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November 2009

Dear Consultee

CONSULTATION ON OPTIONS FOR THE IMPLEMENTATION OF THE SCOTTISH CHARITABLE INCORPORATED ORGANISATION (SCIO)

I am pleased to enclose a copy of the *Consultation on Options for the Implementation of the Scottish Charitable Incorporated Organisation (SCIO)* which has been published today. The consultation paper outlines a number of policy options for the Scottish Charitable Incorporated Organisation (SCIO), developed by the SCIOs Working Group, which was set up to advise Scottish Ministers on the implementation of this new legal form for Scottish charities.

Also enclosed is a shorter consultation guide and a response form for you to complete. Links to all these documents can be found on the Charity Law section of the Scottish Government website, where you will also find details of public consultation events, once these have been finalised: <http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>

Responding to this consultation

We are inviting written responses to this consultation paper by **26 February 2010**. Please send your response with the completed **Respondent Information Form** (see “Handling your Response” below) to CharityAct@scotland.gsi.gov.uk, or to the address below:

Scottish Charitable Incorporated Organisations (SCIOs) Consultation

Charity Law Team
Civil Law Division
Scottish Government
2W, St Andrew's House
Edinburgh EH1 3DG
Tel: 0131 244 0123
Fax: 0131 244 8325

We would be grateful if you would use the consultation response form provided or could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at: <http://www.scotland.gov.uk/consultations>. The Scottish Government now has an email alert system for consultations to which you can subscribe at the following address: <http://www.scotland.gov.uk/Consultations/seConsult>.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. **Please complete and return the Respondent Information Form**, attached to the front of the response section, as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their responses to be made public (see the attached Respondent Information Form), these will be made available to the public in the Scottish Government Library by 26 March 2010 and on the Scottish Government website. We will check all responses, where agreement to publish has been given, for any potentially defamatory material before logging them in the library or placing them on the website. You can make arrangement to view responses by contacting the Scottish Government Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

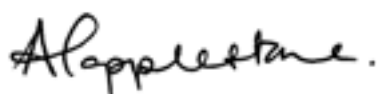
What happens next?

Following the closing date, all responses will be analysed and considered, along with any other available evidence, to help us reach a decision on the best option for implementation of the SCIO. We aim to issue a report on this consultation process by the end of April 2010, after which draft regulations will be developed in light of responses received.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to me at the above address.

Yours faithfully,



Anita Popplestone
Charity Law Team

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

**Consultation on Options for the
Implementation of the Scottish Charitable
Incorporated Organisation (SCIO)**

Consultation Paper

**Scottish Government
2009**

Scottish Charitable Incorporated Organisations (SCIOs) Working Group

Chair: Richard Dennis (Deputy Director, Civil Law Division, Constitution, Courts and Law Directorate, Scottish Government)

Members:

- **Adrienne Airlie** (Institute of Chartered Accountants of Scotland; Martin Aitken & Co)
 - **David Brownlee** (Citizens Advice Scotland)
 - **Ken Butler** (Scottish Drugs Forum)
 - **Stuart Cross** (Charity Law Research Unit, University of Dundee)
 - **Susan Deighan** (Culture & Sport Glasgow)
 - **Marieke Dwarshuis** (Office of the Scottish Charity Regulator (OSCR))
 - **Nancy Fancott** (Scottish Council for Voluntary Organisations (SCVO))
 - **Quentin Fisher** (Office of the Scottish Charity Regulator (OSCR))
 - **Dr Patrick Ford** (Charity Law Research Unit, University of Dundee)
 - **Steve Kent** (Edinburgh Voluntary Organisations Council)
- **Professor Alex McDougall** (Institute of Chartered Accountants of Scotland; HW Chartered Accountants)
 - **Gavin McEwan** (Law Society of Scotland; Turcan Connell)
 - **Stephen Philips** (Law Society of Scotland; Burness)

Secretariat: Anita Popplestone & Stuart Morrison (Charity Law Team, Scottish Government)

**Consultation on Options for the Implementation of the Scottish Charitable
Incorporated Organisation (SCIO)**

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CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

Consultation on Options for the Implementation of the Scottish Charitable Incorporated Organisation (SCIO)

INTRODUCTION

1. **The Charities and Trustee Investment (Scotland) Act 2005** (hereafter “the 2005 Act”) was passed by the Scottish Parliament on 9 June 2005 and received Royal Assent on 14 July 2005. The Act improves and strengthens the regulation of charities operating in Scotland in a way that builds on the value that charities bring to Scottish society. The majority of the provisions in the Act, relating to the basic regulation of charities by the Office of the Scottish Charity Regulator (OSCR), came into force in April 2006.

2. This consultation paper sets out a number of options for the development of the **Scottish Charitable Incorporated Organisation (SCIO)**, a new legal form of incorporation specifically for charities, which is introduced by the 2005 Act. The SCIO is intended to help charities enjoy the benefits of incorporation without being subject to the complex apparatus of company law and dual regulation currently imposed on charitable companies. Scottish Ministers have powers to make further provision in relation to the SCIO by regulations under sections 50, 52 and 64 of the 2005 Act. This consultation does not include draft regulations but rather focuses on the **policy principles** which will determine the structure of the SCIO and the design of the regulatory framework within which it will operate.

3. The options outlined in this consultation paper have been developed and put forward by the Scottish Charitable Incorporated Organisations (SCIOs) Working Group, which was set up to advise Scottish Ministers on the implementation of this new legal form. The SCIO regime will be designed to provide a new incorporation mechanism specifically for charities that will remove the need to register with, and report to, the Registrar of Companies in Scotland. The Office of the Scottish Charity Regulator (OSCR) will be responsible for operating the regime and regulating SCIOs.

4. This consultation paper is divided into a number of parts. **Part one** provides some background to the development of the SCIO and poses some key design questions. **Part two** sets out three potential models for the SCIO, the first of which is the preferred option of the SCIOs Working Group. We are particularly interested in hearing whether you agree with the Working Group as to which model should be implemented. **Part three** discusses some detailed technical aspects of the SCIO regulatory framework. **Part four** focuses on the issues associated with the winding up and dissolution of a SCIO, and **part five** briefly outlines next steps. Although the SCIO model proposed is itself intended to be simple and user-friendly, we are conscious that this consultation paper is quite lengthy and discusses complex issues, such as SCIO insolvency. The main reason for this is that we have tried to provide sufficient background to the SCIO and present the options for implementation, as well as covering some of the more detailed technical aspects. However, we have also produced a separate shorter summary of the proposals,

which can be accessed on the **Charity Law** pages of the Scottish Government website (<http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>) or by contacting the address given below.

5. This is your opportunity to have your say about these plans before the regulations are developed. We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received. However, while we have highlighted key areas for comment, your views on any aspect of the proposals within this document are welcome.

6. You are invited to respond before the closing date on **26 February 2010** in writing to:

Scottish Charitable Incorporated Organisations (SCIOs) Consultation
Charity Law Team
Civil Law Division
Scottish Government
2W, St Andrew's House
Edinburgh EH1 3DG
Tel: 0131 244 0123
Fax: 0131 244 8325
Email: charityact@scotland.gsi.gov.uk

Please reply by **26 February 2010**.

7. This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation web pages of the Scottish Government website at <http://www.scotland.gov.uk/consultations>.

8. The Scottish Government (SG) now has an email alert system for consultations (**SEconsult**: <http://www.scotland.gov.uk/Consultations/seConsult>). This system allows stakeholder individuals and organisations to register and receive a weekly email containing details of all new consultations (including web links). SEconsult complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.

Handling your response

9. We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public. Please complete and return the **Respondent Information Form** (attached to the front of the response form) enclosed with this consultation paper as this will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential, and we will treat it accordingly.

10. All respondents should be aware that the Scottish Government is subject to the provisions of the **Freedom of Information (Scotland) Act 2002** and would,

therefore, have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

11. Where respondents have given permission for their response to be made public and, after we have checked that they contain no potentially defamatory material, responses will be made available to the public in the Scottish Government Library (see the attached Respondent Information Form) by **26 March 2010**. You can make arrangements to view responses by contacting the SG Library on 0131 244 4565. Responses can be copied and sent to you, but a charge may be made for this service.

What happens next?

12. Following the closing date, all responses will be analysed and considered along with any other available evidence to help us reach a decision on how best to take forward the implementation of SCIOs. The responses we receive to this consultation will inform the development of draft regulations, and our intentions for these will be set out in the Consultation Report.

Comments and complaints

13. If you have any comments about how this consultation exercise has been conducted, please send them to the address above.

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

14. Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

15. The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

16. Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses¹. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the

¹ <http://www.scotland.gov.uk/consultations>

written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

17. All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: **Scottish Government consultations** (<http://www.scotland.gov.uk/consultations>).

18. The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review;
- inform the development of a particular policy;
- help decisions to be made between alternative policy proposals; and
- be used to finalise legislation before it is implemented.

19. Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

20. While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

Consultation on Options for the Implementation of the Scottish Charitable Incorporated Organisation (SCIO)

PART ONE - BACKGROUND

Legislative context

21. The Charities and Trustee Investment (Scotland) Act 2005 was passed by the Scottish Parliament on 9 June 2005 and received Royal Assent on 14 July 2005. As with other Acts of the Scottish Parliament, the implementation of the Act has been a phased process. The majority of the provisions in the 2005 Act, relating to the basic regulation of charities by the Office of Scottish Charity Regulator (OSCR) in its new independent role, came into force in April 2006.

22. The changes in charity regulation that the 2005 Act puts in place are designed to support and encourage charitable activity in Scotland, while reassuring the public that their money is being well used. They provide a modern, proportionate regulatory framework that is intended to support charities rather than tying them in red tape. The proposed regime for the Scottish Charitable Incorporated Organisation (SCIO), outlined here, is integral to this.

23. The 2005 Act was motivated by the belief that there is a clear public interest in the effective regulation of charities in Scotland. For regulation to be effective, it must promote five key principles, which have guided the development of the proposals in this consultation paper. It must be:

- independent;
- proportionate;
- accountable;
- transparent; and
- consistent.

The need for the Scottish Charitable Incorporated Organisation (SCIO)

24. Scottish charities can be constituted in a variety of legal forms, including industrial and provident societies and statutory corporations, but most are constituted either as trusts, unincorporated associations or companies limited by guarantee. A trust is a very specific form, or rather a relationship, that sets out an obligation binding a person (which can be an individual or a company) called a 'trustee' to deal with 'property' in a particular way, for the benefit of one or more 'beneficiaries'. So it would not be an appropriate form for all charities and it does not deliver limited liability for charity trustees. Likewise, the unincorporated association and company models can present potential difficulties for charities.

- Unincorporated associations, while simpler than companies to set up and run, do not provide the benefits of limited liability for members or a separate legal identity for the charity. This can raise issues around the employment of staff, and the ownership of property, and prove less attractive to potential partners, funders and investors.

- Company status brings with it a significant administrative burden, not least because charitable companies are subject to dual regulation and have to report to both the Registrar of Companies and OSCR. It does, however, provide members with more protection from exposure to financial liabilities than would be available if the charity were not incorporated.

25. Questions have been raised for some time as to whether company legislation provides the ideal regime for the incorporation of charities and other third sector bodies that are non-profit distributing. The company model is designed primarily for commercial bodies with shareholder members that have a clear financial stake in the company.

26. The Reports of both the Deakin Commission in 1996 and Kemp Commission in 1997 on the future of the voluntary sectors in England and Wales, and Scotland respectively, had proposed that there should be a separate, bespoke vehicle for incorporating charities. Following a fundamental review of company legislation in 2001, the independent **Company Law Review Steering Group** also concluded that there should be a new vehicle for incorporating charities and that this vehicle should be exclusively for charities, offering all benefits of incorporation, including limited liability, without the need for dual regulation. A new incorporated legal form for non-charitable social enterprises, the Community Interest Company (CIC), was created under the **Companies (Audit, Investigations and Community Enterprise) Act 2004**.

27. The **Scottish Charity Law Review Commission (“McFadden”)** endorsed the proposals of the Company Law Review and recommended that a new incorporation vehicle should be made available to Scottish charities. The draft Charities and Trustee Investment (Scotland) Bill included provisions to create a new legal entity, the Scottish Charitable Incorporated Organisation (SCIO). In **consultation** on the draft Bill, there was strong support for a tailor-made incorporation vehicle for charities in Scotland that was as clear and straightforward as possible and, consequently, **Chapter 7 of the 2005 Act** provides for the creation of a regime for SCIOs.

28. The SCIO potentially offers charities a simpler form of incorporation, with the greater business benefits that this brings. As a “body corporate”, a SCIO would be a legal person, distinct from its members and charity trustees, giving it the capacity to employ its own staff, to contract in its own right, the ability to own its own property and to sue and be sued. As the SCIO would be liable for its own debts, this would offer protection to members from personal financial liability but with less onerous regulatory and reporting requirements than currently imposed on charitable companies. The SCIO would enjoy the benefits of single, and therefore more streamlined, registration and reporting requirements, subject to the monitoring and filing requirements imposed by OSCR and not those of Companies House. At a more basic level the SCIOs regime would be set within a legal framework which is designed specifically with Scottish charities in mind.

RELEVANT DEVELOPMENTS IN OTHER AREAS

Charitable Incorporated Organisations (England and Wales, Northern Ireland)

29. Similar provision has been made for new Charitable Incorporated Organisations (CIO) in England and Wales, specifically in new sections which were inserted into the Charities Act 1993 by the **Charities Act 2006**². The Office of the Third Sector (UK Government) and the Charity Commission for England and Wales are currently developing subordinate legislation to implement a CIO regime, which was subject to **consultation**³ in 2008. A joint **Summary of Consultation Responses and Next Steps** was published in September 2009, outlining plans for implementation of the CIO. We understand that they intend the CIO to become available as a form for charities in England and Wales in 2010. Similar provisions for a Charitable Incorporated Organisation regime in Northern Ireland are contained in the **Charities (Northern Ireland) Act 2008**.

30. The policy development process on the CIO for England and Wales has been carried out in advance of our own work on SCIOs, and, indeed, has been underway for a number of years. Thus SCIO implementation may not coincide with that of the CIO, but we have been fortunate to follow the development of this parallel form, gaining valuable insight from the process. It is of paramount importance that the design of the SCIO should be informed by, and address the needs of, Scottish charities, reflecting the particular composition and dynamics of the Scottish charity sector. The extent to which the two regimes correspond in form and detail will depend upon the outcome of our respective consultations and the direction which our respective stakeholders would prefer us to take. While it could be beneficial to both charity sectors if differences between the two were minimised, the ultimate design of each regime must be tailored to the specific context within which it will operate.

Scottish Law Commission project on the law of unincorporated associations in Scotland

31. The Scottish Law Commission (SLC) is currently examining the law in Scotland relating to unincorporated associations, the form of organisation adopted by many smaller charities. In Scots law, such associations are not recognised as having any legal personality. This can create uncertainties over the extent of liability of association members and of officials, particularly under contracts with third parties, including staff, but also in terms of title to heritable property, which must be held in the name of individuals, who may cease to be members. Thus, under the present law, a non-profit making organisation which wishes to avoid the consequences of the absence of legal personality has little choice but to incorporate. The SLC's **Discussion Paper on Unincorporated Associations (DP 140)**⁴ which was published at the end of 2008 proposes legislative change for Scotland which would accord some form of legal status to unincorporated clubs and associations.

² **Schedule 7 of the Charities Act 2006** inserted a new Part 8A to the Charities Act 1993 to provide for the Charitable Incorporated Organisation.

³ http://www.cabinetoffice.gov.uk/third_sector/consultations/completed_consultations/cio.aspx

⁴ <http://www.scotlawcom.gov.uk/downloads/dps/dp140.pdf>

32. There are clearly parallels between the SLC's project and the implementation of the SCIO form, given that they are both intended in part to address difficulties faced by unincorporated, non-profit distributing, organisations. Overcoming the difficulties flowing from the lack of legal personality and the exposure to personal liability are common objectives; however, the SCIO form would only be open to charities and not non-charitable unincorporated associations. So while overlapping, the target audiences are not precisely the same.

33. Given the parallels, it has been suggested to us in preliminary focus groups that the SCIO be put on hold pending the outcome of the SLC's project on Unincorporated Associations. However, at the time of writing, the project has completed its discussion stage, but has yet to bring forward a report with proposed legislation. In addition, the law of unincorporated associations is a reserved matter under Section C1 of Schedule 5 to the **Scotland Act 1998** insofar as it concerns the creation, operation, regulation and dissolution of types of business association, other than charities. So any legislation to implement recommendations would be beyond the competence of the Scottish Parliament and would require to be passed by the United Kingdom Parliament. Thus, it would not be appropriate for us to speculate on whether and when such legislation might be taken forward.

KEY DESIGN QUESTIONS

Original policy drivers for the SCIO – what is it for?

34. Before proceeding to look in detail at the legislative framework and options for implementation, it might be helpful to take a step back and remind ourselves of the reasons for the development of the SCIO concept and its codification in the 2005 Act. The policy drivers for the development of this new legal form were about finding a means of allowing Scottish charities to have the benefit of separate legal personality and for their members to enjoy the protection of limited liability, without being subject to the complex apparatus of company law and dual regulation.

35. The ambition for the SCIO was and is to create an incorporation vehicle that is tailored to the needs of charities, so unencumbered with rules governing shareholder rights and insider dealing. It should also be straightforward and accessible to a diverse range of organisations, of varying sizes, serving different client groups. However, it has to be credible structure that engenders trust and confidence amongst those with which it will do business. So to summarise, it should be:

- straightforward;
- accessible;
- affordable; and
- credible.

36. As we proceed to discuss each of the key areas and examine options, it is important to assess the proposals and questions against these criteria. Undoubtedly, it will not be possible to design a model that satisfies each of these in equal measure; benefits in some areas will have to be weighed against disadvantages or risks in others.

The SCIO market – who is it for?

37. There are roughly 23,300 charities entered on the Scottish Charity Register, of whom 55% are unincorporated associations, 19% are trusts, 19% are companies, with the remaining 7% taking other forms, including industrial and provident societies, statutory corporations, and educational endowments⁵. The table below, prepared by OSCR in September 2009, details the income breakdown for each constitutional form, showing that the majority of charities with lower incomes are unincorporated associations, while most of those with the largest incomes take company form. (Of those listed with £0 income, a proportion are new charities, within their first year of operation, that have yet to submit accounts or complete an annual return).

