of unincorporated associations derive from the Scottish Law Commission 2009 report which had considered the following options, which the Commission consulted on.

- Do nothing
- Option 1 Preferred Option. Automatic attribution of legal personality to unincorporated associations (to be known as SALPs) when they satisfy certain conditions: these being that the association should have 2 members, should be non-profit-making and should adopt a constitutive document containing certain minimum specified conditions.
- Option 2 Provision of a new corporate vehicle for non-profit-making bodies. A number of corporate vehicles already exist in Scotland, including companies limited by guarantee and community interest companies, as well as the recent Scottish Charitable Incorporated Organisation. Responses to the consultation were largely not in favour of a new vehicle for incorporation.

FULL ECONOMIC ASSESSMENT: OPTION 1

| Net Benefit (Present Value (PV)) (£m) | | |
|---------------------------------------|---------|------------------|
| Low: 0 | High: 0 | Best Estimate: 0 |

| COSTS (£m) | Total Transition (Constant Price) | Average Annual (excl. Transition) | Total Cost (Present Value) |
|------------|--------------------------------------|--------------------------------------|-------------------------------|
| Low | 0 | 0 | 0 |
| High | 1.09 | 0.23 | 1.32 |
| Best | 0.54 | 0.11 | 0.65 |

Description and scale of key monetised costs by 'main affected groups'

For associations:
 Creating or amending constitutive document: range between £0 and £635k (one-off)
 Making documentation available upon request: range between £0 and £225k (annual)
 Providing Keeper with constitution: range between £0 and £450k (one-off)

Other key non-monetised costs by 'main affected groups'

For associations and umbrella bodies:
 Costs of supporting familiarisation with new provisions

| BENEFITS (£m) | Total Transition (Constant Price) | Average Annual (excl. Transition) | Total Benefit (Present Value) |
|---------------|--------------------------------------|--------------------------------------|----------------------------------|
| Low | 0 | 0 | 0 |
| High | 1.09 | 0.23 | 1.32 |
| Best | 0.54 | 0.11 | 0.65 |

Description and scale of key monetised benefits by 'main affected groups'

Costs as proxy because of opt-out (see below)

Other key non-monetised benefits by 'main affected groups'

Provide more legal certainty for organisations and third parties when contracting
 Encourage more volunteering as office-bearers and therefore improve accountability across membership
 Allow associations to acquire ownership of property in their own name
 Reduction in litigation

Key assumptions/sensitivities/risks

| |
|--|
| |
|--|

Number of bodies affected not known - assumption may be flawed. As a result, best estimate is at mid-point of range.
 Opt-out means not certain who will be affected.
 Opt-out means the costs can be seen as proxy for benefits (if costs are too great, associations will opt-out).

FULL ECONOMIC ASSESSMENT: OPTION 2

| Net Benefit (Present Value (PV)) (£m) | | |
|--|----------------|-------------------------|
| Low: 0 | High: 0 | Best Estimate: 0 |

| COSTS (£m) | Total Transition (Constant Price) | Average Annual (excl. Transition) | Total Cost (Present Value) |
|-------------------|--|--|---------------------------------------|
| Low | 0 | 0 | 0 |
| High | 0.51 | 3.86 | 4.37 |
| Best | 0.25 | 1.93 | 2.18 |

Description and scale of key monetised costs by 'main affected groups'

For associations:
 Registration between £0 and £340k (one off)
 Filing of accounts between £0 and £459k (annual)
 Production of accounts between £0 and £3.4m (annual)
 Costs of winding-down affairs £170k (one-off)

Other key non-monetised costs by 'main affected groups'

For associations and umbrella organisations:
 Familiarisation costs

| BENEFITS (£m) | Total Transition (Constant Price) | Average Annual (excl. Transition) | Total Benefit (Present Value) |
|----------------------|--|--|--|
| Low | 0 | 0 | 0 |
| High | 0.51 | 3.86 | 4.37 |
| Best | 0.25 | 1.93 | 2.18 |

Description and scale of key monetised benefits by 'main affected groups'

Costs as proxy because of opt-out (see below)

Other key non-monetised benefits by 'main affected groups'

Provide more legal certainty for organisations and third parties when contracting
Encourage more volunteering as office-bearers and therefore improve accountability across membership
Allow associations to acquire ownership of property in their own name
Reduction in litigation

Key assumptions/sensitivities/risks

Number of bodies affected not known - assumption may be flawed. Best estimate taken as midpoint of ranges.
Opt-out means not certain who will be affected
Opt-out means the costs can be seen as proxy for benefits (if costs are too great, associations will opt-out).

