



Scottish Unincorporated Associations

29 June 2012

INTRODUCTION AND KEY POINTS

Introduction

The Charities Committee of ICAS welcomes the opportunity to comment on the Scotland Office's consultation on reforming the law on unincorporated associations.

The ICAS charter requires its committees to act primarily in the public interest, and our responses to consultations are therefore intended to place the public interest first. Our Charter also requires us to represent our members' views and protect their interests, but in the rare cases where these are at odds with the public interest, it is the public interest which must be paramount.

Any enquiries should be addressed to Christine Scott, Assistant Director, Charities and Pensions at cscott@icas.org.uk.

Key points

We welcome the steps taken by the Scotland Office to take forward the proposals from the Scottish Law Commission on the acquisition of legal personality by unincorporated associations, including unincorporated charities. However, we do not believe it is appropriate or desirable for qualifying unincorporated associations to automatically obtain legal personality.

From the consultation questions, it is clear that there are complex issues to resolve around the loss of Scottish Association with Legal Personality (SALP) status either inadvertently or through choice. We believe that further due diligence work is required around this area before the Bill is progressed. We recommend that the Scotland Office explores the idea of prohibiting SALPs from relinquishing separate legal personality once this had been acquired; this would only be possible if legal personality was acquired on an opt in basis.

We do not comment on those aspects of the Bill relating to Scottish partnerships.

COMMENTS ON ASSET TRANSFER SCHEME REGULATIONS

Question 1

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

- on the attribution of separate legal personality to qualifying unincorporated associations;
- that separate legal personality should not be dependent on any registration requirement;
- that unincorporated associations should be able to opt out of becoming a SALP; and
- that SALPs should have limited liability although 'culpable' office bearers and members will continue to incur personal liability for their wrongful actings.

Response

We support in principle the ability of unincorporated associations to acquire legal personality. However, we would prefer qualifying unincorporated associations to be able to opt to acquire legal personality rather than have to opt out of being a SALP. In our response to the Scottish Law Commission's consultation on unincorporated associations (dated 6 March 2009), we set out our reasons for taking this position:

"We are of the view that it would be undesirable for legal personality to be imposed on an association where this may not be wanted or could be inappropriate."

Our position is further reinforced by the current proposals as the acquisition of legal personality places additional responsibilities on the officer bearers (or equivalent) and members of qualifying incorporated associations. We believe this is incompatible with the automatic acquisition of legal personality, as officer bearers and members may not know their association has legal personality or be aware of the implications of having it.

Also, incompatible with the automatic acquisition of legal personality are other matters which require consideration and action by unincorporated associations, for example:

- the acquisition of title to heritable property and investments;
- the process of becoming a counterparty to contracts, for example, employment contracts and contracts for the supply of goods and services;
- insurance arrangements;
- banking arrangements; and
- HMRC registrations around payroll, VAT and tax reliefs.

The impact of loss of SALP status on the ability to pursue legal action against a former SALP and its office bearers etc. features heavily in the consultation. One way of addressing this issue could be to prohibit SALPs from relinquishing legal personality other than through formal dissolution. This would afford a degree of protection to businesses with contractual arrangements with SALPs. It will also give businesses certainty that a SALP cannot dissolve to avoid its obligations.

This would not prevent a SALP converting to a corporate vehicle (as the entity would continue to have legal personality) but could mean that winding up procedures would need to be developed specifically for SALPs. Formal wind up requirements would also place SALPs and their office bearers etc. in the same position as other vehicles with legal personality which wind up. We recognise that there would be cross-border issues to resolve if SALPs were to be prohibited from relinquishing their legal personality.

On winding up, SALPs which were charities would have to comply with charity law requirements in respect of charitable assets. Charities in this position would be in the same position as charities which cease to be Scottish Charitable Incorporated Organisations (SCIOs). SCIOs automatically cease to be charities when they cease to be SCIOs and need to ensure that their remaining assets continue to be applied to the appropriate charitable purposes.

We answer the other questions in the consultation on the basis that associations can continue to exist even if they cease to have legal personality.

We believe that qualifying unincorporated associations which are charities and have opted to acquire SALP status should be required to notify OSCR of their change in status. This would require an amendment to Section 17 of the Charities and Trustee Investment (Scotland) Act 2005. However, if this approach to amending primary legislation isn't feasible in the short-term we would recommend that the Office of the Scottish Charity Regulator (OSCR) gathers information on the status of unincorporated associations on its annual return and publishes the status on its website within the information available to the public on individual associations.

We agree that the limited liability offered to the office bearers and members of SALPs should be no more than that available for the office bearers and members of companies or other entities with legal personality.