Table showing the number of charities in each income band for each constitutional form

Income	Constitutional form (number of charities)							Total
	Unincorporated Association	Company	Trust	Other	Statutory Corporation	Industrial and Provident Society	Educational Endowment	
£0	1,152	522	366	104	11	4	19	2,178
£1 to £4,999	4,649	456	1,590	318	23	6	59	7,101
£5,000 to £9,999	1,456	180	483	116	13	2	6	2,256
£10,000 to £24,999	1,928	330	624	170	8	7	25	3,092
£25,000 to £49,999	1,424	344	435	101	10	4	29	2,347
£50,000 to £74,999	705	279	209	35	5	8	6	1,247
£75,000 to £99,999	482	220	137	23	1	4	1	868
£100,000 to £149,999	379	344	119	32	3	7	4	888
£150,000 to £249,999	313	446	120	19	6	2	2	908
£250,000 to £499,999	187	451	115	18	10	4	2	787
£500,000 to £1 million	69	331	58	12	7	19	3	499
£1 million+	91	634	147	33	87	114	13	1,119
Total	12,835	4,537	4,403	981	184	181	169	23,290

38. Our expectation is that the SCIO will be of most interest to charities at the low to mid range of the income spectrum, say with income between **£25,000 and £1,000,000**. This is because we would expect that the company form would continue to be the most appropriate form for the very biggest charities; whilst the smallest charities, lacking significant assets or liabilities, may find it easier to continue as unincorporated associations. That is not to suggest that income and asset levels are the only means of characterising the charity sector in Scotland. We recognise that some large membership charities may not have significant assets and

⁵ Figures provided by OSCR, correct as at 23 September 2009

similarly, some charities working in particular sectors may have limited income but significant exposure to risk. However, it would be far from straightforward to map the Scottish charity sector according to risk exposure and, in the absence of such a complex analysis, we have opted to use income as a fair indication of probable increased financial activity and attendant risk.

39. At the outset, we want to be clear that we do not think that a whole-of-market approach to designing the SCIO is practical or desirable. Initially we anticipate that most applications will come from unincorporated charities seeking to establish themselves as new SCIOs. For many small unincorporated associations it would be more sensible to remain unincorporated. Subsequently, there may be more interest from existing charitable companies seeking to convert to SCIO form to avoid the additional burden of dual regulation. For other charitable companies the company model would cater better for the complexity and sophistication of their organisation and operations.

40. However, this is purely speculative and in no way seeks to discourage other types or sizes of charity from applying. Indeed, we would not wish to restrict this form to any particular type or size of organisation. Rather, we are aware that the SCIO will not hold the same appeal for all Scottish charities; but we would be interested to hear of any alternative views.

Q1. In designing the SCIO primarily for charities with incomes of between £25,000 and £1,000,000, do you think we have identified the right target market?

41. We are also conscious that the attractiveness of the SCIO to different audiences will largely depend on the design of the final model. Having discussed this issue at some length, the SCIOs Working Group concluded that a one-size-fits-all model was not a realistic option and could ultimately be suitable for none. A whole-of-market approach could lead to a confusion of priorities and lack of clear policy direction, failing to deliver the desired outcome of any stakeholder group. As we proceed to discuss the various options, it may become apparent that certain models would be better suited to certain types of charity. In the case of the preferred option of the Working Group, we have remained focused on the target group identified above, that is, charities in the low to mid income ranges. It is with this audience in mind that we have developed the SCIO model, outlined below (from paragraph 63).

LEGISLATIVE FRAMEWORK - THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) ACT 2005

42. Chapter 7 of the 2005 Act sets out an important foundation of statutory regulation for the creation of this new bespoke form of incorporation for Scottish charities. It also gives Scottish Ministers powers to make further provision by regulations in relation to the SCIO under sections 50, 52 and 64 of the 2005 Act; in particular, provision about:

- **applications** for constitution as, or **conversion** into, a SCIO, the determination of applications, entry in the Scottish Charity Register and the effect of such entry;
- the **administration** of a SCIO;
- **amalgamation** of SCIOs and **transfer** of a SCIO's property, rights and liabilities to another SCIO;
- the **winding up, insolvency or dissolution** of a SCIO;
- the maintenance of **registers of information** about SCIOs (for example, registers of members, of charity trustees or of charges over the SCIO's assets); and
- **such other matters** in connection with the provision made by chapter 7 as they think fit.

43. This section outlines the SCIOs provisions contained in the 2005 Act for background only – these include requirements for SCIO constitutions, membership, duties of members, as well as an application process that bodies must follow if they seek to become or convert to a SCIO - they are finalised and are not the subject of consultation in this paper. However, they do provide the basic framework for the SCIO and, as we move on to examine the different options for implementation, these provisions set the baseline upon which the regulatory superstructure will be built. The table below summarises the provisions in chapter 7.

Table summarising the provisions in chapter 7 of the Charities and Trustee Investment (Scotland) Act 2005

Section	Provision
49 and 50	<p><i>Basic mandatory requirements for a SCIO:</i></p> <ul style="list-style-type: none"> • a SCIO is a corporate body and shall have a constitution, a principal office in Scotland and more than one member. • the constitution must state its name and purposes and contain provisions about the membership and the charity trustees. • unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if it is wound up. • the Scottish Ministers may make regulations specifying further matters relating to a SCIO's constitution.
51	<p><i>Members' duties</i></p> <ul style="list-style-type: none"> • certain of the trustee duties outlined in section 66 are applied to members of a SCIO who are not also charity trustees, specifically to seek, in good faith to ensure that the SCIO acts in a manner which is consistent with its purposes. All of the charity trustee duties set out in section 66 will apply to SCIO members that are also charity trustees. • A breach of this duty is to be treated as misconduct
52 and 53	<p><i>Name and status</i></p> <ul style="list-style-type: none"> • the Scottish Ministers may specify in regulations which documents a SCIO's name must be shown on if they are issued or signed on its behalf. • If the body's name does not include either the words "Scottish charitable incorporated organisation" or "SCIO", then documents must include a statement that it is a SCIO. • It is an offence to issue any document, which should include reference to SCIO status, which does not. • OSCR also has powers to direct a body which is not a SCIO and which is representing itself as being a SCIO to stop doing so by such date as it directs and failure to comply may lead to OSCR applying to the Court of Session for an interdict against such a body.
54 and 55	<p><i>Creation of SCIO and entry in Register</i></p> <ul style="list-style-type: none"> • sets out the procedure for application for registration of a SCIO, similar to those for an application for entry of a body on the Scottish Charity Register, with specific requirements

	<p>relating to a SCIO.</p> <ul style="list-style-type: none"> • The effect of registration is that on entry to the register as a SCIO, the body becomes a body corporate. • If a SCIO ceases to be a charity, it also ceases to be a SCIO.
56, 57, 58 and schedule 4	<p><i>Conversion</i></p> <ul style="list-style-type: none"> • a charity that is a company or an industrial and provident society can convert to a SCIO. • Such bodies cannot transfer if they have any share capital that is not fully paid up or if they have only a single member. • An application for conversion must be accompanied by copies of both the resolution of the body to be converted to a SCIO and that adopting the proposed constitution of the SCIO. • OSCR is required to consult with the Registrar of Companies or the Financial Services Authority and such other persons it thinks fit before determining an application for conversion. • OSCR must grant the conversion only where a charity if converted into a SCIO can continue to meet the charity test. • It must refuse the application: <ul style="list-style-type: none"> ○ if the SCIO's proposed name is objectionable under section 10; ○ if the proposed constitution and powers of the SCIO do not meet the requirements of section 50 and any regulations under that section; or ○ if the application would be refused by virtue of regulations made under section 6(1). • If the converted body meets the charity test OSCR may only refuse the application on these grounds or as a result of representations from those it has consulted under section 57(1). • If OSCR grants conversion to a SCIO, as well as entering the body on the Register, it must send a copy of the body's resolutions to convert and a copy of the entry to the Registrar of the original body.
59, 60 and 61	<p><i>Amalgamation and transfer</i></p> <ul style="list-style-type: none"> • a number of SCIOs can amalgamate by application to OSCR. • A resolution to amalgamate must be passed by either a two-thirds majority of those voting at a general meeting or a unanimous vote by the members of each of the SCIOs involved. • If OSCR grants the application for amalgamation, it must enter the new SCIO on the register and remove the original bodies' entries and all the property, rights and liabilities of all the old SCIOs belong to the new SCIO. • A SCIO can transfer all its property, rights and liabilities to another SCIO, if OSCR confirms the application.
62	<p><i>Third parties</i></p> <ul style="list-style-type: none"> • a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. • Third parties may also assume that charity trustees are authorised to act on behalf of the charity they represent in any matter.
63	<p><i>Amendment of constitution</i></p> <ul style="list-style-type: none"> • A SCIO's constitution may be amended by resolution of its members.
64,	<p><i>Regulations</i></p> <ul style="list-style-type: none"> • the Scottish Ministers may make regulations to set out further provisions on SCIOs such as: <ul style="list-style-type: none"> ○ the application process; ○ the administration of SCIOs; ○ amalgamations, transfers; ○ the winding up, insolvency or dissolution of SCIOs; ○ the maintenance of other registers of information on SCIOs; and ○ such other matters in connection with the provision made by Chapter 7 of the 2005 Act as they see fit.

44. The table above shows that in some areas of SCIO operation and governance, the requirements are set out in more detail, so that, for instance, on matters relating to conversion, much of the framework is already in place. In such cases, we will need to consider how much further detail is required in regulations and how much should be left to administrative guidance from OSCR. In other areas, such as the end of the SCIO life-cycle, there is minimal detail and thus most of the regulatory framework remains to be developed.

45. It is also worth noting that there are significant differences between these provisions and those for CIOs (England and Wales) as set out in the Charities Act 1993, as amended by the Charities Act 2006. By way of example, there is no requirement for SCIOs to follow certain constitutional models as set out in regulations, as is the case for CIOs⁶. Another key divergence is that the 2005 Act does not provide for members of a SCIO to be liable to contribute to the assets if it is wound up⁷, so this option will not feature in the SCIO regulations.

SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS (SCIOS) WORKING GROUP

46. While the provisions in the 2005 Act provide the basic legal framework for a SCIOs regime, much of the detailed requirements will need to be set out in regulations. This allows greater freedom to design a regime best suited to charities in Scotland but it also means that much of the complex administrative detail remains to be developed. The principal objective is to create a structure that is as straightforward as possible for its users but still provides the necessary accountability and governance safeguards. Given the complexities associated with the development of detailed statutory arrangements for this new legal form, an independent group of stakeholders, drawn from the Scottish charity sector and professional advisors, was established. Its remit was to advise Scottish Ministers on how best to deliver the straightforward incorporation vehicle intended, without unduly burdening charities and OSCR with excessive administrative requirements.

47. The Scottish Charitable Incorporated Organisations (SCIOs) Working Group brings together experts in corporate and charity law, charity finance, as well as charity practitioners and representatives of the Scottish Council for Voluntary Organisations (SCVO) and OSCR. Details of the Group's membership can be seen on page 2 and its remit is as follows:

“To advise Scottish Ministers on how best to implement a regime for Scottish Charitable Incorporated Organisations (SCIOs), that is cost-effective, as straightforward as possible and tailored to the needs of Scottish charities.”

48. Since its first meeting on 2 September 2008, the SCIOs Working Group met a further six times and papers from those meetings can be viewed on its dedicated webpages on the **Scottish Government website** at the following address:

⁶ **Section 69B(5) of the 1993 Act (as amended)** states that “A CIO's constitution shall be in the form specified in regulations made by the Commission, or as near to that form as the circumstances admit.”

⁷ **Section 69A(6) of the 1993 Act (as amended)** states that :“ The members may be either—

(a) not liable to contribute to the assets of the CIO if it is wound up, or

(b) liable to do so up to a maximum amount each.”

<http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>. Over the course of these meetings, the Group has considered a wide range of issues, from the practical aspects of SCIO constitutional and disclosure requirements, to the more fundamental questions of policy objectives, such as those discussed above.

49. In addition, a small research project was undertaken to gauge understanding and expectations of the SCIO amongst different audiences, latterly through a small number of **focus groups**. The priorities and concerns that emerged from the focus groups differed and served to emphasise a tension between two interests, which the Working Group had recognised from the outset, namely that of:

- charities seeking a much simpler means of incorporation, in order to protect their members from personal financial liability; and
- funders, lenders and professional advisors looking for the assurances provided by the legal structure surrounding the company limited by guarantee.

50. Balancing these interests, meeting the needs of one without losing sight of the other, have remained at the heart of the Working Group's activity. If this balance could not be achieved and it ultimately emerged after consultation that the SCIO could not be both simple and credible, it was questioned whether implementation should proceed at all. We hope that the discussion of various implementation options below, and the Working Group's preferred option in particular, will demonstrate that these objectives can be delivered and that a viable regulatory framework can be developed. However, we also recognise that the costs of implementation may not be justified if the resultant form is only attractive to a very small number of charities.

51. If the final SCIO product delivered a pared down incorporation vehicle, requiring minimal administration beyond that already required under charity law, would funders and lenders have the confidence to invest in and transact with the new form? It will be important that third parties who intend to engage contractually with a SCIO are reassured that the structure delivers the necessary accountability and transparency to enable them to enter into agreements with SCIOs with confidence. Likewise, SCIOs may wish to raise finance and in order to do so, potential creditors will need to be reassured that their interests will not be overlooked.

52. A different way forward would be to take the existing company law framework and apply it in its entirety to the new charitable form. For charities, this would achieve the benefit of removing the issue of dual regulation and reporting but would this be a sufficient factor in itself to justify transition? Such an approach might also miss the opportunity to consider if the full regulatory burden of company status is necessary and relevant in a charity context. If the SCIO was modelled on the company limited by guarantee, with all the accompanying accountability requirements placed on traditional corporate structures, would charities be willing to adopt a new form that differed only slightly from the existing and trusted company form?

53. So why create an alternative to the charitable company? We know that the reason many charities currently choose not to adopt the company form is the regulatory burden. In part this is because the vast majority of Scottish charities are very small organisations, as can be seen in the table below:

Table showing the percentage of charitable companies in Scotland by income bracket

Annual Income	Total Charities		Charitable Companies		
	Number	% of total charities	Number	% of total charitable companies	% of total charities in income band
Below £5,000	9,279	40%	978	22%	11%
£5 - 25,000	5,348	23%	510	11%	10%
£25,000 - £50,000	2,347	10%	344	8%	15%
£50,000 - £100,000	2,115	9%	499	11%	24%
£100,000 - £250,000	1,796	8%	790	17%	44%
Over £250,000	2,405	10%	1,416	31%	59%
Total	23,290	100%	4,537	100%	19%

54. The Working Group recognised that there could be a significant proportion of the Scottish charity sector for which the company model simply did not cater, because it was considered too complex and administratively onerous. This might also be true of any SCIO model which used the company form as its basis. The Group also recognised that for the very smallest charities, incorporation may simply not be appropriate if they lacked assets or liabilities which exposed their members to risk. The SCIO form may be of limited relevance to such bodies regardless of its design. However, for those in the middle income range, limited liability and legal personality might allow their organisations to grow and develop without significantly increasing exposure to risk, and an alternative form of incorporation, not based on the company model could provide those benefits.

55. In a similar vein, the Working Group also devoted discussion to how prescriptive the regime should be:

- A **very detailed** regulatory framework would provide a clearly defined structure for charities and third parties, as well as consistency of practice and enforcement. It would offer in effect “a specialised form” of company limited by guarantee designed for the charity sector. However, it could be too rigid to allow for the significant variance between different types of charitable organisations working in very different sectors. An overly prescribed model could deter charities from converting if the design did not facilitate the fulfilment of their purposes or cater for their particular organisational structure.
- **Very basic** underpinning regulations would allow for much greater flexibility, encouraging a wider range of charities to become SCIOs and easing the process of adoption/conversion. This could provide an enhanced form of unincorporated association, a simple structure with the benefits of incorporation, specifically designed for the Scottish charity sector. However,

they would not necessarily embed best practice in the way that a more prescriptive model might.

56. In the course of its deliberations, the Working Group heard directly from the Scottish Law Commissioner Colin Tyre QC, regarding the SLC project on the law of Unincorporated Associations (see paragraphs 31-33 above) and from the Office of Third Sector (OTS - UK Government) on its plans for the implementation of the CIO (see paragraphs 29 to 30 above). Each provided fascinating insights into projects (described above) that shared many core themes with the SCIOs project, seeking to devise alternative structures for not-for-profit organisations that provided limited liability and legal personality:

- **Charitable Incorporated Organisations** – the OTS consultation on draft regulations for England and Wales provided very detailed proposals on the creation, operation and dissolution of CIOs which closely followed the company model. The consultation also included **draft constitutions**⁸ which CIOs would need to adhere to, as required under the 1993 Act (as amended).
- **Unincorporated Associations** – the SLC discussion paper considered options to grant separate legal personality to unincorporated associations in Scotland, namely:
 - a statutory scheme in which legal personality is acquired voluntarily by registration in a new public register; and
 - a scheme which attributes legal personality to associations which fulfil certain minimum criteria, either optionally or automatically.

Neither proposal would involve regulatory scrutiny.

57. The SCIOs Working Group saw merit in both these approaches: the former offering the clarity and credibility of a familiar framework, securing the confidence of funders, lenders and overseas partners; the latter offering a very simple, administratively “light-touch” route to obtaining limited liability and legal personality, perhaps more akin to the aspiration of the Scottish charity sector. The Group also acknowledged the drawbacks in each: an extensive regulatory framework could deter smaller Scottish charities from taking up the SCIO form, whilst the lack of regulatory underpinning in the proposals for unincorporated associations might not satisfy the needs of larger complex charities or address the concerns of potential creditors. However, these two contrasting models provided useful markers for opposing ends of a conceptual spectrum, between which a third model could be drawn that might be better suited to the target audience identified above for the SCIO.

OFFICE OF THE SCOTTISH CHARITY REGULATOR (OSCR) - ROLE OF THE REGULATOR

58 Before we proceed to consider the SCIO options in detail, it is worth considering the role of OSCR as the sole regulator of the SCIO. The introduction of the SCIO regulatory framework will undoubtedly have a significant impact on OSCR but the extent of that impact will be dictated by the options developed following this consultation. The more complex and detailed the regulations - and the greater the

⁸ http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/CIO_annex_e.pdf

numbers of charities that convert - the greater the potential resource requirements that will be placed on OSCR. If OSCR has to assume significant aspects of the Companies House role in relation to SCIOs, such as the maintenance and publication of certain registers and records, this could require major IT infrastructure investment. Similarly, if OSCR has to take on new functions in relation to insolvency procedures for SCIOs, we could expect there to be a significant impact on its existing role.