Problem Under Consideration

Proposals for reforming the law on unincorporated associations in Scotland were set out in a Scottish Law Commission report and draft bill of 2009 (the 2009 report)⁴⁴. A full analysis of the problem under consideration can be found there.

Unincorporated Associations are not-for-profit associations which are associations of members that have not incorporated under the Companies Act or any other vehicle for incorporation that exist, such as the Scottish Charitable Incorporation Organisation. These associations cover a wide range of objects and purposes, from purely charitable to member interest, and include sport and cultural groups, small political associations or local branches, religious associations, etc..

While there are no data for establishing a definite number of unincorporated associations in Scotland, a large proportion are included in statistics held on the voluntary or third sector. There are approximately 45,000 third sector organisations in Scotland⁴⁵. Around half are charities, the remainder being a range of voluntary and community groups, social enterprises (3000⁴⁶) and mutuals and membership organisations. Of the 23, 400 which are charities⁴⁷, approximately 56% (13100) are unincorporated associations⁴⁸.

Based on these figures, a reasonable estimate is that there are around 30,000 unincorporated associations in Scotland.

The current law does not recognise the existence of such organisations as separate legal entities. Where they are of sufficient size to enter contracts, own property, engage employees and so forth, this lack of legal personality has given rise to a variety of problems which the Commission have summarised in their report as:

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

⁴⁴ Scottish Law Commission (2009). *Report on unincorporated associations*, Edinburgh, Scottish Law Commission (Scot Law Com No217), 83pp.

⁴⁵ Scottish Council for Voluntary Organisations (2011) Scottish Third Sector Key Statistics 2011

⁴⁶ Social Enterprise Scotland website

⁴⁷ Office of the Scottish Charities Regulator (2011) OSCR Management Information December 2011

⁴⁸ Office of the Scottish Charities Regulator (2008) Scottish Charities 2008

- They cannot own property. Title must instead be taken in the name of individual members or office-bearers as trustees, necessitating further transfers when such members or office-bearers die or cease to participate in the association's activities.

Despite this lack of legal personality, much of the statutory regulation that applies to bodies corporate proceeds upon the false assumption that an association does have some form of existence in law. This fallacy creates uncertainty which can lead to challenge and potentially costly litigation.

Rationale for intervention

The case for reforming the law, based largely on case law, is set out more fully in the Commission's Discussion Paper⁴⁹ and Report. The key reasons for change are:

1. There is evidence that lack of legal personality is having a detrimental effect on the sector. Responses to the Commission's consultation include a submission from SCVO which suggested that there was a problem with recruitment of volunteers to take on positions of responsibility on committees and boards. Lack of legal status sometimes means that organisations are unable to benefit from the advantages (training, support, access to funding) of being part of an umbrella body. Consultees noted difficulty in raising finance, assuring credit-worthiness and obtaining insurance.
2. There is evidence that third parties are not able to or find difficulty in taking action against unincorporated associations (p8-11 of Commission's Discussion Paper).
3. There is evidence that individual members are not able to or find difficulty in taking action against an unincorporated association or its office-bearers (p11-12 of Commission's Discussion Paper).
4. The Commission found from their public consultation that there is a lack of awareness of the current law by those responsible for managing unincorporated associations; some were unaware of the duties and responsibilities resting on the committee or other members of an associations or club. Amending the law could well have the indirect benefit of ensuring greater awareness of the legal status - and therefore better management - of unincorporated associations and their members.

Policy objective

The policy objective is to automatically attribute legal personality to unincorporated associations so a limited liability rests with the association and not its members or office-bearers individually; and to do so in such a way that appropriate protection is provided for the interests of third parties who enter into legal relationships with such associations.

Description of options considered (including do nothing);

Do nothing.