59. The expectation of the Scottish Government is that the registration and regulation of SCIOs will be resourced through OSCR's existing budget rather than asking SCIOs themselves to bear the cost, as companies do when paying filing charges. However, we do recognise that if some of the more detailed options are taken forward, the demands placed on OSCR may exceed its existing capacity. With current pressures on public spending, the likelihood of increasing existing resources is minimal and, in such a scenario, this will inevitably influence decisions on implementation of certain options, which will be judged on their ability to deliver value for money.

60. Beyond the issue of additional costs, there is the more fundamental question of an extension of OSCR's core regulatory function. OSCR was established to register and regulate charities in Scotland but does not currently have a formal role in the insolvency or sequestration of Scottish charities, beyond ensuring that any remaining assets are disposed of in accordance with the charity's purposes. Essentially, OSCR is a regulator of status (i.e. charitable status) but not currently a regulator of form (i.e. constitutional form such as incorporation). This latter aspect will change with the introduction of SCIOs and will require new processes and operations. However, other potential changes may require additional layers of expertise and skills and these too will impact on OSCR's resources. We understand that OSCR intends to undertake an impact assessment on the consultation options presented here.

61. Ultimately, the impact on OSCR and how this will be managed are matters for OSCR itself. As a Non-Ministerial Department, OSCR is independent from Scottish Ministers, reporting directly to the Scottish Parliament. So, as this is a Scottish Government consultation on the policy principles of SCIOs regulations, we cannot cover the detailed operational and administrative aspects of the regime, as these will be for OSCR to develop. For this reason we will not be seeking your views directly on OSCR's regulatory operations with regard to SCIOs but would ask you to bear in mind that your responses to other questions will impact on OSCR's role and in fleshing out the regime, the consequences for OSCR will be taken into account.

PART TWO - SCIO MODELS: OPTIONS APPRAISAL

62. In preparing the following three options, we have attempted to outline some basic frameworks as a starting point for discussion but recognise that the final model may draw on elements from different options. The most developed of these models is the first, representing the SCIOs Working Group's preferred option. The remaining two options, which we shall refer to as the "company model" and the "minimalist model" are more briefly sketched to provide simple suggestions of possible alternatives to the preferred SCIO design, weighing up the benefits and disbenefits of each. Detailed discussions of particular aspects, such as application process or insolvency, are explored in more depth in later sections.

OPTION 1 – THE PREFERRED SCIO MODEL

63. As discussed above, the SCIOs Working Group concluded that the target market for the SCIO would be charities with comparatively low to mid range incomes, that would benefit from the acquisition of legal personality and limited liability but for whom the administrative requirements of company law were a barrier to incorporation. So in designing a SCIOs model for this client group, the Group wanted to ensure that the new form would deliver those benefits without building in a similar degree of regulatory detail and administrative compliance as enshrined in company law.

The starting point: charity law

64. Whilst acknowledging that a balance needed to be struck between securing the benefits and protection of incorporation and applying the requirements and responsibilities placed on traditional corporate structures, the SCIOs Working Group questioned whether the trade-off must of necessity be a very detailed regulatory framework. One alternative approach would be to pare down the company model, retaining those elements necessary to ensure transparency and accountability but removing aspects which are not essential to the operation and regulation of a non-profit distributing corporate body. However, the Working Group felt that, as a matter of principle, the model should instead begin from the premise of charity law, adding only those elements thought to be essential to instil good governance and secure the confidence of third parties dealing with legal entities with limited liability. In other words, what is the reasonable cost of limited liability and legal personality to merit those benefits?

65. In this model, we would proceed from the baseline of charity law and regulation and ask ourselves what additional requirements were necessary for SCIOs. How will a SCIO differ from an unincorporated charity and what additional regulation will this necessitate? This model sets the regulatory floor for SCIOs, but is sufficiently flexible to allow SCIOs to voluntarily go further should they so wish. This is particularly relevant around the issue of raising finance. If the majority of potential SCIOs are small to medium sized charities with an average income of around £100,000, then we might expect that most would not want to use complicated financial instruments requiring the full range of supporting mechanisms. So we could design a flexible form that offers enough safeguards to justify separate legal identity and limited liability, but allows charities to go further if they wanted to demonstrate

they deserved other benefits. Were they to expand and assume more business oriented structures, we would expect the company format to be more appropriate.

Good Governance

66. It is worth remembering that SCIOs will be subject to most of the regulatory requirements placed on other Scottish charities. OSCRC's regulatory scrutiny of charities already provides effective safeguards against misconduct and poor governance and the SCIO would be subject to the same regulatory oversight as all other forms of Scottish charity. For this reason, there is no reason to build in further general duties for charity trustees of SCIOs as these are already set out in section 66 of the 2005 Act. SCIO members are also bound by some of these duties by virtue of section 51. Failure to fulfil these standards is to be treated as misconduct in the administration of the SCIO, which can lead to investigation and intervention by OSCRC. We consider these duties, and the consequences that would follow a breach, to be sufficiently broad to cover the risk of maladministration and see no need for further elaboration of these in regulations. Further general discussion of issues specifically relating to charity trustees and members can be seen below (from paragraph 119).

Constitutional framework

67. Other means of shoring up good governance arrangements could include making further provision on SCIO constitutions. There is little detail elsewhere in the 2005 Act concerning charity constitutions and, from the experience of OSCRC, we are aware that they can vary considerably, in form and content. There is no requirement in the 2005 Act for model constitutions to be set out in regulations but we will need to consider how much constitutional detail is specified in statute. The benefits of providing detailed constitutional requirements and structure in regulations include clarity for the charity and administrative ease for OSCRC. Third parties can also benefit from knowing what sort of body they are dealing with. However, such an approach can prove very restrictive and, once set in regulations, mandatory constitutional clauses would be difficult to amend or adapt to changing circumstances.

68. SCIO constitutions are explored in more detail below (from paragraph 105) but it is important to consider them briefly here as the approach to regulating SCIO constitutions is central to this model. The SCIOs Working Group sought to strike a balance in this model between supporting smaller organisations for whom model constitutions might be most useful, and providing flexibility to cater for the wide variety of organisational structures within the Scottish charity sector. Thus, its preferred approach would be to list in regulations the areas which a SCIO constitution must cover but not spell out actual clauses. Model constitutions could then be set out in guidance for would-be SCIOs to draw upon if so wished. This approach would fit well with a relatively simple regulatory framework for the SCIO which provides the foundations for good governance but allows SCIO members and charity trustees greater ownership of, and involvement, in the development process. At the heart of this model is an increased emphasis on the role of the members and charity trustees in the shaping of their SCIO and its governance, drawing on the

advice of umbrella support organisations, such as SCVO, and under the regulatory oversight of OSCR.

69. Shifting the emphasis from codifying actual procedural and administrative requirements in regulations to simply requiring that these be developed and covered in constitutions is one of the principal ways of lightening the regulatory framework for this SCIO model. It seeks to maintain accountability and organisational rigour, strengthening governance and building capacity, without encumbering SCIOs with excessive regulatory detail. This model of SCIO could carry significantly less administrative burden than company law, in terms of documentation and form-filling requirements, given the existing robust monitoring regime that OSCR operates.

Publication Requirements

70. Similarly, SCIOs could be subject to fewer or different publication requirements than companies. There are good governance reasons for requiring the maintenance of registers of members and charity trustees but under this model these need not be published by OSCR. Similarly, detailed provisions on the maintenance of registers of debentures and charges might be superfluous if the SCIO model were designed for charities with lower incomes that would not be expected to seek to raise finance in such ways, as discussed above. To require OSCR to operate a publication regime for such information could arguably add layers of administrative bureaucracy that would not be warranted for these small and medium sized charities, unlikely to use such loan instruments. Cutting out such provisions would significantly streamline the regulations. Alternative publication measures might instead require OSCR to publish a SCIO's constitution and accounts on its website, thus ensuring increased transparency, without actually placing any further burden on the SCIO itself. Under current charity law requirements, Scottish charities must prepare and submit accounts to OSCR and make them available to third parties on request. More discussion of publication requirements, particularly those pertaining to loan instruments, can be seen below (from paragraph 130).

A credible model

71. Would such a move undermine creditor protection and reduce confidence in the SCIO? One of the key questions which the SCIOs Working Group grappled with centred on the extent of the perceived risk of bad practice, non-compliance and abuse. Was it so significant as to require that all the safeguards from the company regime must of necessity be built into the SCIO framework to counter them? Does the credibility of the SCIO as a legal form, particularly with third parties from the business sector, rest on the technical details of the regulatory framework? Indeed, is the issue of charity form of great relevance to third parties?

72. Anecdotally, we have heard that unincorporated charities tend to experience few difficulties with banks and lenders as a result of their unincorporated form. In initial pre-consultation correspondence with representatives of the funding and lending sectors we heard that OSCR's regulatory oversight of Scottish charities was a source of reassurance to third parties. So would the additional administrative requirements placed on companies be justified for SCIOs? If the anticipated level of risk to which third parties might be exposed is likely to be of a lesser degree for

charities than for commercial organisations, it should be possible to omit many of these details, provided the SCIO is seen as embodying sufficient governance safeguards. This SCIO model could embody these in constitutional requirements, yet remain simple enough to set up and run, minimising the cost of professional advice. Of course, SCIOs are free to go beyond the requirements of the regulations if they want to build greater confidence. An example of this might be choosing to prepare accrued accounts because funders and lenders are likely to prefer these.

73. Of particular concern to third parties, such as potential creditors, would be the safeguards that were put in place to protect their interests in the (hopefully) unlikely event of a SCIO finding itself in financial difficulty. A range of options for solvent and insolvent dissolution of SCIOs are discussed in some detail in part four. None of the options set out in part four are specifically tied to any of these three SCIO models although some options would sit better with one model than others. The SCIOs Working Group did not have a single preferred option in terms of insolvency regimes, but did conclude that either a stripped down corporate insolvency route (option 2, from paragraph 175) or the proposal concerning the appointment of an independent third party in difficult cases (option 3, from paragraph 179) would be best suited to tie in with their preferred SCIO model.

74. You may find it helpful to better envisage the shape of this SCIO model and scope of its regulatory framework by consulting the suggested list of provisions provided at Annex A. This is by no means intended to be exhaustive and the final regulations for this model, if chosen, may appear very different. But we hope that it will provide a useful comparison with the other models and sharpen the focus on what such a framework might look like.

Q2. Having considered the issues discussed above and the draft framework provided at Annex A, do you agree with the Working Group that option 1 presents the right SCIO model for implementation?

Q3. Does it deliver those original policy objectives in creating a straightforward yet robust incorporation vehicle for Scottish charities?

Q4. Have we correctly identified the advantages and disadvantages? Do you think it has missed any aspects?

OPTION 2 – THE COMPANY MODEL

75. The option above reflects the preferred model identified by the SCIOs Working Group. However, we realise that it may be difficult to reach a view on its merit without alternative options with which to compare it. One such alternative is a model closely based on the company limited by guarantee, retaining many of the aspects of the company law regime. We would expect the regulations for this model to integrate significant elements of company law:

- Provisions for the **formalities of doing business under the law**, including **contracts, execution of documents and use of seals**⁹

⁹ similar to sections 43 to 52 of the Companies Act 2006.

- Provisions for the **register of members**¹⁰
- Provisions for the **register of directors or charity trustees**¹¹
- Provisions for keeping and use of **records of resolutions and meetings**¹²
- Provisions for the notification and registration of **debentures**¹³
- Provisions for the notification and registration of **charges**¹⁴.
- Provisions for the keeping and use of **records, service of documents and communications**¹⁵
- Provisions for **delivery of documents** to the regulator¹⁶

76. Were we to draw on this approach, such a model would require a regulatory framework designed to make provision for many possible circumstances in the lifecycle of a SCIO. Additionally, it might be necessary to import and modify significant portions of other legislation, particularly sections of the Companies Act 2006 and subordinate legislation made under it. As the consultation proceeds to discuss some specific aspects of the SCIO, it will become evident that, if this model were to be adopted, a much higher burden of administrative procedure would be required than would be necessary for simpler models. So that, in the case of winding up and dissolution, for example, the full machinery of corporate insolvency would most probably be applied (see section on insolvency and dissolution below). The table in Annex B provides a suggested list of provisions that this model of SCIO might include, again not intended to be exhaustive but it may be helpful in illustrating the possible extent of the regime.

77. This design approach would be based on three key principles:

- firstly, a regulatory structure that is deliberately detailed would aim to codify procedure for all contingencies; this does not necessarily provide for any significant degree of flexibility but does strive for consistency of practice and enforcement;
- secondly, embedding all the necessary detail in statute would be more likely to ensure adherence to standards of disclosure and transparency, and may minimise the risk of bad practice; and
- finally, this model would be grounded on the principle that the credibility of the SCIO as a legal form would be dependent on robust accountability requirements to provide the safeguards necessary for significant financial transactions.

78. This option, based on the model of the company limited by guarantee, would capture many of the safeguards enshrined in company law but would have the benefit of single registration, reporting and regulatory oversight. Utilising the company model could also have the benefits of familiarity and confidence. It borrows from a structure that is known and trusted by banks, funding organisations, and businesses both within the UK and overseas. This could ease the bedding in

¹⁰ similar to **Chapter 2 of Part 8 of the Companies Act 2006**.

¹¹ akin to elements of **Chapter 1 of Part 10 of the Companies Act 2006 in relation to Directors**.

¹² as in **Chapter 6 of Part 13 of the Companies Act 2006**.

¹³ drawn from **Parts 19 & 21 of the Companies Act 2006**.

¹⁴ as in **Chapter 2 of Part 25 of the Companies Act 2006**

¹⁵ elements of **Part 37 of the Companies Act 2006**.

¹⁶ elements of **Part 35, Companies Act 2006**.

process as charities and their advisors may draw on prior experience of working with the company model.

79. This option could potentially create new and significant responsibilities for OSCR as much of the filing and information requirements taken from company law would be imported for SCIOs. The full extent of the practical impact on OSCR would only emerge once the model was fully developed but it seems likely that significant aspects of the Companies House role would have to be taken on. This could entail a more fundamental change for OSCR in expanding its core business. Questions also arise as to whether OSCR's enforcement powers would carry sufficient weight to reinforce the requirements under this model, without the creation of additional criminal penalties, akin to those built into company law. As discussed below (from paragraph 145), the 2005 Act does not provide for the creation of offences in the SCIO regulations and without the necessary statutory authority, criminal penalties cannot be created in subordinate legislation (i.e. regulations) unless the primary legislation (i.e. the 2005 Act) is amended.

80. The extensive regulatory scaffolding required for this model could prove to be a significant deterrent for some smaller organisations. Indeed, forming a charity as an incorporated body, of whatever structure, will not be the optimal approach in every case but our expectation is that, if the SCIO were to follow this model it would be most attractive to larger, more sophisticated organisations. In reality, this represents a relatively small proportion of the Scottish charity sector and the SCIOs Working Group questioned whether this is the segment of the sector for which the SCIO should be designed. Indeed, many of these charities may already be incorporated as companies and whilst this model may prove attractive to those charities which are already familiar with many of these requirements, would the development and introduction of a brand new incorporation vehicle for a potentially small number of organisations be justified? The main advantage would appear to be removal of dual registration and reporting but would this in itself be so significant as to warrant the introduction of a new, complex regime? Is compliance with existing company legislation so onerous a task for larger charitable companies of whom there are relatively few? Would they not be better advised to remain as charitable companies? What value would such a model add?

81. The Working Group thought this model unlikely to meet the needs of the smaller to medium sized unincorporated charity that would benefit from legal personality and limited liability, yet for whom such complex regulatory requirements were a significant disincentive, requiring costly professional advice. It would meet the requirements of those charities currently following company requirements and free them from double regulation. But it is not clear that this benefit is sufficient – for this scale of body – to justify the costs of conversion. The Group concluded that the company model did not meet the original policy drivers for the SCIO and would not deliver a more straightforward, cost-effective incorporation vehicle for a significant number of Scottish charities. However, we would welcome your views on this model.

Q5. Do you agree that option 2, the company model would not deliver the best SCIO form for Scottish charities? Have we correctly identified the advantages and disadvantages? If you disagree, please tell us why.

OPTION 3 – THE MINIMALIST MODEL

82. Another alternative option to the SCIO model preferred by the SCIOs Working Group would be to take the provisions in chapter 7 of the 2005 Act as providing the basic form of the SCIO and seek to add no more than is absolutely necessary. The assumption here is that the on-going administration of the SCIO should be no more complex than that of another form of charity (i.e. unincorporated association). The basis for this model would be very similar to that proposed for unincorporated associations by the Scottish Law Commission. The key differences would lie in the retention of existing charity regulation for SCIOs, which is already beyond that proposed by the SLC in relation to its proposed new law of unincorporated associations, for which little or no registration or reporting requirements would be introduced. There is certainly no intention to provide a regulatory framework for SCIOs which would create a lesser standard of reporting and regulation than is in place for other Scottish charities. But we could start from the existing position for charities, using the provisions in primary legislation for SCIOs as a baseline and consider only the barest minimum of additional regulation for SCIOs.

83. The provisions set out in chapter 7 of the 2005 Act establish a baseline for SCIOs which cannot be altered by the SCIO regulations. That is not to say that the primary legislation could not be amended in future but that is not the subject of this consultation. Thus it would not be possible in regulations to adopt an “opt out” system, as discussed in the SLC’s paper, whereby all unincorporated charities on the Scottish Charity Register would automatically be designated as SCIOs, unless they had actively chosen to remain as they were¹⁷. As discussed below (from paragraphs 87), designation as a SCIO flows from a decision by OSCR based upon its determination of an application. So this necessitates an “opt in” system. In this option, we could seek to limit the administrative requirements associated with the application or opt in process, so that it is, in essence, no more difficult to apply to become a SCIO than it is to apply for charitable status.

84. But can or should the SCIO realistically be this simple? The almost complete lack of regulatory detail may leave OSCR and charities with more confusion than clarity, with little to distinguish a SCIO from any other form of charity. Detailed regulations need not be about tying organisations in red tape; they can clarify difficult issues and provide clear rules which can be understood by all parties. An opportunity would be missed to create a distinct form and identity for the SCIO, with solid governance foundations, which could be considered credible and robust. Without some basic additional constitutional requirements, would the SCIO form instil confidence in third parties or provide sufficient reassurance that the SCIO is properly managed? Without a distinctive structure and framework would charities understand the SCIO as a distinct entity and consider the transition worthwhile? Should the benefits of limited liability and legal personality have a cost because of the increased risk to the rest of us?