Option 1 Automatic attribution of legal personality to unincorporated associations where they satisfy certain conditions: that there should be at least two members, that its objects do not including making a profit for its members and that it has adopted a constitutive document containing certain minimum specified provisions. An association of this kind will be termed Scottish Association with Legal Personality (SALP). It will be possible for associations to opt out of being a SALP upon resolution of its members. Where a SALP owns heritable property, its official address is required to be

⁴⁹ Scottish Law Commission (2008). *Discussion paper on unincorporated associations*, Edinburgh, Scottish Law Commission (Discussion Paper No140), 94pp

publicly available and notified to the Keeper of the Registers of Scotland. It will be obliged to disclose its name and official address on documents and publications and make certain documents available to third parties upon application.

Option 2 Provision of a new vehicle for incorporation. The Commission considered the option of providing a new vehicle for associations to incorporate. Given the additional requirements of incorporation to register and provide accounts against the benefits of increased limited liability, it was considered likely that unincorporated associations would choose to remain without legal personality, despite the risks. In addition, the landscape of vehicles for incorporation was already crowded – including with the introduction of Scottish Charitable Incorporated Organisations in 2011 – such that organisations wishing to incorporate did not require yet another option.

Monetised and non-monetised costs and benefits of each option (including administrative burden);

Do nothing is the policy baseline and the costs and benefits of other options should be compared to that.

Preferred Option: SALP

Monetised costs [NB as there is an option to opt out of becoming a SALP the costs are given as a range starting at nil]

For associations without a constitutive document, or without one that met the statutory criteria, there would be a one-off cost for the creation or amendment of one. Model constitutions are widely available and it is expected this cost would be minimal. Given the nature of the sector, in many instances, time to prepare a constitution is likely to be provided voluntarily; in some instances, though, there will be the cost of an employee's time to prepare the constitutive document. Gross hourly pay in the voluntary sector was £12.48 in 2010 [NCVO Workforce Almanac 2011]. Assuming the task would take approximately 3 hours, a cost per association is estimated at £37.44. All the charitable sector UAs are required to have a constitution by OSCR and we consider it likely that only a very small proportion of other UAs would require to create or amend a constitution. Assuming that there are around 17000 UAs which are not charities and may therefore incur a cost, we assume an **overall one-off cost in a range between £0 and [£37.44 x 17000 =] 636k.**

Making documentation available upon request will involve either a one-off cost of making this available electronically or ongoing costs to provide and send copies. As charities are not required to fulfil this requirement already, we assume this cost would apply to all unincorporated associations. We assume that, where an association already provides a website, any additional one-off costs of making documentation available electronically would be absorbed in that existing outgoing; we, further, assume, that most of this documentation is already likely to be available on the website. We therefore do not consider there is a cost for these associations. We think it reasonable to assume that at least 50% of unincorporated associations, i.e. 15000, would have a web site.

Where the association does not have a website, there will be an ongoing cost of provision of documentation upon request. Those costs are likely to be the costs of copying/printing and postage costs, with minimal staff costs. We cannot predict how often such a request is likely to be made: perhaps never. However, on the assumption that, averaged out, each association faces a request annually, a cost is arrived at of:

Copying (20p a sheet over 10 pages) £2

Postage (Standard class - large mail) £.58

One hour staff costs (see above for basis of these) £12.48

Total £15 (rounded down).

We assume an overall annual cost in a range between £0 and [£15 x 15000 =] £225k

For associations that hold heritable property, there would be requirement to provide the Keeper with a copy of their constitution and their official address [we don't know if the Keeper would charge a fee for this]. This would be a new requirement for all SALPs holding heritable property but we have no means of determining which associations are in this position and assume that they all could be.

In line with the costs above, a total cost would be £15.

Given this, we assume an overall one-off cost in a range between £0 and [£15 x 30000 =] 450k

Non-monetised costs

There will be costs to associations and umbrella organisations that support and guide them of familiarisation with the new provisions. We expect this not to be an onerous task and the costs minor.

Non-monetised benefits

The scale of the benefits is difficult to monetise but as these could apply to all of the 30,000 estimated unincorporated associations, they are not insubstantial.

Also, as the associations will have the option of an opt-out (which requires only the resolution of its members and is therefore cost-neutral), the perceived benefit to associations of having legal personality will be at least as equal to the small costs of complying with the additional requirements. They would otherwise opt out. Using this as a proxy, we could judge the monetary value of the benefits to equate to between £0 and £1.31m.

Provide clarity to third parties on the identity of the party with which they are contracting. This might increase the confidence of business to deal with associations and result in more legally certainty in contractual arrangements.

Personal liability would not attach to a member by fact of being a member. This would be a benefit both to an individual and the wider voluntary sector, with more people likely to volunteer to be involved as office-bearers.

Associations would be able to acquire ownership of, and hold title to, property in their own name, removing the need to transfer ownership when trustees die or no longer wish to be trustees.

May be some reduction in litigation with resultant savings to the court system.

Requiring the adoption of a constitutive document would put in place rules to which reference can be made when problems arose; thus, improving governance and consistency.

Policy Option 2: New vehicle for incorporation

Monetised costs [NB As this would be an opt-in option, the costs are given in a range beginning with nil]

One-off costs of registration with Companies House or AN Other. Registration as a Community Interest Company is £20 and we assume a similar fee for a new third sector incorporated vehicle. Given that an existing vehicle exists for the charitable sector, we assume only non-charitable UAs would wish to opt in. **We therefore assume an overall cost in the range £0 to [£20 x 17000 =] £340k.**

Annual cost of filing annual accounts with Companies House or AN Other. We assume that there would be a cost analogous to the Companies House fee for submitting returns (£14 if submitted electronically or £40 if submitted in paper format). Given that an existing vehicle exists for the charitable sector, we assume only non-charitable UAs would wish to opt in. If we assume half of these submit by paper and half by electronic means, we could estimate an average cost of £27. **We therefore assume an overall cost in the range £0 to [£27 x 17000 =] £459k.**

Production of annual accounts. An impact assessment which accompanied the introduction of SCIOs in Scotland quoted a figure of £4000 for production and audit of accrued accounts and £200 for simple receipts and payments accounts. A decision on which would be necessary has not been taken. We assume that it is likely to be the lower end of the scale given the likely simplicity of these organisations' income and payment transactions. **We therefore assume an overall cost in the range £0 to [£200 x 17000 =] £3.4m.**

Additional costs of winding down affairs upon dissolution. We envisage this would follow the approach taken for SCIOs and would be a process of sequestration, managed by the Accountant in Bankruptcy (AiB). AiB charge a £100 fee and then would recover any additional costs during the process of taking over and managing any transfer of assets. Information on the numbers of organisations that might dissolve is not possible to obtain as we have no information on the general health of the sector. However, we assume – for these purposes - around 10% dissolve each year. Again, on the basis that this vehicle would not be used by the charitable sector, **we assume an overall cost of [£100 x 1700 =] £170k.**

Costs to Companies House: Companies House charges according to HM Treasury principles of full cost recovery (after allowing for capital at 3.5%) – we therefore assume no additional costs to CH of this measure.

Costs to AiB: we assume AiB recovers at full cost recovery in line with HM Treasury principles.

Non-monetised costs

There will be costs to associations and umbrella organisations that support and guide them of familiarisation with the new provisions. We expect this not to be an onerous tasks and the costs minor.

Non-monetised benefits

Also, as the associations will have the option of an opt-out (which requires only the resolution of its members and is therefore cost-neutral), the perceived benefit to associations of incorporation will be at least as equal to the small costs of complying with the additional requirements. They would otherwise opt out. **Using this as a**

proxy, we could judge the monetary value of the benefits to equate to between £0 and £4.37m.

Provide clarity to third parties on the identity of the party with which they are contracting. This might increase the confidence of business to deal with associations and result in more legally certainty in contractual arrangements.

Personal liability would not attach to a member by fact of being a member. This would be a benefit both to an individual and the wider voluntary sector, with more people likely to volunteer to be involved as office-bearers.

Associations would be able to acquire ownership of, and hold title to, property in their own name, removing the need to transfer ownership when trustees die or no longer wish to be trustees.

May be some reduction in litigation with resultant savings to the court system.

Requiring the adoption of a constitutive document would put in place rules to which reference can be made when problems arose; thus, improving governance and consistency.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

The preferred policy is of broad interest, in that it affects a high number of organisations of various types. However, consultation has shown that there is overwhelming support for pursuing these proposals which are not contentious or of significant wider public interest. Crucially, those affected have the option to opt out of becoming a SALP but it is considered unlikely that this would be the case, given that the requirements that apply to SALPs are relatively unburdensome set aside the benefits of limited liability.