¹⁷ See paragraph 4.12 onwards of the SLC’s [Discussion Paper on Unincorporated Associations \(DP 140\)](http://www.scotlawcom.gov.uk/downloads/dps/dp140.pdf) which can be viewed at: <http://www.scotlawcom.gov.uk/downloads/dps/dp140.pdf>. While this would remove uncertainty around the legal personality of unincorporated charities and the liability of their members, it would not be possible without amendment to the 2005 Act. Were such a move to be contemplated in future its potential benefits would have to be weighed against the resultant removal of choice regarding legal form for Scottish charities.

85. The brief list of provisions at Annex C aims to add the minimum of regulatory detail and provides very little by way of an indication of what the SCIO would look like. Similarly, the insolvency regime we would expect to apply with such a model is the “Default” option (from paragraph 188). While this may initially be an attractive option, as we proceed to discuss some particular aspects of the regulatory framework, the case for more detailed regulations might become more persuasive. The SCIOs Working Group did not think that such a model provided an ideal framework for incorporation.

Q6. Do you agree that option 3, the minimalist model would not provide the ideal structure for the SCIO? Have we correctly identified the advantages and disadvantages? If you disagree, please tell us why.

Q7. Of the three models outlined above, which would you prefer the SCIO to be based on? Please tell us why you have chosen a particular option over and above the others.

PART THREE - OTHER ASPECTS OF THE REGULATORY FRAMEWORK

86. The following sections discuss certain aspects of the SCIO regulatory framework in more detail. The reason for considering these elements separately from the models described above is that in most instances the questions raised would apply across the models.

APPLICATION PROCESS

87. Some details of the application process for a body applying to be constituted as a SCIO are already spelt out in the 2005 Act. Section 54 requires that:

- 2 or more individuals apply;
- the application must state proposed name of SCIO;
- the application must state the proposed principal office, which must be in Scotland;
- the application must be accompanied by a copy of the SCIO proposed constitution; and
- include any other information or documentation required by regulations under s6(1) or otherwise requested by OSCR.

88. If you compare the above requirements with those set out in section 4 concerning application for entry in the Scottish Charity Register, the provisions are very similar, although the latter are in fact slightly more detailed, requiring applicants to:

- state name of body applying;
- state principal office, or name & address of would-be charity trustees;
- accompany application with statement of body's purposes;
- accompany application with copy of body's constitution;
- accompany application with body's most recent statement of account (if any); and
- any other information or documentation required by regulations under s6(1) or otherwise requested by OSCR.

89. So on the face of the 2005 Act, there is little to differentiate between the two application processes. Indeed, it would be possible to leave it at that and allow the two processes to operate conjointly (albeit that SCIOs are subject to section 54 of the 2005 Act and not section 4), building on the familiarity and administrative ease of the existing application system. As yet, Ministers have not exercised their powers under section 6(1) to make further regulations concerning the application process for charitable status (including applications under s.54(1)). They also have powers under section 64(a) to make further provision in relation to application for constitution as a SCIO. Such regulations can make provision about the information and documentation required, the form and manner of applications, the period within which OSCR must make a decision and the circumstances in which OSCR may refuse to enter a body on the register.

90. It would seem sensible to assume that the need to make further provision with regard to the application process would depend on which of the SCIO design options, described above, were chosen. Even if a very sophisticated company style model was developed, it could be considered preferable to leave the additional details of the application process to be developed and set out administratively. This would give OSCR the freedom to modernise the application requirements without recourse to regulatory amendments. It does not imply that such requirements would be optional; the Act is clear that applicants must supply other information or documents “otherwise required by OSCR”¹⁸. And for those who might be concerned that this gives OSCR free rein to place unnecessarily excessive demands on applicants, it is required by section 1(9) of the 2005 Act to perform its functions having regard to “the principles under which regulatory activities should be proportionate, consistent, transparent and targeted only at cases in which action is needed”.

91. Currently, in addition to the application requirements set out in section 4¹⁹, OSCR also requires applicants for charitable status to:

- state the proposed constitutional form of the prospective charity;
- provide details of the parent charity (if any);
- state the accounting period end date;
- state proposed beneficiary group;
- state proposed geographical spread;
- state proposed conditions of benefit;
- provide a statement of proposed activities/type of activities; and
- provide a charity trustees’ declaration.

92. So it is conceivable that the SCIOs regulatory framework could include such requirements in addition to those already set out in the 2005 Act. However, we are of the view that OSCR’s existing approach to standard applications for charitable status works well and could be carried over to the SCIOs regime. We would welcome your views as to whether all application requirements should be set out in regulations or left to OSCR to develop, consult on, and publicise in guidance.

Q8: Do you agree that the additional details of the SCIO application process should be set out administratively by OSCR rather than in regulations?

Q9: Are there specific additional requirements you would expect to be required in SCIO applications?

Unincorporated associations - incorporation as SCIOs

93. In addition to the application provisions for the establishment of new SCIOs set out in section 54 of the 2005 Act, there are also provisions for the conversion of existing charities which are companies and industrial and provident societies to SCIO form. The reason that there is no reference to conversion of unincorporated charities to SCIOs is that the conversion mechanism can only apply to charities that

¹⁸ Section 54(2)(d)(ii) of the 2005 Act.

¹⁹ in terms of the power in section 4(d)(ii)

are already incorporated and therefore already have legal form. Conversion of, for example, a company to a SCIO alters the legal form of the body, from one corporate form to another; for an “unincorporated association”, clearly there is no corporate body to convert. Therefore, for an unincorporated charity, the process of becoming a SCIO will involve incorporating and, as such, the creation of a new legal entity. So this will mean that the application process set out in section 54 will be followed in the case of charities that are currently unincorporated.

94. OSCR already deals with charities that wish to incorporate (usually unincorporated charities that change their legal form to become companies limited by guarantee). In such situations, charitable status for the new body (the new charitable company) will have to be sought before the existing charity (the unincorporated association) transfers all its assets and liabilities to the new charitable company and is dissolved.

95. The process for incorporating as a SCIO could be very similar²⁰ and the following is an indication of the steps involved:

- establishment and entry in the Scottish Charity Register of a new SCIO; and
- dissolution of the old charity and its removal from the Register.

CONVERSION

96. The 2005 Act provides some detail around the mechanics of conversion, such as the procedural requirements for submission and determination of applications, as well as the removal of the body from one register, be it the Register of Companies or the Mutuels Register (for industrial and provident societies (I&Ps)) and its subsequent entry on another. It is intended that once OSCR has confirmed that it will grant the body's application to become a SCIO, the relevant original Registrar will cancel the body's entry on the original register, subject to its own procedures and rules.

97. During initial preparatory stages, we met with the Registrar of Companies in Scotland and identified some key areas for further consideration of which conversion is a primary example. In considering conversion provisions for charitable companies and I&Ps to SCIO status, further discussions with the Registrar and with the Financial Services Authority, as the current regulators of these bodies, will be necessary to explore the technical aspects of conversion. Many of these issues will be operational matters to be explored between OSCR and the relevant regulators, but these discussions will be underscored by the twin objectives of administrative ease and maintaining accountability.

98. The application process for conversion follows that of new applicants under section 54 of the 2005 Act, with the additional requirement for copies of the relevant resolutions. The extent of further information or documentation which may be required will be, to some degree, dictated by the model chosen for the SCIO. The 2005 Act requires OSCR to consult the relevant Registrar and such other persons as

²⁰ Section 55(4) provides that “All property for the time being vested in those individuals (or any of them) on trust for the charitable purposes of the SCIO (when constituted) vests by virtue of this subsection in the SCIO”, so we might anticipate that the transfer arrangements may be more streamlined.

it thinks fit. So regulations may provide for similar arrangements to those used by Companies House during the winding up of a company, or for the publication process that OSCR undertakes for a charity reorganisation scheme.

99. As with new applications, there are good grounds for resisting the temptation to spell out every aspect of the process in regulations. This will allow OSCR to develop systems, in consultation with its stakeholders, that are fit for purpose but which can also be adapted in light of experience without recourse to regulatory amendment.

Q10. Do you agree that the additional details of the conversion process should be set out administratively by OSCR rather than in regulations?

100. It is worth noting at this juncture that the 2005 Act does not provide for the conversion of a SCIO to a charitable company form. Given that company law is reserved to Westminster, devolved legislation cannot make provision about the creation of a company, and this would include making provision for SCIOs to become companies. The regulation making power in section 64 is quite clear that the “other matters” upon which Ministers can make regulations for SCIOs must be in “connection” with the provisions made in Chapter 7 of the 2005 Act. As the chapter does not make provision for the conversion of SCIOs to other corporate forms, or indeed for corporate forms other than companies and I&Ps (such as CIOs, CICs or statutory corporations) to convert to become SCIOs, the SCIO regulations cannot make provision for these either.

AMALGAMATION

101. The process for amalgamation of SCIOs shares many themes with the process for conversions. The important factors for creating a robust conversion and amalgamation framework are the adequate provision of information relating to existing and proposed structures, records of decisions and agreement of the relevant parties, including other regulators and, potentially, interested third parties. The need to provide a clear audit trail will be essential, both in recording the steps in the process, but also in allowing others to trace the migration of organisations from one regime to another, as well as the merger of smaller entities to form new larger ones.

102. A successful amalgamation regime will create the context for the strengthening and growth of SCIOs. It will facilitate the joining of SCIOs in a streamlined process. In amalgamating two or more SCIOs, a brand new SCIO will be created. The amalgamation provisions in the 2005 Act (sections 59 and 60) do not cater for take-overs where one SCIO would be absorbed into another which retains its identity. Were this to be the desired outcome, the smaller SCIO would need to be wound up and dissolved before its assets were transferred to the SCIO which was intended to continue.

103. It should be noted that the amalgamation provisions do not provide for the merger of a SCIO with a CIO. If a SCIO and a CIO wished to merge, they would first need to decide which form the merged charity should take, based on where its principal office would be (i.e., in Scotland or in England and Wales) and then one

would have to wind up and transfer its assets to the other, seeking the consent of the relevant regulator to do so.

104. The provisions in the 2005 Act do not include much detail on OSCR's determination of the application for amalgamation; so there is scope for more detail to be developed in regulations, although the process would be more flexible if it was not codified in statute. The extent of regulatory detail will again depend on the option chosen for the SCIO structure. If the SCIO were to be closely modelled on the company limited by guarantee, it might be necessary to include many of the requirements placed on merging companies under Chapter 2 of Part 27 of the Companies Act 2006. Alternatively, a much lighter structure might require much less administrative detail with minimal regulations, beyond some additional publication requirements. Were we to follow the Working Group's preferred model, we would be minded to leave much of the procedural detail to be determined administratively and restrict the regulatory detail to further publication requirements.

Q11. Do you agree that the additional details of the SCIO amalgamation process should be set out administratively by OSCR rather than in regulations?

CONSTITUTIONS

105. There is little detail elsewhere in the 2005 Act concerning charity constitutions and, from the experience of OSCR, we are aware that they can vary considerably, in form and content. By way of contrast, there are dedicated provisions for a SCIO's constitution under section 50, which stipulate that it must:

- state its name and its purposes;
- make provision:—
 - about who is eligible for membership, and how a person becomes a member; and
 - for the appointment of 3 or more persons ("charity trustees") who are to be charged with the general control of the SCIO's administration, and about any conditions of eligibility for becoming a charity trustee.
- also provide for such other matters, and comply with such requirements, as are specified in regulations made by the Scottish Ministers.

106. In contrast to the CIO in England and Wales²¹, there is no requirement under the 2005 Act for SCIO constitutions to be set out, clause by clause, in regulations. However Ministers may choose to make requirements in relation to SCIO constitutions in regulations made under section 50(3) of the 2005 Act. So, while we need not develop mandatory constitutional forms for the SCIO, we will need to consider the extent to which the form and content of SCIO constitutions are provided for in subordinate legislation. There is potential scope to allow greater constitutional freedom for SCIOs, with best practice supported through the provision of OSCR

²¹ **Section 69B(5) of the 1993 Act (as amended)** states that "A CIO's constitution shall be in the form specified in regulations made by the Commission, or as near to that form as the circumstances admit."

guidance, but this would need to be weighed against the potential risks to quality, probity and good governance standards.

107. There are a number of possible approaches to regulating the design of SCIO constitutions. These include:

- setting out elements that have to be included;
- designing models that have to be adopted;
- providing models that can be expanded; or
- none of the above, i.e. allowing complete freedom in the drafting of constitutions.

108. The Working Group was fortunate to have in its membership a representative of the Law Society who had previously worked with the original Charity Bill Team on SCIOs proposals. As part of that work, Stephen Phillips had developed two model constitutions for a “foundation” type SCIO, based on the trust model of charity and an “association” form of SCIO, which was closer to a membership based organisation. To support the Working Group’s deliberations, a sub-group met to discuss these models and consider how they might best be reshaped to reflect the further policy development. The **revised model constitutions**²² can be viewed on the Scottish Government’s website. As invaluable as they have proved in developing our thinking about SCIO constitutional requirements, they include a number of assumptions about the SCIO form and so we have opted not to include them in this document in order not to unduly influence responses on the SCIO options set out above. Please do take the opportunity to view the models but we would ask that you consider them separately from the SCIO options presented here.

109. Whilst the specific clauses in SCIO constitutions will depend to a large extent on the option chosen, there are some basic questions of specificity and prescriptiveness which can be considered separately. Model constitutions can prove to be very helpful, particularly to smaller bodies with limited resources, but also to regulators and third parties, providing clear, well developed governance structures and rules. However, this approach leaves little room for flexibility and places a very onerous task on the drafter to design a one-size-fits-all constitution to which all potential SCIOs would have to conform. Placing the constitutional model in regulations also restricts the possibility of amending the design to meet changing needs or previously unforeseen circumstances. This is where the approach to providing a model constitution in guidance would have the advantage of allowing OSCR and SCVO to amend it in response to new or altered information.

110. It has been suggested that there is an inherent danger in providing model constitutions, namely that charities may become SCIOs without fully understanding the implications. Off-the-shelf constitutions might fail to meet the needs of organisations, and lead to a lack of awareness among charity trustees of the powers/restrictions which the constitution places on them. An alternative would be to spell out some very basic constitutional requirements in regulations but allow much greater freedom for “freestyle” constitutional drafting, eschewing the model approach altogether. This would demand greater involvement from charity trustees in creating

²² (<http://www.scotland.gov.uk/Resource/Doc/48453/0084366.pdf>)

a custom-made SCIO constitution and encouraging more ownership of its design. However, it would place a heavier burden on charity trustees, particularly of the smaller organisations and we have heard pleas from representatives of such charities for an off-the shelf model which would be easily adaptable to reduce the costs of seeking professional drafting advice. Dropping the concept of a model constitution altogether would inevitably lead to a huge variety of constitutional styles and forms, which would, in turn, be more resource intensive for OSCR during the application process.

111. Other alternatives include providing model sections for 70-80% of the constitutions, allowing some flexibility for organisations to adapt the remainder to their own requirements. Or perhaps models could be developed purely for use by smaller charities with larger charities required to develop their own, in recognition of the likelihood that bigger organisations may require more sophisticated governing documents to cater for more complex structures and governance arrangements. Sector-specific model constitutions might provide a better solution but could significantly add to the work of preparing and monitoring guidance. This is a subject about which we would be particularly keen to hear the views of charities and other interested parties.

112. So while there is no requirement in the 2005 Act for model constitutions to be set out in regulations, we will need to consider how much constitutional detail is specified in subordinate legislation. Having considered a variety of possible approaches to regulating constitutions, the Working Group concluded that it would be better to set out in regulations the areas which a SCIO constitution must cover but not stipulate how these should be covered. This would ensure that certain key governance aspects featured in SCIO constitutions but would allow precise clauses to be tailored to the needs of the SCIO in question. Model constitutions could then be developed by OSCR and SCVO upon which potential SCIOs could draw.

Q12. Do you agree that the regulations should cover the basic elements to be required of a SCIO constitution rather than setting out the exact form and content?

113. What governance aspects should then be listed in the regulations? Further to the requirements above which are set out in the 2005 Act and require clauses on membership and trusteeship, the regulations made under section 50(3) might also require the following to be addressed:

- powers and general structure;
- procedural rules, including calling and holding of meetings, quorums, decision-making processes, voting rights, resolutions, minutes and records;
- board composition and role of office-bearers, as well as rules dealing with conflict of interest;
- administration, including delegation, accounting, record-keeping, etc; and
- arrangements for winding up and dissolution.

Q13: Do you agree that these are the aspects of SCIO governance that SCIO constitutions should be required to cover? If you think any aspects have been missed, please provide details of these.

114. By requiring that these aspects be covered in SCIO constitutions, the members and charity trustees will be encouraged to give full consideration to the management and structure of the body. The development of such clauses should help to underpin best practice in SCIO governance, as well as allowing sufficient flexibility to cater for the abundant variety of organisational structures within the Scottish charity sector. It was this desired flexibility and the drive to encourage more ownership of constitutions amongst charity trustees and members that led the SCIOs Working Group to move away from a fixed constitutional design for the SCIO. However, there was also a strong motivation to ensure that potential SCIOs were properly supported in that process and, thus, this relative freedom in constitutional design was to be balanced by the provision of clear non-statutory guidance from OSCR, complemented with advice from sectoral representative bodies, such as SCVO.

DOCUMENTS

115. All charities are required to disclose their charitable status on certain documents under section 15 of the 2005 Act and the **Charities References in Documents (Scotland) Regulations 2007** (as amended). These requirements are disapplied to SCIOs under section 52(4) of the 2005 Act. Section 52 contains similar requirements to section 15, to be elaborated in regulations made under section 52(1), but with the key difference being that a criminal penalty is attached to failure to comply. This mirrors the fact that charitable companies are subject to trading disclosure requirements that have offences attached²³. The penalty resulting from the offence of failing to comply with the requirements of section 52 is set out in section 53 and, therefore, not the subject of this consultation.