Given that many of the costs identified are one-off and minor in scale, and that there is a strong degree of uncertainty about the numbers of bodies to whom they will apply, the resource required to acquire more robust data on impact would not appear to be well-spent. We have drawn upon consultation responses to the Commission's Discussion Paper in 2009 and will review the IA following the government's own consultation to establish whether a more indepth appraisal of impact would be proportionate.

Risks and assumptions

| Assumptions of Option 1 (preferred option) | How estimated |
|--|---|
| Number of organisations affected is 30,000 | Approximately 45,000 third sector organisations in Scotland: around half are charities. Of the 23,400 that are charities, 56% (or 13,100) are unincorporated. Of the 21,600 that are not, we have assumed all are unincorporated except for the 3000 that are identified as social enterprises. We have rounded down to 30,000. |
| All organisations will opt-in to being | Responses to the SLC consultation indicate very positive support for the proposed SALP vehicle from influential bodies |

| | |
|---|--|
| SALPs. | such as the Scottish Council for Voluntary Organisations (SCVO) and the Office of the Scottish Charities Regulator (OSCR). |
| Costs of creating a constitution will apply to only proportion of those affected | Charity sector SALPs will have constitutions. Assuming (see above) 13,100 are in this sector, around 17000 may incur a cost for a constitution. This is a high end estimate. |
| Time taken to create a constitution is 3 hours | Based on download and completion of a SCVO model constitution by one member of the organisation. |
| Cost for provision of documentation upon request (annual) or to the Keeper (one-off) is £15 | Assumes an annual request for each organisation for third party and one off to the Keeper - this may be too much or too high for the average. |

Direct costs and benefits to business calculations

These proposals would not impact on business.

Economic/Financial

We can find no impact on the economy or business.

Social

The proposals will encourage better management of voluntary and community sector organisations and will remove the disincentive that personal liability may have been to individuals becoming involved as office-bearers. This should provide a stronger basis for the success of the sector, removing risks and improving the ability of unincorporated associations to engage in contractual and mutually beneficial relationships with third parties.

Environmental

No environmental impact identified.

Summary and preferred option with description of implementation plan.

The preferred option is Option 1. This provides maximum flexibility for organisations to opt out of additional regulation where they consider the benefits do not exceed or match the costs to them of becoming SALPs.

While it is possible that some smaller associations may choose to opt-out, it is considered more likely that they would find themselves ineligible for SALP status (by virtue of not having a constitution that meets the requirements).

We intend working with SCVO and OSCR to publicise the policy to the third sector.

IMPACT ASSESSMENT: CRIMINAL LIABILITY OF PARTNERSHIPS

| Cost of Preferred (or more likely) Option | | | | |
|---|----------------------------|--|------------------------------|-------------------------------|
| Total Net Present Value | Business Net Present Value | Net cost to business per year (EANCB on 2009 prices) | In scope of One-In, One-Out? | Measure qualifies as One-Out? |
| £m | £m | £m | Yes | In/Out/zero net cost |

What is the problem under consideration? Why is government intervention necessary?

In the case of *Balmer v HM Advocate*, an attempt was made to prosecute a Scottish partnership which had been responsible for the management of the Rosepark Nursing Home at the time of a fire in January 2004 leading to the death of 14 of its residents. The High Court held that since the juristic personality of a Scottish partnership is extinguished upon dissolution, it is not possible to prosecute a dissolved partnership. The result is that dissolved partnerships can escape prosecution for serious offences, such as alleged breaches of safety requirements with fatal results. Among other things, this prevents them from fully internalising the adverse risks and potential costs (i.e. negative externalities) that such breaches have on third parties.

What are the policy objectives and the intended effects?

The objective is to prevent Scottish partnerships or individual partners from escaping prosecution for potentially serious offences alleged to have been committed prior to the dissolution of the partnership; to allow for a fine levied upon a Scottish partnership which has been dissolved to be paid from the partnership assets or those of individual partners; and to enable the prosecution of a Scottish partnership or an individual partner for an offence allegedly committed prior to a change in membership, notwithstanding the change in membership. As well as helping to safeguard the interests of justice, the changes may also have a deterrent effect.

What policy options have been considered, including any alternatives to regulation?

- (i) The preferred option is a targeted interim solution in which, pending a general reform to the law of partnership, limited provision would be made to allow prosecution of dissolved partnerships and individual partners thereof in the case of criminal liability by means of a Bill in the UK Parliament. This option addresses the immediate issue of concern and can be implemented reasonably quickly hence we support this approach.
- (ii) The second option is do nothing, which could result in dissolved partnerships escaping prosecution for potentially serious offences.
- (iii) The third option is a long term solution to the "dissolution issue", which involves implementation, for Scotland, of the Joint Report on Partnership Law published in 2003 and for specific provision to be made on criminal liability of Scottish partnerships in resulting legislation.

FULL ECONOMIC ASSESSMENT

| Net Benefit (Present Value (PV)) (£m) | | |
|---------------------------------------|----------------|----------------|
| Low: Optional | High: Optional | Best Estimate: |

| COSTS (£m) | Total Transition (Constant Price) | | Average Annual (excl. Transition) | Total Cost (Present Value) |
|--|--|--|--|--|
| Low | Optional | | Optional | Optional |
| High | Optional | | Optional | Optional |
| Best | | | | |
| Description and scale of key monetised costs by ‘main affected groups’ | | | | |
| <p>The changes to the law are likely to have minimal economic impact on partnerships, partners and the courts. There may be some minor transition costs as people familiarise themselves with the new law. Furthermore, adjustment costs can be expected to fall primarily on those partnerships which currently deviate the most from the desired standard of practice.</p> | | | | |
| Other key non-monetised costs by ‘main affected groups’ | | | | |
| <p>There will be a cost attached to prosecuting dissolved Scottish partnerships since this is not currently possible (and to a lesser extent individual partners of a dissolved partnership since the policy/legislative proposals relating to their liability are intended to clarify the existing law- that is put beyond doubt that such a prosecution is competent). However, paragraph 2.1 of the SLC’s Discussion Paper on Criminal Liability of Partnerships states that such prosecutions have been very rare.</p> | | | | |
| BENEFITS (£m) | Total Transition (Constant Price) | | Average Annual (excl. Transition) | Total Benefit (Present Value) |
| Low | Optional | | Optional | Optional |
| High | Optional | | Optional | Optional |
| Best | | | | |
| Description and scale of key monetised benefits by ‘main affected groups’ | | | | |
| <p>Increased clarity in the law would avoid costly litigation such as in the Balmer case- costs were borne by the Crown Office and Procurator Fiscal Service and therefore the taxpayer (nb- it is not possible to identify the actual costs involved as separate records of costs of individual cases are not held).</p> | | | | |
| Other key non-monetised benefits by ‘main affected groups’ | | | | |
| <p>The proposals will help to safeguard the interests of justice by ensuring that alleged perpetrators of serious criminal wrongdoing are held to account. The proposals may also have a deterrent effect which will benefit wider society. Additionally, the proposals will prevent multiple attempts at prosecution from taking place, as was the case with Rosepark, thereby providing a saving on litigation costs.</p> | | | | |
| Key assumptions/sensitivities/risks | | | | |
| <p>It is difficult to estimate the number of cases that may be prosecuted and that may impose an additional cost on the criminal justice system.</p> | | | | |

Problem under consideration

On 31 January 2004, a fire occurred at the Rosepark Nursing Home in which 14 of its residents were killed, and on 25 February 2005 the firm was dissolved. The partners in Rosepark were charged on indictment of a number of health and safety violations, but the High Court held that since the juristic personality of a Scottish partnership is extinguished upon dissolution, it is not possible to prosecute a dissolved partnership. The implication is that partnerships can escape prosecution for potentially serious offences alleged to have been committed prior to dissolution.

Policy objective

The policy objective is to amend the law to close this loophole which would allow for the prosecution of a partnership and/or an individual partner. The Bill will capture criminal offences only- and they are expected to be those that would normally be capable of being committed by a body corporate (e.g. health and safety, corporate manslaughter). The provisions will apply to general partnerships only and a summary outline of the intention of the key provisions is set out below-

(i) The intention is for the Bill to provide that it is competent to prosecute a dissolved partnership in relation to an offence allegedly committed prior to dissolution, notwithstanding the dissolution of that partnership. It will also provide that proceedings must be commenced, by the service of an indictment or complaint, within 5 years of the date of dissolution (and that this time limit is without prejudice to the six-month time limit for the prosecution of summary-only offences imposed by section 136 of the Criminal Procedure (Scotland) Act 1995).