116. However, we would welcome your views on what documents should be included in the regulations. For the avoidance of confusion, the SCIOs Working Group proposed that the SCIOs regime should be aligned with that for all other Scottish charities in terms of the documents which must identify status. The Charities References in Documents (Scotland) 2007 Regulations (as amended) list the documents that could feature (although we would wish to point out that it remains our policy intention to add websites to this list, as indicated in our recent consultation **“Proposals for Minor Amendments to the Act and to the Charities Accounts (Scotland) Regulations 2006”**²⁴) and there is no good reason why we should not simply apply the same requirements as for other charities:

- business letters and e-mails;
- advertisements, notices and official publications;
- any document which solicits money or other property for the benefit of the charity;
- bills of exchange (excluding cheques), promissory notes, endorsements and orders for money or goods;

²³ Under section **112 of the Companies Act 1989** as amended

²⁴ See paragraph 39 of the **Proposals for Minor Amendments to the Act and to the Charities Accounts (Scotland) Regulations 2006** (<http://www.scotland.gov.uk/Publications/2009/04/24092805/4>)

- bills rendered;
- invoices, receipts and letters of credit;
- statements of account prepared in accordance with either regulation 8, 9 or 14 of the Charities Accounts (Scotland) Regulations 2006;
- educational or campaign documentation;
- conveyances which provide for the creation, transfer, variation or extinction of an interest in land;
- contractual documentation;

Q14. Do you agree that the documents and information sources, in which SCIOs should be required to include their name, should mirror those for other Scottish charities?

117. Separate from the requirements of section 52, the SCIO regulations under section 64 could include specific provisions on the keeping, submission and publication of certain categories of documents. There are no requirements on non-company charities to maintain and publish documents and records (other than constitutions and accounts, which include trustees' annual report, etc). Charitable companies must adhere to a number of requirements under company law in relation to written resolutions, minutes of meetings and other records.

118. The 2005 Act already places certain requirements on charities in relation to SCIO constitutions (see above) and resolutions in relation to conversions, amalgamations, transfers and amendment of constitutions. While we consider it appropriate to require SCIO constitutions to cover administrative and procedural matters, such as the recording of decisions and record keeping, we would not be minded to regulate separately on these aspects. However, we would be interested to hear your views on whether additional requirements should be included in the regulations on documentation and record keeping.

Q15. Do you agree that the SCIO regulations should not make specific provision on the keeping and/or publication of records and minutes, and the submission of certain documentation to OSCR, (additional to that already in the 2005 Act)?

CHARITY TRUSTEES AND MEMBERS OF SCIOS

119. Central to the SCIO project is the desire to provide limited liability to those who set up and run charities, often in a voluntary capacity. Limited liability in this context is specifically related to personal financial liability; it does not cover personal liability for negligence²⁵. We appreciate that exposure to personal financial liability is regarded by some as a disincentive to working with unincorporated charities and that the introduction of the SCIO may counter this. A key benefit of the SCIO is that it will protect its members from such liability. Charity trustees, if distinct from the members of a SCIO, will be treated like company directors, as "agents" of the SCIO, and

²⁵ It is important to differentiate between the personal financial liability for the debts of an organisation, referred to in this context and the liability for alleged breach of duty. Trustee indemnity insurance (TII) is intended to cover trustees against having to personally pay legal claims made against them (by their charity or by a third party) for a breach of trust, or a breach of duty or negligence, committed by them in their capacity as trustees. TII is designed to insure against claims that may arise from their legitimate actions as trustees, and will be covered against liability as long as they have acted honestly and reasonably.

therefore enjoy similar protection to that afforded to company directors who act in accordance with their duties.

120. It might be helpful if we clarify what is meant by the term “members” in the context of the SCIO provisions. “Membership” in the language of charities can mean the charity’s trustees, its beneficiaries or volunteers, a list of subscribed supporters or fee-paying users of a particular facility or, indeed, those who by dint of enrolment at a particular educational institution are considered members. SCIO members are more akin to members as understood in the company law sense, more commonly known as shareholders and have duties and rights flowing from this financial stake in the company. Clearly, SCIO members will not be shareholders in this sense but their relationship with the SCIO is similar, in terms of a clearly defined role and stake in the organisation.

SCIO members’ duties

121. An issue not of direct relevance to the SCIO regulations, but one worth noting at this point, is the duties placed on members of SCIOs under the 2005 Act. Section 51 states that members of a SCIO (whether or not they are also charity trustees) are also subject to duties ascribed to charity trustees under section 66(1)(a), (3) and (4), namely that in exercising their functions in their membership capacity, they must act in the interests of the charity, in particular seeking “in good faith to ensure that the charity acts in manner which is consistent with its purposes”. Failure to do so will be considered to be misconduct in the administration of the charity, although this duty is without prejudice to any other duty imposed on a charity trustee by enactment or otherwise in relation to the exercise of their functions. This means that if a charity trustee or SCIO member is obliged to follow a certain course of action by law, such as a requirement in insolvency or employment legislation, which does not appear to be in the interests of the charity, they will not be guilty of misconduct in adhering to those requirements.

Registers of members/charity trustees

122. Currently, there is no requirement for charities or OSCR to keep or publish registers of charity trustees or members (although charity trustees should be listed in the Trustees Annual Report unless exempt from this requirement under section 3(4) of the 2005 Act). Charitable companies will be subject to the register requirements of company law, which include a requirement to keep and publish a register of members²⁶ and a register of directors²⁷. While the extent of registration requirements for charity trustees and members of SCIOs may be linked to the model structure chosen, it is also possible that a comparatively basic SCIO model could include a requirement to keep such registers if this were deemed essential for reasons of transparency.

123. However, we are aware that for large membership charities with possibly hundreds of members a publicly available register could be problematic, both in terms of its administration, cost and, more significantly in relation to protection of personal information. Provisions for the maintenance and publication of registers of

²⁶ Chapter 2 of Part 8 of Companies Act 2006

²⁷ sections 162 to 167 of the Companies 2006 Act

charity trustees might be more feasible, given that we might expect this to be a smaller and perhaps more stable register than that of members, which may fluctuate more. Charity trustees of a SCIO are subject to more statutory duties than SCIO members under section 66 of the 2005 Act and it might be reasonable to demand greater accountability of them.

124. Registers do not necessarily provide the transparency that some might expect. They can be unreliable, depending on the accuracy of the information provided and quickly become out of date. So they can provide a false sense of security, whilst levying an administrative burden on the charities and the regulator for little actual value. An alternative option would be to include provisions on the maintenance of such registers by SCIOs, as a matter of good governance, but not require them to be accessible to the public.

125. OSCR has powers under the 2005 Act to request information in the discharge of its regulatory functions, so the SCIOs Working Group saw no reason to make separate provision for the submission of registers to OSCR, either at a set time or on demand.

Q16. Do you agree that SCIOs should be required to keep registers of their members and that such registers should not be accessible to the public? If you disagree, please tell us why.

Q17. Do you agree that SCIOs should be required to keep registers of their charity trustees and that such registers should not be accessible to the public? If you disagree, please tell us why.

Eligibility for membership/charity trusteeship

126. Ultimately, it will be for SCIOs to determine their own rules around eligibility for membership and charity trusteeship which should be spelt out in their constitutions. It should be noted that the 2005 Act contains provisions relating to disqualification from charity trusteeship and these would apply equally to SCIOs as to any other charity. There is no policy intention to dictate additional rules in the SCIO regulations. However, there may be some categories of potential members and/or charity trustees that it is desirable to explicitly exclude in SCIO constitutions. There are good governance reasons for making such exclusions, perhaps to avoid potential conflicts of interest by excluding employees from membership and/or charity trusteeship, or to ensure continuity of Board membership by excluding corporate charity trustees who may not be represented by one single individual. These would be decisions for the SCIO members and we see no reason to set such restrictions in statute.

127. In relation to the minimum age of a SCIO charity trustee, the Working Group were clearly of the view that this should be set at 16 to mirror the age of legal capacity in Scotland²⁸.

²⁸ [Age of Legal Capacity \(Scotland\) Act 1991](#)

THIRD PARTIES

128. Section 62 of the Act provides that a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. Third parties may also assume that charity trustees are authorised to act on behalf of the SCIO they represent in any matter. This is intended to provide a level of protection to those dealing, in good faith, with SCIOs and their charity trustees, in a similar manner to that provided to those dealing with registered companies.

129. We want to ensure that this new form of charitable incorporation delivers a streamlined regulatory framework that removes the need for dual regulation but is also deemed to be a credible, robust organisational structure by those beyond the charity sector in Scotland. It may be important that SCIOs have the ability to raise finance, if necessary, and to engage contractually with third parties. To that end, we are interested in the factors that might influence the approach of third parties to doing business with charities which adopt the SCIO form in future, and the steps we should take to ensure that charities converting from limited company form do not face any additional business difficulties in doing so. As part of our pre-consultation work, we wrote to a number of organisations representing the business and financial sectors in Scotland to explore some of these issues. We received some very interesting responses, expressing a range of views and would be interested to hear wider views on some of the questions posed:

Q18: Do you agree that the preferred SCIO model outlined above (option 1, page 22) will help to minimise any uncertainty about doing business with a new form of incorporated organisation?

Q19: Do you anticipate there being any additional costs for third parties associated with the introduction of a new form?

Q20: Do you consider it important for a SCIO to be able to raise finance?

PUBLICATION REQUIREMENTS

130. Some charities, particularly the larger ones, may wish to borrow in order to expand their services or to acquire property or equipment. Section 50(5) of the 2005 Act empowers the SCIO to do anything which is calculated to further its purposes or is conducive or incidental to doing so, subject to anything in its constitution. So barring any prohibitive clause in its constitution, a SCIO can seek to borrow in the furtherance of its purposes.

131. To minimise the risk of default on the loan, lenders will often require a security for such borrowing in the form of a mortgage, a fixed charge or a floating charge over the assets of the body. This provides the lender with the possibility of recouping the funds from the sale of such assets in the event of non-repayment of the loan. In the event of liquidation or receivership under the companies regime, those lenders with charges over certain assets have first priority over those assets. A lender will wish to be assured that the borrower does indeed own the assets and whether any other charges are attached to the assets in question. Many companies will enter into a

debenture with a lender, which is essentially a document acknowledging the debt, issued by the company.

132. Most types of security granted by companies must be registered with Companies House. This is to ensure that other potential lenders can be easily aware of pre-existing charges. **Companies House guidance** specifies that the following types of security require registration in Scotland:

- a charge to secure any issue of debentures;
- a charge on uncalled share capital of the company;
- a charge on land (wherever situated), or any interest in it, but not a charge for any rent or other periodical sum arising from land;
- a charge on book debts of the company;
- a floating charge on the company's undertaking or property;
- a charge on calls made but not paid;
- a charge on a ship or aircraft or any share in a ship; and
- a charge on goodwill, on a patent or a licence under a patent, on a trademark or on a copyright or a licence under a copyright.

133. These registration requirements flow from company law. The question for us in designing the SCIO is whether parallel registration requirements should be built into the SCIO regulatory framework. This question is directly linked to the discussion of options above. The closer the design to the company model and more detailed the regulatory framework, the more likely it is that such requirements will feature in the SCIO regime as it would be targeted at those likely to be interested in more complex financial mechanisms. If we were not to provide such detailed provisions on registration of charges, because the form was aimed at smaller organisations, that need not mean that SCIOs were prohibited from granting securities but it might impact on the willingness of lenders to enter into these arrangements.

134. The complexities associated with building the regulatory infrastructure to provide for the registration of charges would contrast starkly with the simple streamlined regime to which we aspire. It would introduce a new layer of administrative complexity for a regulator whose core purpose is the regulation of charitable status, as opposed to the registrar of charity charges. Unlike commercial companies, charities are far less inclined to use these mechanisms for securing finance, so the registration of charges may only be of relevance to a relatively small number of SCIOs, and we are not convinced that the cost of including such a facility is justified for a minority of organisations. Paper based registers would require less investment but what value would there be in creating a regime for the registration of charges which did not allow instant access to a searchable register?

135. While we cannot opt to specifically exclude SCIOs from such financial mechanisms, the lack of searchable registers may effectively dissuade lenders from entering into these arrangements. This may help to keep the SCIO form simple and encourage those interested in utilising such facilities to become companies. SCIOs would still have the option of seeking unsecured loans, such as bank overdrafts or security over property and go beyond the minimum standards if they chose to do so.

Q21. Do you agree that the regulations should not provide for the maintenance and publication of registers of charges and debentures, as proposed in the preferred model (option 1, page 22)?

136. It is worth observing at this juncture that the issue of floating charges should not be grouped in with the discussion of other charges. Floating charges are loans made to businesses, essentially charges over assets owned by the body from time to time. They "float" because they are charges not attached to particular assets. The floating charge fixes on the charged assets owned by the company at the time when the charge "crystallises", i.e. in the event of liquidation or receivership and gives the lender priority over other creditors without such a charge.

137. Floating charges can only be granted by an incorporated body, specifically companies, so at present SCIOs will not be able to grant floating charges²⁹. To allow SCIOs to do likewise would not be within the scope of these regulations. We do not consider it to be essential to the success of the SCIO that they be empowered to grant floating charges and are not minded to seek to change the current position. Of course, the ability to grant floating charges would still remain open to charitable companies and for those organisations that would seek to use such a facility, we would consider the company form to remain the corporate vehicle of choice.

138. One possible alternative to publication by OSCR of registers of charges over assets, which might provide a degree of reassurance to potential creditors and other interested parties, would be to require the publication of SCIO accounts, including the Trustees Annual Report, by OSCR on its website, utilising the regulation making power under section 44. Online publication of SCIO accounts could give potential donors, funders and lenders valuable information about the financial health of the SCIO, providing an indication of its assets and liabilities and a clearer insight into the charity's governance. This could be seen as too slow a mechanism to be meaningful but it might add a layer of transparency, similar to the publication of company accounts, which third parties might find useful.

Q22. Do you agree that the regulations should require OSCR to publish SCIO accounts on its website to increase transparency?

ACCOUNTING REQUIREMENTS

139. The preparation, submission and external scrutiny of charity accounts are governed by chapter 6 of the 2005 Act and the **Charities Accounts (Scotland) Regulations 2006**, as amended. These regulations provide a proportionate and consistent accounting regime for all charities operating in Scotland, whilst relieving the burden on smaller charities by allowing them to produce simpler Receipts and Payments (R&P) accounts, unless their constitution states otherwise or if they have company form. Under company law, charitable companies must prepare fully accrued accounts and under charity law all accrued accounts must be produced in accordance with the **Accounting and Reporting by Charities: Statement of Recommended Practice 2005 (the "SORP")**³⁰. So the accounting requirements for charitable companies, flowing from company law, do not distinguish between

²⁹ s 38 of the **Bankruptcy and Diligence (Scotland) Act 2007**

³⁰ <http://www.charity-commission.gov.uk/Library/publications/pdfs/sorp05textcolour.pdf>

charities of different income brackets in the way that they do for non-company charities.

140. The issue for SCIOs in terms of accounting requirements will be whether there should be a similar blanket requirement that all SCIOs produce SORP compliant accrued accounts in line with the regime for charitable companies or whether they should be subject to the existing rules governing other charities in Scotland, which differentiate by size of income. Again, this may come close to the model adopted for SCIOs more generally.

141. The current 2006 Accounts Regulations - specifically regulations 6, 8 and 9 - provide different thresholds which determine the accounting requirements for individual charities. In summary:

- all charities must submit accounts and an annual report to OSCR;
- these should be fully accrued accounts if the charity's annual income equals or exceeds £100,000; and
- these must be audited by an eligible auditor if gross income equals or exceeds £500,000, or the value of assets exceeds £2.8 million.

142. These thresholds aim to balance the goals of increasing public confidence in charities through effective regulation, increasing transparency and public accountability of charities for the use of their funds, and minimising the regulatory burden on charities as far as is consistent with these objectives. As part of its consultation on "**Proposals for Minor Amendments to the Act and to the Charities Accounts (Scotland) Regulations 2006**"³¹, the Scottish Government sought views on whether thresholds should be amended, so these may yet be subject to change.

143. In relation to accounting requirements for SCIOs, one approach would be to remain silent in the regulations, as without regulatory provision to the contrary, SCIOs would be subject to the existing requirements for all Scottish charities. However, the question has been raised as to whether the benefits of limited liability should be balanced by a more robust accruals based accounting regime, thus implying that SCIO accounts be SORP compliant to provide the necessary transparency for third parties. In the context of limited liability, would R&P accounts provide enough information and reassurance to potential funders and creditors? As R&P accounts would only be prepared by charities with smaller gross income, it might be assumed that the smaller charities would only seek smaller loans and have fewer creditors. An alternative stance might be to allow smaller SCIOs to have their accounts examined by an examiner without professional qualifications if fully accrued accounts were required for all SCIOs, but is it unreasonable to expect an unqualified independent examiner to be familiar with the complexities of the Charities SORP?

144. Given that our preferred SCIOs model is more closely aligned to charity law, we are minded to retain the existing charity accounting regime for SCIOs, as we consider it to be robust yet proportionate. To introduce different accounting requirements for SCIOs might simply serve to confuse. However, we would welcome your views on this position.

³¹ <http://www.scotland.gov.uk/Publications/2009/04/24092805/0>

Q23: Do you agree that the accounting framework for SCIOs should mirror the existing requirements for charities rather than companies (that for charities allows those with limited income to produce a simpler form of accounts, i.e. receipts and payments accounts)? If you disagree, please tell us why.

OFFENCES PROVISIONS

145. In the 2005 Act, offences attaching specifically to breaches of the SCIO provisions can be found in section 53, relating to breaches of the requirements under section 52 (relating to the inclusion of SCIO name and status on certain documents). SCIOs would also be caught by offence provisions applicable to other charities, including: offences relating to the provision of false or misleading information to OSCR or the destruction of certain documents (s 26); failure to comply with an OSCR direction under section 28; failure to provide information required by OSCR under section 29; contravention of a suspension or direction under section 31 (section 32); failure to provide a statement of account under section 44 (section 45); acting as charity trustee while disqualified under section 69 (section 70); or failure to comply with regulatory requirements relating to fundraising, public benevolent collections, or goods collections (Part 2 of the 2005 Act).

146. In terms of the SCIO regulations, new offences cannot be created in subordinate legislation without express statutory authority and, given that the regulation making powers in sections 50 and 64 do not expressly provide Ministers with such authority to create offences in SCIO regulations, no further offences will attach to the regulatory requirements.

147. Of course, it is important that the SCIO is not seen as providing an opportunity for abuse or fraudulent activities. Such activity is thankfully rare in the charity sector but public confidence in Scottish charities did suffer in the wake of past scandals and much of the regulatory framework that has since been put in place is designed to prevent that happening again. OSCR takes its role in investigating alleged misconduct in charities very seriously and needs to have the adequate sanctions with which to enforce requirements. We remain confident that the Scottish charities regime adequately equips OSCR with the necessary enforcement tools to deal effectively with potential breaches by all forms of charity. These are not all in the form of criminal penalties but are appropriate to the infringement in question, to prevent abuse while being fair and proportionate.

PART FOUR - WINDING-UP, INSOLVENCY & DISSOLUTION PROVISIONS: OPTIONS APPRAISAL

148. There is relatively little detail in the 2005 Act specifically detailing the procedures for the winding up, dissolution or insolvency of a SCIO. Section 55(7) states that if “a SCIO ceases to be a charity it ceases to be a SCIO” but beyond this simple statement there is little else to determine how the end of a SCIO’s life should be handled. Under section 64(d) of the 2005 Act, the Scottish Ministers have powers to make regulations about the “winding up, insolvency or dissolution of a SCIO” and, unlike any other SCIO regulations, these would be subject to affirmative resolution procedures in the Scottish Parliament (section 103(5)(c)), that is, they would have to be put to a vote in Parliament).

149. In light of the comparative lack of reference elsewhere in the 2005 Act to SCIO winding up and dissolution, this provides a very broad remit for such regulations and allows a considerable degree of freedom to determine the form that they should take. However, they will also require more development than other aspects of the SCIO regime where some detail is already spelt out in the primary legislation.

150. Prior to discussing the options which may be available to SCIOs, it may be useful to draw a distinction between ‘solvent dissolution’ and insolvency which may, or may not, lead to dissolution. Due to the differing circumstances in which a SCIO would reach its ‘end of life’, it may be appropriate for SCIOs to be able to make use of different regimes:

- a **solvent dissolution** would occur where the SCIO is able to pay its debts in full, including any interest, within a reasonable period of time of commencing the winding up³²; and/or
- an **insolvent dissolution** would occur where the SCIO is unable to pay its debts as they fall due³³.

OPTIONS FOR SOLVENT DISSOLUTION OF A SCIO

151. This initial section sets out options for proceeding where a solvent SCIO decides to dissolve itself. Similar to other sections of this document, we are presenting a range of possible options. However, in relation to both solvent and insolvent dissolution of a SCIO, the SCIOs Working Group have not reached a final view on a preferred option but did emphasise that protection of creditors and administrative simplicity were the overriding priorities. For this reason, we have not singled out particular options for preferential treatment but present all on a similar footing.

³² This definition of a solvent dissolution is consistent with the required statutory declaration of solvency required in a voluntary winding up, by virtue of **s89 of the Insolvency Act 1986**.

³³ This definition of insolvency is also found in section 7(1) and (2) of the Bankruptcy (Scotland) Act 1985, in **section 123 of the Insolvency Act 1986 (1986 c. 45)** and in section 62(3) of the Sale of Goods Act 1893 (1893 c. 71, repealed by 1979 c. 54 and is therefore consistent with current insolvency legislation.

Option 1 - The basic option for solvent SCIOs

152. This option would mirror the process that the majority of unincorporated charities go through when they dissolve. That is, to say, an application for consent to take the action (under s16(2)(c) of the 2005 Act), taking the action, subject to OSCAR's consent and any attached conditions, and the final notification to OSCAR that the action has been taken (section 17(1)(d)). At the point at which OSCAR confirms the action, and removes the SCIO from the Scottish Charity Register, the SCIO would be taken as dissolved.

153. By adopting this option, we would ensure that SCIOs are not subject to any requirements beyond that which apply to an unincorporated charity. However, the question would be whether or not this process would be sufficient given the incorporated status of a SCIO. If we want SCIOs to have the ability to raise finance, potential creditors may seek a more formal dissolution structure. Were there other SCIOs registered, with which transfer arrangements could be agreed under section 61, and the necessary resolutions passed, and if OSCAR confirms the resolution both the assets and liabilities could be transferred (which would be effected under section 61(5)(a)), thus providing some additional protection for creditors. Section 61(5)(b) and (c) provides that the act of OSCAR confirming the resolution results in transfer of the property etc to the transferee SCIO and dissolution of the transferring SCIO.

Option 2 - Striking-off – solvent SCIOs

154. In order to provide creditors, potential creditors, or other interested parties an opportunity to object to the dissolution of a SCIO, we could adopt a process which would be broadly equivalent to a company applying to Companies House to be struck off the Register of Companies. Under this process, the SCIO would apply to OSCAR to be struck off the Scottish Charity Register. If it is removed, the SCIO would then be dissolved. While it may be that the process involved in this option is an operational matter for OSCAR, it may be helpful to set out some basic information which would need to be provided to OSCAR in the application - for example, the destination of any excess assets and how any liabilities would be satisfied.

155. Under this option the SCIO may be required to satisfy certain conditions prior to entering the process, to ensure greater protection of creditors. For example, that the charity trustees sign a 'declaration of solvency'. If, at any point, it is discovered that the SCIO is insolvent, the process could be ended, or converted to an insolvent process (see below). As the process would be designed to protect (potential) creditors, while ensuring that the SCIO does not face undue obstacles, we would expect the application to be published in the public domain. Initial thinking would suggest that the OSCAR website would be the most practical place for publication. However, certain circumstances may make it more appropriate that the application received wider publication, in instances where the charity has income over a certain amount, for example. Regulations made under section 39 of the 2005 Act³⁴ already contain a publication requirement in relation to applications for reorganisation of charities, and it may be possible to include similar provisions here. The purpose of these notices would be to ensure that creditors are aware of the proceedings. While

³⁴ Charities Reorganisations (Scotland) Regulations 2007

there would be cost implications of placing such notices, these would be considerably less than those associated with the formal appointment of a liquidator.

Option 3 - Members voluntary liquidation process – solvent SCIOs

156. A third option could be to import a regime similar to a Members Voluntary Liquidation process. With this process, the members of the SCIO would resolve that the SCIO be wound-up, with the charity trustees making a statement of solvency. The charity trustees would then appoint a liquidator to manage the process of winding-up the SCIO and distributing the assets. As with the above processes, we would expect OSCR to have a role to play here. We would certainly expect that the SCIO would have to seek the consent of OSCR to begin the process, and perhaps also at other stages throughout the process, such as prior to the final distribution of assets.

157. There would need to be transparency to ensure that those with outstanding claims against the SCIO were made aware that the SCIO sought to liquidate itself voluntarily. Again, we would suggest that the OSCR website is the baseline for publication of the intention, possibly with wider publication where appropriate. However, it may also be appropriate that the SCIO be required to send notice of their intention to all known creditors.

158. Although this process would undoubtedly be a more expensive option than 2, above, it would be likely to provide more reassurance to creditors. Since there would be a liquidator acting in this process, it would be possible to convert proceedings to an insolvent liquidation if this is required.

Option 4 - Only allow a solvent SCIO to follow the insolvent dissolution process

159. This option would see a SCIO which wished to dissolve itself only be able to use the insolvent dissolution option. This would ensure that all SCIOs used only one process, which would create certainty and consistency for SCIOs, OSCR and for lenders/funders. However, such a process would also see additional costs incurred by the SCIO, reducing the assets available for distribution. Such a situation may also place an undue burden on the SCIO, its charity trustees and its members and would be a questionable use of charitable funds in the case of a solvent SCIO. Costs can vary considerably in winding up of organisations. The costs incurred depend on the size and structure of an organisation. However, it is considered unlikely that a straightforward liquidation could be completed for any less than £4,000 and, in most cases, costs would be significantly higher.

Q24. Which of the above options for the dissolution of a *solvent* SCIO do you think strikes the right balance between protecting creditors and reducing the administrative burden on charities?

160. We are acutely aware that insolvency is a fairly specialised area that may be unfamiliar to many. The insolvency regime for companies provides a useful context in which to pose some of the questions related to the insolvency of this new corporate form. However, the language of corporate insolvency is highly technical

and can be confusing to those not experienced in the field. So before proceeding to discuss some of the options for developing a SCIOs insolvency regime, it might be helpful if we explain some of the key terms and processes within the existing insolvency regime for companies and corporations.

CORPORATE INSOLVENCY – LEGISLATIVE FRAMEWORK

161. The procedures detailed below are available for a company facing insolvency or financial difficulties. The law relating to these procedures is principally contained in the **Insolvency Act 1986** (“the 1986 Act”), **the Insolvency (Scotland) Rules 1986** (“the 1986 Rules”) and **the Receivers (Scotland) Regulations 1986**. The main aspects of insolvency law in relation to business associations (such as companies and corporations) are reserved to Westminster in the terms of the **C2 reservation of Schedule 5 to the Scotland Act 1998**. Only the following are excepted from this general reservation, and are therefore devolved:

- the process of winding up, including the person having responsibility for the conduct of winding up or any part of it, and his conduct of it or of that part;
- the effect of winding up on diligence;
- avoidance and adjustment of prior transactions on winding up;
- the general effect of winding up;
- procedures for the initiation of winding up;
- powers of courts in relation to proceedings for winding up; and
- procedures giving protection from creditors.

162. The insolvency legislation provides four different regimes for limited liability companies facing insolvency or financial difficulties:

- **Voluntary Arrangements** - This procedure allows for the company and its creditors to implement a number of proposals which may allow the company to avoid other types of insolvency procedures. The proposals, if accepted, must be implemented by a qualified insolvency practitioner. The person nominated can also be the liquidator or administrator. Examples of voluntary arrangements are:
 - moratorium (temporary suspension) on repayment of debt;
 - composition of debt, i.e. creditors are offered “65 pence in the pound”; and/or
 - equity for debt swap.

The Insolvency Act 2000 introduced a possibility for directors of small companies to apply to the nominee, and then the court, for a 28 days moratorium from creditor actions in order to put proposals of voluntary arrangements to creditors³⁵.

- **Administration** - Company administration is directed at rescuing companies as going concerns. Administration can, since the **Enterprise Act 2002**, be commenced without a court hearing, although a number of formalities must be

³⁵ Legislative provisions for company voluntary agreements are contained in **Part 1 of the 1986 Act** and **Part 26 Arrangements and Reconstructions of the Companies Act 2006**.

adhered to and the option of a court hearing still remains. An administrator can be appointed by the company or its directors, the holder of a floating charge or by an administration order of the court. The three main objectives with administration are, in this order:

- to rescue the company as a going concern; or
- to achieve a better result for the company's creditors as a whole than would be likely if the company was wound up; or
- to realise property in order to make a distribution to one or more preferential creditors.

While a company is in administration there is a moratorium on creditor actions and no resolutions may be passed for the winding up of the company³⁶.

- **Receivership** – An administrative receiver is a receiver and manager of the whole (or substantially the whole) of a company's assets, appointed by the holder of a charge and/or security, usually a bank. However, since the Enterprise Act 2002 came into effect, administrative receivers may only be appointed by the holder of a floating charge created before the implementation of the Act (15 September 2003) and holders of charges created as part of specific transactions³⁷. The main responsibilities of a receiver are to ensure the appointing lender is paid off. The law recognises that the receiver's control over the company can have considerable effect on the company and its other creditors. Therefore a number of statutory duties are imposed on the receiver³⁸.
- **Liquidation – Winding up** - The two available types of liquidation are:
 - liquidation by the court (compulsory liquidation); and
 - voluntary liquidation instigated by the members or the creditors.

There are differences between these procedures; however, they are designed to achieve the same end result, namely to collect and distribute the assets of the company. When liquidation comes to an end the company may be dissolved and will no longer exist as a legal entity³⁹. It is important to recognise that not all liquidations are insolvent liquidations. In particular, it is a precondition of a members' voluntary liquidation that the directors make a statement confirming the solvency of the company.

163. These four regimes apply to limited liability companies, different rules apply to other kinds of business.

OPTIONS FOR INSOLVENT DISSOLUTION OF A SCIO

164. Having discussed the options for the dissolution of a solvent SCIO, we turn now to look at options which should be available where the SCIO is insolvent. The approach to be taken for the new SCIO form will largely depend on what type or size

³⁶ Legislative provisions for administration can be found in **Part II** and **Schedule B1 of the 1986 Act**.

³⁷ See **sections 72B-72G of the 1986 Act**

³⁸ Legislative provisions for receivership can be found in **Part III of the 1986 Act**.

³⁹ Legislative provisions for liquidation are found in Part IV of the 1986 Act. The Limited Liability Partnerships (Scotland) Regulations 2001 makes provision for the winding up and insolvency of Limited Liability Partnerships.

of charity the SCIO is aimed at and what the insolvency process should be designed to achieve. If SCIOs tend to be fairly small or medium sized organisations, would it be appropriate to apply the full complex machinery of corporate insolvency to them? However, if there were very limited formal procedures put in place, would these be sufficient for very large complex organisations or meet the needs of creditors? Should the purpose of these provisions be to protect creditors, to protect the charitable assets or rescue the insolvent SCIO as a going concern? Or should the overriding principle be one of simplicity, cost-effectiveness and administrative ease?

165. The approach taken in the draft **Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations**⁴⁰ closely follows the existing corporate insolvency regime for companies in England and Wales. In that respect, these regulations apply and modify a very significant proportion of the Insolvency Act 1986 and related subordinate legislation to CIOs. This has the advantage of applying a familiar and trusted framework to the new form, in order to provide the reassurance to creditors. It does, however, add to the size and complexity of the statutory framework.

166. Having considered the advantages and disadvantages of using existing regimes for companies and those of unincorporated bodies and with the benefit of seeing a fully worked up regulatory regime for the insolvency and dissolution of CIOs, we have drawn up the following options for SCIO insolvency. As we proceed to consider each option in turn, it is worth remembering that the costs of any of these processes would usually be paid out of the resources of the charity. This raises questions as to whether: (a) a costly process is a good use of charitable assets; and, on a more practical note, (b) what should be done in the case of very small SCIOs where the assets involved are such that they cannot cover the costs of an independent agent, be it a liquidator or Judicial Factor.

167. Another critical factor is the length of time each option would take to develop. Designing a new or adapted insolvency framework for SCIOs could be a complex and time-consuming process. That should not be taken as a sign of our reluctance to pursue such an approach; on the contrary, a regime tailored specifically for this new form would have many advantages over adopting a framework designed for commercial entities or doing nothing. However, we have to be realistic about the implications on the timetable for introducing the SCIO, were we to build in the time needed to construct a new insolvency regime. For this reason, the Working Group proposed an additional interim option that would allow for temporary arrangements while the full framework was under development, so as not to delay the SCIO's introduction.

168. As with the section on solvent dissolution, we consider four main options, but with the addition of a fifth "interim" option.

Option 1 - Apply the current corporate insolvency regime

169. This would see the entire machinery which is outlined above, applied to a SCIO which was insolvent. The advantages of such a move would include that a familiar and established set of procedures would be in place, which would allow a

⁴⁰ http://www.cabinetoffice.gov.uk/media/cabinetoffice/third_sector/assets/CIO_annex_b.pdf

range of options for creditors and the SCIO. However, such a regime may be disproportionate if one of the “lighter touch” forms of SCIO was adopted. Although it might benefit from reliance on an established regime, the work to extract the relevant sections of the complex corpus of corporate insolvency law and import them with modification into SCIO insolvency regulations would be considerable and significantly delay the introduction of the SCIO. As the law on corporate insolvency is reserved, it would not be a straightforward matter of applying the existing regulatory framework; rather, this approach might require the relevant provisions to be imported verbatim, which would result in very lengthy detailed insolvency regulations.

170. In addition, the full corporate insolvency regime is unlikely to be a cost effective method, with costs potentially running into thousands of pounds – money which could otherwise be used to pay creditors, or be used for charitable purposes. Estimation of costs in relation to using existing insolvency regimes is difficult to pinpoint. It may depend on any number of factors including the size and complexity of a business and its structure, the number of outstanding creditors etc. However, we could reasonably expect such costs to be significant, particularly in relation to larger SCIOs. In more complex winding up operations, liquidators’ fees may reach up to £20,000.

171. The current corporate insolvency regime does not, of course, only allow for an entity to be wound-up and dissolved; it also allows for the possible rescue of an entity as a going concern, by means of administration. However, would it be appropriate for a SCIO to be able to enter administration with a view to being rescued? Such a route may be desirable for commercial entities where the aim is to maximise funds for creditors but perhaps of less value to a charitable entity. Voluntary arrangements can also be entered into under the existing insolvency regime, which may either allow a ‘breathing space’ for the entity to pay its debts or a reduction in debt by various means.

172. What would this option mean for OSCR? The current insolvency regime for companies is primarily driven by the creditor(s) of a company, particularly in the case of liquidation, as it is usually they who will petition the Court for the winding-up of a company. Therefore, it may be that OSCR has less of a role here than in some of the other options. Currently, a creditor who applies to the Court for the liquidation of a charity which is a company does not need to apply to OSCR to do this (although there is a requirement to notify them within one month of the appointment of a receiver (section 17(1)(f) of the 2005 Act) or of any administration order or an order for the winding up made by the Court).

173. With the Court appointment of a liquidator, the liquidator is required to prepare a report concerning the conduct of the company director(s), and submit it to the **Department of Business, Innovation and Skills**. This report may lead to the director(s) being disqualified from being company directors, under the **Company Directors Disqualification Act 1986**. It may be appropriate for such a requirement to continue, but with the report going to OSCR concerning the conduct of the SCIO’s charity trustees. The benefits of using such a system include the fact that all relevant legislation is already in place and parties will be well versed in either the sequestration route or compulsory liquidation. However, there would be no way that

OSCR could formally disqualify a person from being a charity trustee on the basis of the report at present without an amendment to primary legislation.

174. Although uncertainties will arise in which model to use, once chosen, the process to follow will be relatively straightforward to an experienced party. This option would have the benefit of familiarity, where there are many parties well versed in the administrative requirements of sequestration or liquidation. Leading on from this however, is the chief disadvantage of using the default option, namely cost. It is difficult to indicate the precise cost of each insolvency procedure, but as they would require the services of a qualified individual such as an Insolvency Practitioner or accountant, charging professional rates for their services, we could expect the costs to be significant.

Option 2 - Apply the current insolvency regime, with modifications

175. Under this option, we would start with the current insolvency regime, and strip out the elements which we do not consider appropriate to apply to a SCIO. The elements which would be removed would depend to a large extent on the basic design of the SCIO, and the powers which it would have. For example, if the design of the SCIO is towards the lighter end of the spectrum, it may be that the option of administration is not appropriate, as it would conflict with the simple structure. In addition, the option of receivership could be removed given that we do not anticipate that a SCIO will be able to grant a 'floating charge' over all, or part, of its assets.

176. At its most extreme, all the provisions of corporate insolvency could be removed, save for compulsory liquidation and, possibly, the creditors voluntary liquidation. However, this need not mean that a SCIO and its creditor(s) cannot enter into an informal process similar to any of the voluntary arrangements outlined above. The role of OSCR within this type of process would be similar to that above.