(ii) Sections 4(2) and 9 of the Partnership Act 1890 and sections 70(6) and 143(2) of the Criminal Procedure (Scotland) Act 1995 operate to render a fine imposed upon the partnership enforceable against the assets of the individual partners as well as against those of a partnership. The Bill will apply these provisions in relation to dissolved partnerships, so that any fine imposed following a prosecution may be enforced against the former partners, jointly and severally, with each partner having a right of relief against his or her fellow former partners.

(iii) The Bill will also provide that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by the dissolution of that partnership. The Scottish Law Commission expressed the view in their "Report on Criminal Liability of Partnerships" that such a prosecution would be competent under the present law but the Bill puts this beyond doubt. This means that although it would be competent, in terms of the proposed provisions outlined in (i) above, to prosecute the dissolved partnership, the dissolved partnership need not be prosecuted before a prosecution of an individual partner can take place. It will also provide that a prosecution of an individual partner will only be competent where a "relevant enactment" provides for the individual liability of partners for offences committed by a partnership. "Relevant enactment" will be defined as an enactment to the effect that a partner may be prosecuted for an offence committed by a partnership. The effect of the proposed provisions outlined in this paragraph is to make it clear that any liability to prosecution which may arise under a relevant enactment will not be affected by the dissolution of the partnership.

(iv) The Bill will provide that it is competent to prosecute a partnership in respect of an offence allegedly committed prior to a change in membership of the partnership, notwithstanding that change in membership. This addresses the uncertainty in the

present law as to whether the legal personality of a partnership necessarily comes to an end upon a change in membership.

(v) The Bill will also provide that the competency of criminal proceedings against an individual partner in relation to an offence allegedly committed by a partnership is not affected by a change in the membership of that partnership. This parallels the provision outlined above in paragraph (iii) for the prosecution of individual partners following the dissolution of the partnership. Provision will be made to permit a partner to be prosecuted in accordance with a relevant enactment regardless of whether the partnership is also prosecuted. (The Scottish Law Commission believe that this may be appropriate in exceptional cases, as they observe that it will generally be appropriate, where the partnership continues in existence at the time of the prosecution, for the partnership as well as the partner to be made the subject of proceedings.)

Description of options considered

Background

Partnership was the subject of a major law reform project conducted jointly by the Law Commission for England and Wales and Scottish Law Commission. The project culminated in 2003 in the publication of the Joint Report on Partnership Law. The report recommended a comprehensive package of reforms to the law of partnership, which, if implemented, the Commissions felt would clarify and modernise the present law, although it did not focus particularly upon the question of criminal liability. The report recommendations in relation to general partnerships have never been implemented. In its Discussion Paper on Criminal Liability of Partnerships (May 11), the Scottish Law Commission considered, among other things, the problem identified in *Balmer v HM Advocate*: that the prosecution of a partnership may be frustrated by dissolution and set out the options for law reform. Its Report on Criminal Liability of Partnerships (Dec 11) recommended that the dissolution issue should be resolved by the implementation, for Scotland, of the Joint Report on *Partnership Law*. Its second approach recommended that pending a general reform to the law of partnership, limited provision should be made to address the dissolution issue by means of a Bill in the UK Parliament. The SLC Report was subsequently laid before Parliament and can be accessed via the following link- see <http://www.official-documents.gov.uk/document/cm82/8238/8238.pdf>)

Option 1- the targeted interim solution was that pending a general reform to the law of partnership, limited provision should be made to address the dissolution issue by means of a Bill in the UK Parliament. This latter option addresses the immediate issue of concern and can be implemented reasonably quickly hence we support this approach. In addition, Paragraph 2.15 of the Scottish Law Commission's report on the Criminal Liability of Partnerships states *"An overwhelming majority of consultees supported the proposal for a more targeted solution. We think it worth recording that all of those who supported this proposal regarded it as necessary only because they viewed the need for a solution to the dissolution issue as urgent and the likelihood of early legislation in relation to partnerships more generally to be low."*

Option 2- doing nothing could result in partnerships escaping prosecution for potentially serious offences.