177. The underlying assumption here is that the leaner the regime, the lower the anticipated costs associated with its application for all but the most complex compulsory liquidations, where large liabilities and numerous creditors are involved. In such cases, it is likely that costs and administrative complexity would follow under any option.

178. Although we might expect that the insolvency regulations under this option would be shorter than those for the first option, that does not necessarily mean that the work involved in their development would be simpler or quicker. Identifying which provisions should be selected from the existing corporate insolvency framework and adapted for this bespoke insolvency regime could add significantly to the timetable for introduction.

Option 3 - Appointment of an independent third party to manage the most complex or contested insolvency cases

179. An alternative approach would be to create a bespoke form of insolvent dissolution, based on elements which already exist in law but also drawing on the practical realities of the charity sector in Scotland. If we take the experience of most unincorporated charities as our starting point, we might expect that in the majority of

insolvent dissolutions, the charity trustees will work with the creditors to reach a satisfactory solution, without recourse to formal insolvency procedures. This avoids the costs associated with the appointment of an insolvency practitioner, liquidator or administrator and can be a simpler process to manage. Ideally, we would like to preserve this informal yet mutually acceptable approach for SCIOs, where appropriate. However, we also recognise that there will be situations where the extent of the liabilities and number of potential creditors (possibly including employees) is such that a more formal, independent process is required. Likewise, when creditors wish to contest a proposed settlement, we need to provide for some form of independent adjudication of their claims.

180. In such cases, it might be appropriate to seek the appointment of an independent third party to manage the process. This would seem to offer a fair and proportionate approach but the question remains as to who such an appointee should be. At present the Court⁴¹ has a wide power to appoint a person – a judicial factor (JF) - to act to manage the affairs of a trust estate, an intestate estate, a limited company or a charity. In addition to this, OSCR already has a power to apply to the Court of Session for the appointment of a JF where they consider there has been misconduct in the operation and management of a charity (section 34(5)(c) of the 2005 Act). A JF is a person who is appointed by the Court to protect and preserve an estate, and where appropriate, realise and distribute the estate to those entitled to it. He or she acts under the supervision of the **Accountant of Court**, and will often need the consent of the Accountant of Court to proceed with certain actions.

181. We consider that the option of appointing an independent third party - such as a JF - to manage the winding-up and dissolution of a SCIO, to be a sensible middle ground, which would allow creditors to be satisfied that their claims are dealt with by an independent person, while also ensuring that the costs associated with the process are not unduly excessive. Another key question with this option would be where the responsibility would lie for applying for the appointment of an independent third party.

182. It seems sensible that the creditor(s) can make an application, in the same way as a creditor could apply for a company to be wound-up. However, should the creditor be able to apply directly, or should it be done via another party? The SCIOs Working Group were of the view that OSCR as charity regulator, should have no formal role in taking decisions about whether insolvency proceedings should be taken before the Court or managed by a third party. This would mark a clear deviation from its primary functions and would call for greater intervention in the business of the charity than would be appropriate. So, it would not be our intention to require the creditor(s) to apply first to OSCR, although some form of notification process could be helpful. It would be preferable if the matter was brought to the attention of OSCR in order to allow the exercise of existing regulatory oversight, in terms of the charitable assets.

⁴¹ Historically, the power to appoint a JF was only exercisable by the Court of Session. However, in recent years the power to appoint a JF has been extended to the appropriate Sheriff Court. **The Law Reform (Miscellaneous Provisions) (Scotland) Act 1980** amended **the Judicial Factors (Scotland) Act 1880**, to allow the Sheriff to have the same powers to appoint a JF as the Court of Session

183. Again, it would appear to be appropriate for the SCIO to make an application, if at any time it was decided that its affairs should be wound-up. However, arrangements would have to be built into the regime to require the SCIO to notify its creditor and/or OSCR before doing so.

184. Such a route would not be without significant cost implications and could still be a lengthy and complicated process. However, if this was only used in a minority of difficult cases, the overall costs when compared to the full application of corporate insolvency rules in every case, could be far lower. If adopted, the regulations implementing this option could be supported by detailed guidance, perhaps developed by OSCR working with SCVO, the **Accountant in Bankruptcy (AiB)**⁴² and other partners, on how best to work with creditors in the first instance to reach a mutually acceptable resolution.

185. We are aware that the Scottish Law Commission (SLC) is in the early stages of considering the existing law on **Judicial Factors in Scotland**⁴³ with a view to clarifying and simplifying it and has met with the Accountant of Court, representatives of OSCR and practitioners experienced in this field. In light of concerns raised that the existing legislation fails to reflect what happens in practice, the SLC is considering a number of issues, including the procedures for appointment, clarification of functions, powers and duties, as well as accounting and formal discharge procedures. Amongst the issues under consideration is whether, in the interests of streamlining the function and reducing costs, the role can be formally placed in an office or added to the functions of an existing public body.

186. Given the current uncertainty surrounding the role of judicial factors, it may seem unwise to put this forward as a serious option for SCIO. However, we regard the SLC project as a very promising opportunity, which may allow us to develop a bespoke insolvency regime in tandem with legislative reforms to the law of judicial factory. Such an approach would lend a degree of uncertainty to this option, not least in terms of timing, but were the judicial factor route to be determined as ultimately unsuitable, this option could be modified to refer instead to the appointment of an insolvency practitioner or liquidator but we are aware that the costs associated with such appointments could be greater. Again, however, the central theme of this option would remain that the appointment of an independent third party to manage the process was regarded as the route of last resort, with the presumption that most SCIO insolvencies would be managed without recourse to this formal process.

187. Whilst this approach might have much to recommend it in terms of proportionality, it could draw out the development process considerably. Once again, the timetable for the development of such a purpose-built insolvency framework could significantly delay the implementation of the SCIO regulations.

⁴²AiB is the agency of the Scottish Government responsible for administering all aspects of personal insolvency within Scotland. AiB is also responsible for developing policy in relation to certain aspects of corporate insolvency, particularly the devolved areas under the Scotland Act 1998, namely receivership and the procedural aspects of liquidation.

⁴³<http://www.scotlawcom.gov.uk/html/cjudfac.php>

Option 4 - The Default Regime

188. Under this option the SCIO would be treated as an unregistered company, but this could leave uncertainty about the process to be applied. The use of sequestration under **the Bankruptcy (Scotland) Act 1985** might be inappropriate because sequestration is not designed for managing the insolvency of large complex organisations, particularly those with a large number of employees. Another factor to bear in mind is the fact that an unregistered company cannot apply for its own sequestration without the consent of one or more creditors.⁴⁴ Compulsory winding up by the court would be possible for an unregistered company, but voluntary liquidation procedures would not be available.⁴⁵ Under either route the insolvency procedure would not be available to the SCIO of its own volition, but would require the act or consent of a third party.

189. Benefits to this model include the fact that there would be no requirement for new legislation to be introduced, reducing the risk of delays to implementation, and it would be a comparatively lower cost model than the majority of other models discussed. Again, this may only be effective where the wider SCIO regime is aimed at those organisations at the lower end of the scale. Sequestration proceedings would be inappropriate where the structure of a SCIO is larger and somewhat unwieldy.

190. The chief disadvantage of this model would be a significant state of uncertainty as to the SCIO's status, particularly as a SCIO could not itself petition to be wound up under this regime. Furthermore, a SCIO would be restricted in attempting to enter liquidation of its own will. This may lead to the undesirable scenario where a SCIO wishes to wind itself up but cannot do so until a creditor is found who will consent to the SCIO's requests or petitions on their behalf.

191. Taking all of the above into consideration, we are of the view that importing a regime which strictly adheres to either the current regime in corporate insolvency or sequestration processes (i. e. option 1 or 4 above) would be difficult to reconcile with the preferred SCIO model. They lack a fundamental flexibility that would be required where SCIOs are intended to provide for a relatively broad range of organisations. Although not identifying either as a preferred option, the SCIOs Working Group were more sympathetic to options 2 and 3, both of which provided a more appropriate model to base insolvency procedures for SCIOs upon, particularly in light of the SLC's proposed reform of the law of judicial factors. However, the Group recognised that both options 2 and 3 could require considerable time to develop and delay the SCIO's introduction.

Option 5 – Apply the default regime in the interim, whilst a dedicated insolvency regime for SCIOs is developed.

192. In light of this, the SCIOs Working Group put forward a fifth option, a temporary solution catering for the interim period following the implementation of the general SCIO regulations but prior to the development of a dedicated insolvency

⁴⁴ Section 6(6)(a) of the Bankruptcy (Scotland) Act 1985

⁴⁵ Section 221(4) of the 1986 Act

framework. Under this option, the default approach would apply in the intervening period. While this would have all of the drawbacks mentioned above, in practice we would expect very few SCIOs to become insolvent so soon after the form is made available for use. This approach would allow us to devote the time necessary to develop a fit-for-purpose insolvency framework for the SCIO without holding up the implementation.

193. In terms of risk of abuse, we do not think this interim default option would necessarily offer an attractive route for charitable companies wishing to escape their creditors, because the court route would still be open to creditors under the default option.

Q25. Which of the above options for the dissolution of an *insolvent* SCIO do you think strikes the right balance between protecting creditors and reducing the administrative burden on charities? If you have selected option 5, the interim option, please tell us which of options 1-3 you would prefer to be developed for the longer term.

PART FIVE - NEXT STEPS

194. As previously stated, this consultation examines policy principles rather than detailed legislative provisions. This is to allow greater public and stakeholder involvement in decisions about the fundamental structure of the SCIO and the regulatory framework within which it will operate. As part of the consultation process, we intend to arrange public events to better understand the needs and perspectives of different stakeholders. Details of these events will be published on the **Charity Law** pages of the Scottish Government website (<http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>).

195. Once the consultation closes, we will analyse the responses and prepare a consultation report summarising these and outlining next steps. Our intention is then to prepare draft regulations taking on board the views received during consultation. The timing of implementation will largely depend on the outcome of the consultation and whether a further consultation on draft regulations is deemed necessary. We do not wish to delay the introduction of the SCIO any more than is necessary but also recognise that it will be important that those who will have to work with the provisions should have the opportunity to comment on them. So we may undertake a shorter, more targeted consultation on draft regulations with charity practitioners and professional advisors. Our expectation is that the form will become available some time late in 2010 or early 2011.

196. We understand that it will take some time for the new form to bed in and implementation may need to be phased to allow for OSCR to make the necessary operational arrangements. We will work with OSCR and other partners to ensure that charities fully understand the requirements which will be placed on them when becoming SCIOs. To underpin this effort we intend to develop a communications strategy to raise awareness and increase access to information.

197. In the meantime, we would welcome your views on the questions raised in this consultation, which can be submitted on the response form (see pages 66-75 below) before the closing date of **26 February 2010** to:

Scottish Charitable Incorporated Organisations (SCIOs) Consultation
Charity Law Team
Civil Law Division
Scottish Government
2W, St Andrew's House
Edinburgh EH1 3DG
Tel: 0131 244 0123
Fax: 0131 244 8325
Email: charityact@scotland.gsi.gov.uk

Table listing suggested regulatory provisions for preferred SCIO model

<u>Option 1 – Preferred SCIO Model – Suggested Provisions (Not including winding up and dissolution)</u>
<p>Establishment of new SCIO</p> <ul style="list-style-type: none"> • Application process for constitution as new SCIO. • Determination of application • Registration process
<p>SCIO Constitution</p> <ul style="list-style-type: none"> • Additional matters to be covered in the constitution : <ul style="list-style-type: none"> ○ powers (if the SCIO wishes to detail specific powers beyond that in section 50(5) of the 2005 Act or limit them in any way then these must be spelt out in its constitution); ○ general structure; ○ procedural rules, including calling and holding of meetings, quorums, decision-making processes, voting rights, resolutions, minutes and records; ○ board composition and role of office-bearers, as well as rules dealing with conflict of interest; ○ administration, including delegation, accounting, record-keeping, etc; ○ procedures for constitutional amendment; and ○ arrangements for winding up and dissolution. • Amendment of constitution.
<p>Administration of SCIO</p> <ul style="list-style-type: none"> • Capacity of SCIO. • Meetings and resolutions – i.e. there must be at least one meeting of trustees and members annually - detailed requirements are to be left to the SCIO to spell out in its constitution. • Record keeping. • Service of documents. • Communications.
<p>Conversion</p> <ul style="list-style-type: none"> • Application process for conversion to SCIO form. • Determination of application for conversion.
<p>Amalgamation and transfer</p> <ul style="list-style-type: none"> • Application process for amalgamation of two or more SCIOs. • Determination and notification process for amalgamation. • Application process for transfer of a SCIO's undertaking to another SCIO. • Determination and notification process for transfer.
<p>Members</p> <ul style="list-style-type: none"> • SCIO required to keep a register of members.
<p>Charity trustees</p> <ul style="list-style-type: none"> • Liability of charity trustees in default. • Validity of acts of charity trustees. • SCIO to be required to keep a register of trustees.

- Register of trustees to be made available to OSCR, and/ or other third parties, on request.

Documents

- References in documents .

Table listing suggested regulatory provisions for company model

<u>Option 2 – Company Model – Suggested Provisions (Not including winding up and dissolution)</u>
<p>Establishment of new SCIO</p> <ul style="list-style-type: none"> • Application process for constitution as new SCIO, correspondence. • Provision for entrenchment: statement of compliance. • Determination of application. • Registration process.
<p>SCIO Constitution</p> <ul style="list-style-type: none"> • Adherence to one of two model constitutions, to be specified in schedules to the regulations. • Additional requirements with which the constitution must comply. • Additional matters to be covered in the constitution. • Provisions which must not be included in a SCIO's constitution. • Application of duty of care. • Provision for entrenchment – [ability to entrench certain elements of constitution by putting them in memoranda and providing that they cannot be altered]. • Date on which a resolution amending a SCIO's constitution is deemed to be passed. • Effect of amendment of a SCIO's constitution on its members.
<p>Administration of SCIO</p> <ul style="list-style-type: none"> • Capacity of SCIO. • Meetings and resolutions. • Record keeping. • Service of documents. • Communications.
<p>Conversion</p> <ul style="list-style-type: none"> • Application process for conversion to SCIO form, provision for entrenchment. • Determination of application for conversion, including notification and publication requirements. • Financial statements on conversion.
<p>Amalgamation and transfer</p> <ul style="list-style-type: none"> • Application process for amalgamation of two or more SCIOs. • Determination and notification process for amalgamation. • Application process for transfer of a SCIO's undertaking to another SCIO. • Determination and notification process for transfer.
<p>Members</p> <ul style="list-style-type: none"> • Register of members: <ul style="list-style-type: none"> ○ availability and right to require for inspection; ○ response to request for inspection or copy; ○ refusal of inspection or default in providing a copy; ○ removal of entries relating to former members; ○ power of OSCR to order rectification of the register; ○ power of court to rectify register;

- register to be evidence;
- time limit for claims arising from entry in register.
- Single register of members and charity trustees:
 - single register to be kept available for inspection;
 - power of OSCR to order rectification of the single register;
 - power of court to rectify single register;
 - single register to be evidence;
 - time limit for claims arising from entry in register.
- Index of members.
- Information as to the state of register or index.
- Eligibility criteria for membership.

Charity trustees

- Register of charity trustees:
 - rights to inspect and require copies;
 - removal of entries relating to former trustees;
 - power of court to rectify register;
 - register to be evidence;
 - time limit for claims arising from entry in register;
 - particulars of charity trustees to be registered: individuals;
 - particulars of charity trustees to be registered: corporate directors and bodies corporate.
- Index of charity trustees.
- Eligibility criteria for charity trusteeship.
- Appointment of charity trustees.
- Liability of charity trustees in default.
- Validity of acts of charity trustees.
- Duty not to accept benefits from third parties.
- Charity trustees of a SCIO not to take part in decisions in which they have a personal interest.

Documents

- References in documents.
- SCIO contracts.
- Execution of documents by a SCIO.
- Execution of deeds by a SCIO.
- Execution of deeds or other documents.
- Common seal.
- Official seal for use abroad.
- Bills of exchange and promissory notes.
- Minutes as evidence.
- SCIO records:
 - meaning of “SCIO records”;
 - form of SCIO records;
 - records as evidence;
 - records of decisions and meetings etc;
 - records as evidence of resolutions etc;
 - inspection of records of decisions and meetings;
 - records of resolutions and meetings of classes of members;
 - records of charity trustee decisions;
 - duty to take precautions against falsification;

- Service of documents on SCIO.
- Service of documents on charity trustees etc.
- The SCIO communications provisions:
 - sending or supplying documents or information in electronic form or by means of a website;
 - deemed agreement to receipt of information in electronic form;
 - right to a hard copy version;
 - deemed delivery of documents and information;
 - OSCR's requirements as to form and authentication of hard copies;
 - agreement for delivery by electronic means;
 - requirements for proper transmission;
 - power to accept documents not meeting requirements for proper transmission;
 - replacement of a document not meeting the requirements for proper transmission;
 - interpretation of the SCIO communication provisions.
- Retention of documents by the OSCR.
- Supply by OSCR of copies of documents open to public inspection.

Procedural requirements

- Meetings:
 - types of meeting, annual general meetings, etc;
 - power of members to call meetings;
 - power of court or OSCR to order meeting;
 - notice of meetings;
 - adjournment of meetings.
- Decisions:
 - types of decision;
 - procedures for tabling proposals;
 - voting & proxy voting.

Debentures and Charges

- Debentures:
 - meaning of "debenture";
 - perpetual debentures;
 - registration of allotment of debentures;
 - register of debenture holders;
 - register of debenture holders: right to inspect and require copy;
 - register of debenture holders: response to request for inspection or copy;
 - register of debenture holders: refusal of inspection or default in providing copy;
 - register of debenture holders: offences in connection with request for or disclosure of information;
 - time limit for claims arising from entry in register;
 - right of debenture holder to copy of deed;
 - liability of charity trustees of debentures;
 - power to re-issue redeemed debentures;
 - deposit of debentures to secure advances.
- Certification and transfer of debentures:
 - duty of SCIO as to issue of certificates etc on allotment;
 - registration of transfer;

- procedure on transfer being lodged;
- transfer of shares on application of transferor;
- execution of share transfer by personal representative;
- evidence of grant of probate etc;
- certification of instrument of transfer;
- duty of company as to issue of certificates etc on transfer;
- issue of certificates etc: cases within the Stock Transfer Act 1982;
- issue of certificates etc: allotment or transfer to financial institution;
- issue of certificates etc: court order to make good default.
- Official seal for debentures.
- Charges:
 - SCIO's register of charges;
 - instruments creating charges and register of charges to be available for inspection;
 - notification of charges created by a SCIO;
 - notification of charges existing on property acquired by a SCIO;
 - charge in series of debentures;
 - additional notification requirement for commission etc in relation to debentures;
 - charges created in, or over property in, jurisdictions outside the United Kingdom;
 - charges created in, or over property in, England, Wales or Northern Ireland;
 - the period allowed for notification;
 - certificate of notification of charges;
 - endorsement of certificate on debentures;
 - notification of enforcement of security;
 - extension of period for compliance and rectification;
 - consequences of failure to notify OSCR of charges created by the SCIO;
 - SCIOs to keep copies of instruments creating charges.