Option 3- the SLC's preferred long term solution to the "dissolution issue" is implementation, for Scotland, of the Joint Report on Partnership Law published in 2003 and for specific provision to be made on criminal liability of Scottish partnerships

in resulting legislation. But they recognised that such far reaching changes would take time and therefore also recommended a targeted, interim solution.

Monetised and non-monetised costs and benefits of each option (including administrative burden)

According to Scottish Government/ONS figures (Scottish Corporate Sector Stats 2011), at March 2011 there were around 25,300 general partnerships in Scotland employing a total of 147,370 people and with a combined turnover of 9.316 billion. The vast majority of partnerships are small in nature, with 99% employing fewer than 50 people. Partnerships make up an estimated 8% of the unregistered group i.e. those not registered for VAT or PAYE. These figures do not include Limited Liability Partnerships and Limited Partnerships (which fall under the legal status of Limited Companies so would be counted as Companies) and to which the Bill provisions will not apply.

Partnerships vary in size: they can be as small as 2 persons on a short-term profit-making venture (e.g. market stall). Many are family-run businesses but there are also many professional or business partnerships – from law firms to medical practices, international consultancies to retail businesses.

The changes to the law are likely to have minimal economic impact on partnerships, partners and the courts. There may be some minor transition costs as people familiarise themselves with the new law. It is difficult to estimate the number of cases that may be prosecuted and that may impose an additional cost on the criminal justice system. But the proposals will help to safeguard the interests of justice by ensuring that alleged perpetrators of serious criminal wrongdoing are held to account. The proposals may also have a deterrent effect which will benefit wider society.

Small Firms Impact Test

The majority of partnerships subject to the proposals are small, but the same law will apply so no disproportionate impact on small firms.

Micro- Businesses- Moratorium on New Domestic Regulation

Background to Policy

Micro-businesses are those with fewer than 10 employees. The Government's policy in relation to the moratorium on new domestic regulation for micro-businesses and start-ups was announced in the Plan for Growth published on 23 March 2011.

The moratorium policy applies to all new domestic regulation within the scope of "One In-One Out" (OIOO) that affect micro-businesses, and which is intended to come into force before 31 March 2014 (the end of the moratorium period). It also applies to certain categories of domestic regulation that are outside the scope of OIOO, particularly regulations addressing systemic financial risk. The policy applies to both regulatory measures and de-regulatory measures, and measures with a zero net cost for business.

Application for Waiver

We wish to disapply the moratorium policy in respect of the proposed measures and will seek the required agreement of both the Reducing Regulation Sub Committee and

Economic Affairs Committee to a waiver as part of the normal policy clearance process.

The measures proposed are not imposing new burdens and we believe they are sufficiently urgent to require their implementation in respect of micro-businesses (and other partnerships) before the end of the agreed moratorium period (i.e. 31 March 2014). In addition, we believe that the impact on micro-businesses and other partnerships will be minimal.

Rationale and evidence that justify the level of analysis used in the IA (proportionality approach)

It is in the public interest to close this loophole and cost should not be a key consideration. In any event, the cost to business and others is considered to be minimal. It is for partnerships and individual partners to ensure they are operating within the law.

Risks and assumptions

It is difficult to estimate the number of cases that may be prosecuted and that may impose an additional cost on the criminal justice system.

Wider impacts

The proposals will help to safeguard the interests of justice by ensuring that alleged perpetrators of serious criminal wrongdoing are held to account. The proposals may also have a deterrent effect which will benefit wider society.

Summary and preferred option with description of implementation plan.

To introduce a Bill that would make provision to enable the prosecution of a partnership or an individual partner for an offence allegedly committed prior to dissolution notwithstanding the dissolution of the partnership, to enable the prosecution of a Scottish partnership or an individual partner for an offence allegedly committed prior to a change in membership, notwithstanding the change in membership. Provision will also be made for a fine levied upon a Scottish partnership which has been dissolved to be paid from the partnership assets or from individual partners.

The Bill would extend to Scotland only and, other than the section providing for short title, extent and commencement which would come into force on the day the Act is passed, commencement of the provisions would be by order- probably within a year of the Act being passed. This would give adequate notice to all those affected by the new provisions. It is likely that we would write to those who submitted consultation responses as well as the Scottish Government and other key stakeholders advising them of the new legislation.

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