Table listing suggested regulatory provisions for minimalist model

<u>Option 3 – Minimalist Model – Suggested Provisions (Not including winding up and dissolution)</u>
Establishment of new SCIO <ul style="list-style-type: none"> • Application process for constitution as new SCIO.
SCIO Constitution <ul style="list-style-type: none"> • Additional matters to be covered in the constitution.
Conversion <ul style="list-style-type: none"> • Application process for conversion to SCIO form.
Amalgamation and transfer <ul style="list-style-type: none"> • Application process for amalgamation of two or more SCIOs.
Documents <ul style="list-style-type: none"> • References in documents.

A Guide to the Consultation on Options for the Implementation of the Scottish Charitable Incorporated Organisation (SCIO)

1. What is this consultation about?

This consultation seeks your views on the design of the Scottish Charitable Incorporated Organisation.

2. What is a Scottish Charitable Incorporated Organisation?

A Scottish Charitable Incorporated Organisation (SCIO) is a new legal form, introduced under the Charities and Trustee Investment (Scotland) Act 2005, which will allow Scottish charities to incorporate without having to become companies.

3. Why would a charity want to incorporate?

When an organisation incorporates, it acquires legal personality and provides its trustees and members with a certain degree of insulation from personal liability. This allows the charity itself to own property and enter into contracts, including employment contracts, rather than requiring the trustees to do so in a personal capacity.

4. What is the difference between a SCIO and a company limited by guarantee?

A SCIO is a new legal form of incorporation designed solely for charities, introduced under Scottish charity law and regulated only by the Office of the Scottish Charity Regulator (OSCR). In contrast, a charitable company is required to comply with both charity legislation and company law, and must report to both Companies House and OSCR.

5. Can a charity become a SCIO now?

No. The SCIO provisions under chapter 7 of the 2005 Act are not yet in force. The relevant sections will be commenced once regulations, setting out the detailed operational framework, have been produced. We are now consulting on the policy options – in other words, the underlying principles that will determine how it will work in practice – developed by the SCIOs Working Group for the implementation of the SCIO. Regulations will then be drafted in light of responses received to the consultation.

6. Who is the SCIO for?

There has never been an intention to restrict the SCIO form to any particular size or type of charity. However, we did not think it would be possible to design a “one-size-fits-all” model and so focussed our attention on the type of charity we think would benefit most, namely small-to-medium sized charities with annual incomes between £25,000 and £1m. Other charities could apply if they so wished but the charitable company form may continue to be most appropriate for the very largest charities, whilst the very smallest charities with few assets would have little to gain from incorporating. **(See Q1 in the response form).**

7. What are the SCIO options?

3 models have been identified for the SCIO **(see Qs 2-7 in the response form):**

- **Option 1 – the preferred model – (see Qs 2, 3 & 4 in the response form)** – proceeds from the baseline of charity law and regulation and asks what additional requirements would be necessary for SCIOs. This model seeks to strike a balance between supporting smaller organisations and providing flexibility to cater for the wide variety of organisational structures within the Scottish charity sector. Employing a relatively simple regulatory framework for the SCIO that provided the foundations for good governance would allow greater freedom to design the constitutional architecture best suited to the needs of the organisation and its users. The members of the charity would play a key role in the shaping of their SCIO and its governance, drawing on the advice of umbrella support organisations, such as SCVO, and under the regulatory oversight of OSCR. This model of SCIO could carry significantly less administrative burden than company law, in terms of documentation and form-filling requirements, given the existing robust monitoring regime that OSCR operates. Similarly, SCIOs could be subject to fewer or different publication requirements than companies, with less emphasis on public registers. Alternative publication measures might instead require OSCR to publish a SCIO’s constitution and accounts on its website, thus ensuring increased transparency, without actually placing any further burden on the SCIO itself.

- **Option 2 – the company model – (see Q5 in the response form)** – based on the model of the company limited by guarantee. We would expect the regulations for this model to integrate significant elements of company law, including provisions relating to formal documentation, record-keeping, decision-making, registers of members, charity trustees, charges and debentures, as well as importing portions of other legislation. So SCIOs could be subject to a higher burden of administrative procedure than under simpler models, and such extensive regulatory scaffolding required for this model could prove to be a significant deterrent for some smaller organisations. Our expectation is that this model would be most attractive to larger, more sophisticated organisations, which represent a relatively small proportion of the Scottish charity sector. The main advantage would appear to be removal of dual registration and reporting but would this in itself be so significant as to warrant the introduction of a new, complex regime? The Working Group thought this model unlikely to meet the needs of the smaller to medium sized unincorporated charity that would benefit from legal personality and limited liability and concluded that the company model did not meet the original policy drivers for the SCIO and would not deliver a more straightforward, cost-effective incorporation vehicle for a significant number of Scottish charities.
- **Option 3 – the minimalist model – (see Q6 in the response form)** – starts from the existing position for charities, using the provisions in primary legislation for SCIOs as a baseline and adds only the barest minimum of additional regulation for SCIOs. In this option, we could seek to limit the administrative requirements associated with the application process, so that it is no more difficult to apply to become a SCIO than it is to apply for charitable status. Without some basic additional constitutional requirements, would the SCIO form instil confidence in third parties or provide sufficient reassurance that the SCIO is properly managed? The SCIOs Working Group did not think that such a model provided an ideal framework for incorporation.

8. What other aspects of the regulatory framework are covered in the consultation?

The consultation paper also covers a number of the more detailed aspects of the SCIOs regime (**see Qs 8-23 in the response form**), including:

- **Application process** – includes proposals that additional features of the SCIOs application process should be set out by OSCR in guidance rather than prescribed in regulations.
- **Conversion process** – regulations may include publication requirements but much of the procedural detail could be set out by OSCR in guidance.
- **Amalgamation process** – again, regulations may include publication requirements but much of the procedural detail could be set out by OSCR in guidance.
- **SCIO constitutions** – proposes that SCIO constitutions should cover the basic elements to be covered in constitutions rather than spelling out exact form and content, to allow greater freedom of design whilst maintaining solid governance foundations.

- **SCIO documentation** – proposes to follow the requirements placed on other Scottish charities. Although record-keeping and documentation of decision-making would have to be covered in SCIO constitutions, it is not proposed to regulate separately on the discharge of these functions.
- **Registers of SCIO members and charity trustees** – proposes that regulations may require the maintenance of registers of SCIO members and charity trustees, but not require these to be published more widely.
- **Third parties** – seeks views from third parties, as to what they might look for in a SCIOs model, as potential funders and lenders.
- **Raising finance** – the Working Group’s preferred model for the SCIO (see Option 1 above), is based on the assumption that most small to medium sized charities, for whom it is designed, would not be expected to use loan instruments, such as debentures, to raise finance. Consequently, the regulations would not include detailed provisions on the maintenance and publication of registers of charges and debentures.
- **Accounting framework** – proposes that rules and thresholds governing SCIO accounting and external scrutiny follow those for other Scottish charities but, in the absence of searchable registers of charges, asks whether SCIO accounts should be published on the OSCR website.

9. How does the consultation paper address the end of a SCIO’s life?

A range of options for solvent and insolvent dissolution of SCIOs are discussed in some detail in part four of the consultation paper:

- **Solvent Dissolution** would occur where the SCIO is able to pay its debts in full, including any interest, within a reasonable period of time of commencing the winding up (**see Q24 in the response form**):
 - **Option 1 – The basic option** – a SCIO would not have to undertake any specific action in order to dissolve itself, beyond that which is required in its constitution, mirroring the process that the majority of unincorporated charities go through when they dissolve.
 - **Option 2 – Striking-off** - broadly equivalent to the process involved when a company applies to Companies House to be struck off the Register of Companies. The SCIO would apply to OSCR to be struck off the Scottish Charity Register; if removed, the SCIO would then be dissolved. In order to ensure protection of (potential) creditors, the SCIO may be required to satisfy certain conditions prior to entering the process and to publicise the intended dissolution, allowing objections to be lodged.

- **Option 3 – Members Voluntary Liquidation Process** – having resolved that the SCIO be wound-up and making a statement of solvency, the charity trustees would then appoint a liquidator to manage the process of winding-up the SCIO and distributing the assets. Publication of intention to wind up would be required, with notification for known creditors.
- **Option 4 – SCIOs obliged to use insolvency procedures** – only allows use of the insolvent dissolution option. This would ensure that all SCIOs used only one process, which would create certainty and consistency for SCIOs, OSCR and for lenders/funders. However, such a process could have more significant cost and administrative implications for the SCIO and OSCR.
- **Insolvent dissolution** would occur where the SCIO is unable to pay its debts as they fall due(see Q25 in the response form):
 - **Option 1 – Apply the current corporate insolvency regime** – the advantages of this option would include that a familiar and established set of procedures would be in place. However, this might be disproportionate if one of the “lighter touch” forms of SCIO was adopted. In addition, the full corporate insolvency regime is unlikely to be a cost effective method, with costs potentially running into thousands of pounds – money which could otherwise be used to pay creditors, or be used for charitable purposes. It could also take a long time to develop, potentially delaying implementation.
 - **Option 2 – Apply the current corporate insolvency regime, with modification** – starts with the current corporate insolvency regime and strips out the elements considered inappropriate for SCIOs. The elements which would be removed would depend to a large extent on the basic design of the SCIO, and the powers which it would have, but we would expect lighter models to remove the need for administration and receivership. The leaner the regime, the lower the anticipated costs associated with its application for all but the most complex compulsory liquidations. It too could take a long time to develop, potentially delaying implementation.
 - **Option 3 – Appointment of an independent third party to manage the most complex or contested insolvency cases** – creates a bespoke form of insolvent dissolution, based on elements which already exist in law but also drawing on the practical realities of the charity sector in Scotland. Taking the experience of most unincorporated charities, where in the majority of insolvent dissolutions, the charity trustees work with the creditors to reach a satisfactory solution, the assumption is that recourse to formal insolvency procedures would be used only as a last resort. This could be more far cost-effective, streamlined and preserves an informal yet mutually acceptable approach for SCIOs, where appropriate. However, in situations where the extent of the liabilities and number of potential creditors (possibly including employees) is such that a more formal, independent process is required, it might be appropriate to seek the appointment of an independent third party to manage the process. Such a route would not be without significant cost implications and could still be a lengthy and complicated process. However, if this was only used in a minority of difficult cases, the overall costs when compared to the

full application of corporate insolvency rules in every case could be far lower. It could also take a long time to develop, potentially delaying implementation.

- **Option 4 – The default regime** – treats a SCIO as an unregistered company. However, this would leave uncertainty about the process to be applied, such as sequestration. This approach could be relevant to an option where SCIOs are intended to provide a vehicle for smaller organisations, but this might require some restrictions on size or powers in order to minimise exposure to risk, both for the SCIO and its potential creditors. The SCIO would require the act or consent of a third party to wind up. Benefits to this model include the fact that there would be no requirement for new legislation to be introduced and it would be a comparatively lower cost model than the majority of other models proposed. The chief disadvantage of this model would be a significant state of uncertainty as to the SCIO's status, particularly as a SCIO could not itself petition to be wound up under this regime.
- **Option 5 – Apply the default regime in the interim, whilst a dedicated insolvency regime for SCIOs is developed.**

10. What happens next?

You are invited to submit your responses to the questions in the consultation paper (a response form can be found on our website at the following address: <http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>) by **26 February 2010** to the address below. Once the consultation closes and the responses have been analysed a Consultation Report will be produced which will outline the Scottish Government's intentions for the implementation of the SCIO.

11. Who can I contact for more information or with any other questions?

More information about the SCIOs Working Group, including some further questions and answers on SCIOs, can be found on the Scottish Government website: <http://www.scotland.gov.uk/Topics/People/15300/charities/law/SCIOs>. Other queries or requests for information can be sent to: CharityAct@scotland.gsi.go.uk, or to the address below:

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RESPONDENT INFORMATION FORM

Please Note That This Form **Must** Be Returned With Your Response to Ensure That We Handle Your Response Appropriately

1. Name/Organisation

Organisation Name

Title Mr Ms Mrs Miss Dr Please tick as appropriate

Surname

Forename

2. Postal Address

Postcode	Phone	Email

3. Permissions

I am responding as...

Individual

/

Group/Organisation

Please tick as appropriate

(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate Yes

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

Yes, make my response, name and address all available

or

Yes, make my response available, but not my name and address

or

Yes, make my response and name available, but not my address

(c) The name and address of your organisation **will be** made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your **response** to be made available?

Please tick as appropriate Yes

No

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate Yes No

Consultation on Options for the Implementation of the Scottish Charitable Incorporated Organisation (SCIO)

RESPONSE FORM

Q1: In designing the SCIO primarily for charities with incomes of between £25,000 and £1,000,000, do you think we have identified the right target market?

Yes	No	Don't know
Supporting Comment:		

Q2. Having considered the issues discussed in paragraphs 63-74, and the draft framework provided at Annex A, do you agree with the Working Group that option 1 presents the right SCIO model for implementation?

Yes	No	Don't know
Supporting Comment:		

Q3. Does option 1 deliver those original policy objectives in creating a straightforward yet robust incorporation vehicle for Scottish charities?

Yes	No	Don't know
Supporting Comment:		

Q4. Have we correctly identified the advantages and disadvantages? Do you think option 1 has missed any aspects?

Yes	No	Don't know
Supporting Comment:		

Q5. Do you agree that option 2, the company model, would not deliver the best SCIO form for Scottish charities? Have we correctly identified the advantages and disadvantages? If you disagree, please tell us why.

Yes	No	Don't know
Supporting Comment:		

Q6. Do you agree that option 3, the minimalist model, would not provide the ideal structure for the SCIO? Have we correctly identified the advantages and disadvantages? If you disagree, please tell us why.

Yes	No	Don't know
Supporting Comment:		

Q7. Of the three models outlined above, which would you prefer the SCIO to be based on? Please tell us why you have chosen a particular option over and above the others.

Yes	No	Don't know
Supporting Comment:		

Q8: Do you agree that the additional details of the SCIO application process should be set out administratively by OSCR rather than in regulations?

Yes	No	Don't know
Supporting Comment:		

Q9: Are there specific additional requirements you would expect to be required in SCIO applications?

Yes	No	Don't know
Supporting Comment:		

Q10. Do you agree that the additional details of the conversion process should be set out administratively by OSCRC rather than in regulations?

Yes	No	Don't know
Supporting Comment:		

Q11. Do you agree that the additional details of the SCIO amalgamation process should be set out administratively by OSCRC rather than in regulations?

Yes	No	Don't know
Supporting Comment:		

Q12. Do you agree that the regulations should cover the basic elements to be required of a SCIO constitution rather than setting out the exact form and content?

Yes	No	Don't know
Supporting Comment:		

Q13: Do you agree that the elements listed under paragraph 113 are the aspects of SCIO governance that SCIO constitutions should be required to cover? If you think any aspects have been missed, please provide details of these.

Yes	No	Don't know
Supporting Comment:		

Q14. Do you agree that the documents and information sources, in which SCIOs should be required to include their name, should mirror those for other Scottish charities?

Yes	No	Don't know
Supporting Comment:		

Q15. Do you agree that the SCIO regulations should not make specific provision on the keeping and/or publication of records and minutes, and the submission of certain documentation to OSCR, (additional to that already in the 2005 Act)?

Yes	No	Don't know
Supporting Comment:		

Q16. Do you agree that SCIOs should be required to keep registers of their members and that such registers should not be accessible to the public? If you disagree, please tell us why.

Yes	No	Don't know
Supporting Comment:		

Q17. Do you agree that SCIOs should be required to keep registers of their charity trustees and that such registers should not be accessible to the public? If you disagree, please tell us why.

Yes	No	Don't know
Supporting Comment:		

Q18: Do you agree that the preferred SCIO model outlined in paragraphs 63-74 will help to minimise any uncertainty about doing business with a new form of incorporated organisation?

Yes	No	Don't know
Supporting Comment:		

Q19: Do you anticipate there being any additional costs for third parties associated with the introduction of a new form?

Yes	No	Don't know
Supporting Comment:		

Q20: Do you consider it important for a SCIO to be able to raise finance?

Yes	No	Don't know
Supporting Comment:		

Q21. Do you agree that the regulations should not provide for the maintenance and publication of registers of charges and debentures, as proposed in the preferred model (option 1, page 22)?

Yes	No	Don't know
Supporting Comment:		

Q22. Do you agree that the regulations should require OSCR to publish SCIO accounts on its website to increase transparency?

Yes	No	Don't know
Supporting Comment:		

Q23: Do you agree that the accounting framework for SCIOs should mirror the existing requirements for charities rather than companies (that for charities allows those with limited income to produce a simpler form of accounts, i.e. receipts and payments accounts)? If you disagree, please tell us why.

Yes	No	Don't know
Supporting Comment:		

Q24. Which of the options for the dissolution of a *solvent* SCIO do you think strikes the right balance between protecting creditors and reducing the administrative burden on charities?

Option	Yes	No	Don't know	Comment
Option 1 – the basic option				
Option 2 – striking off				

Option 3 – Members Voluntary Liquidation				
Option 4 – only allow formal insolvency				

Q25. Which of the options for the dissolution of an *insolvent* SCIO do you think strikes the right balance between protecting creditors and reducing the administrative burden on charities? If you have selected option 5, the interim option, please tell us which of options 1-3 you would prefer to be developed for the longer term.

Option	Yes	No	Don't know	Comment
Option 1 – Apply the current insolvency regime				
Option 2 – Apply the current insolvency regime, with modification				
Option 3 – Appointment of an independent third party to manage the most complex or contested insolvency cases				
Option 4 – The default regime				

Option	Yes	No	Don't know	Comment
Option 5 – Apply the default regime in the interim, whilst a dedicated insolvency regime for SCIOs is developed.				

Any other comments

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