Question 2

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

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

Response

While we agree that the availability of SALPs could create an incentive to avoid incorporation, we do not believe that it would be appropriate to set a threshold above which a SALP could not opt out or would have to opt in (after previously opting out).

The introduction of a threshold could result in inadvertent non-compliance of the law. It would be very challenging for qualifying unincorporated associations to know when they had exceeded a threshold and if the threshold was open to interpretation, then its application could become subjective, for example, unincorporated associations, other than charities, do not have their accounting framework set out in regulations.

Thresholds which determine legal personality would have to apply in 'real time' to provide certainty under the law to relationships with stakeholders, for example, employees, suppliers and members. However, we do not believe this would be feasible as it would require more sophisticated accounting and reporting arrangements and a greater knowledge of the law than associations are likely to have. Most organisations even large companies would not be able to assess their size in real time.

Size thresholds can work but this depends on the circumstances, for example, unincorporated associations which are charities are accustomed to applying thresholds to determine what accounting framework they need to use to prepare their accounts and to determine what type of external scrutiny they require. However, charities have the opportunity after the end of the financial year to determine the requirements so the thresholds are not applied in 'real time'.

We do not support the creation of a register of SALPs. However, we mention in our response to question 1 that we believe SALPs, which are charities, should notify OSCR of their status or, at least, OSCR should obtain this information via its annual return exercise.

Question 3

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

Response

We do not agree that there should be specific criminal sanctions contained in the proposed Bill nor do we believe that a specific offence of holding out as a SALP should be included in the Bill. It is likely that there are sufficient provisions within existing civil and criminal law which could deal with any particular circumstances where an unincorporated association was holding itself out as a SALP where it is not a SALP. We would expect the drafters of the Bill to explore this issue as part of any routine due diligence.

Question 4

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

Response

Yes, we agree that office bearers and managers should have the right of relief against those in post at the time of a breach of a clause 4 duty.

Question 5

Should the Bill include provisions which will enable SALPs to avoid multiple or vexatious requests for documentation? Should a reasonable interval between requests be specified?

Response

We have no objection to the inclusion of a provision on dealing with multiple or vexatious requests. However, we do not agree that an interval should be specified and associations should be given the freedom to decide for themselves whether or not a request is vexatious.

If the Scotland Office is minded to include an interval in the Bill, then we would not consider 28 days to be reasonable. We would consider that a request which was made repeatedly to an organisation every 28 days to be vexatious.

Question 6

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

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

Response

We believe that where SALP status is lost, under the model which is currently proposed, that there should be automatic rights of reversion back to office bearers etc. We take this view as in reality all the administrative and legal steps to transfer the assets and liabilities back to office bearers etc. may not be achievable within the same timescale as the change in status. Also, there would be no ability for an association which lost its SALP status inadvertently to undertake any formal steps to transfer assets and liabilities back to office bearers etc.

The issue of inadvertent loss of SALP status due to the official address of the association moving out of Scotland or the management ceasing to be wholly or mainly carried on in Scotland, highlights the need for UK wide measures to enable unincorporated associations to acquire legal personality.

Inadvertent loss could also impact on any insurance cover taken out by the former SALP. The insurance industry may provide market-led solutions for associations acquiring SALP status but there could be issues around the inadvertent loss of SALP status which could create pitfalls for office bearers etc. This is an issue which the Scotland Office may wish to consider in more detail before proceeding with the Bill.

Question 7

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

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

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

Response

We are not able to offer a solution on this matter and we are not commenting on the proposals around the criminal liability of partnerships. However, we believe that any provision around the prosecution of dissolved SALPs should be consistent with the provisions for Scottish partnerships, albeit that there may be scope to pursue the office bearers etc. of a former SALP if it continues to be an unincorporated association.

It is possible for a company to be reinstated after it is removed from the Companies House register. Although SALPs will not be registered, it may be possible to have a mechanism for reinstating SALP status in certain circumstances. Barriers to this could of course be that a reinstated SALP may not meet the qualifying conditions for SALP status or that the former SALP no longer exists as an unincorporated association.

Question 8

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

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

Response

We believe that the main difficulty in achieving any redress against an association would be if the unincorporated association had ceased to exist altogether after relinquishing or inadvertently losing SALP status.

We envisage that the office bearers etc. of unincorporated associations which no longer have SALP status could be pursued in the same way as the office bearers etc. of unincorporated associations are now.

Question 9

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

Response

We do not agree that unincorporated associations should automatically acquire SALP status. Therefore, we envisage that associations should be able to determine a realistic timetable for the voluntary acquisition of SALP status.

Question 10

Does the draft impact assessment adequately capture the costs and benefits of the proposals on unincorporated associations we should be aware of?

Response

We have no specific points to make on the draft impact assessment. However, we made the following comments on regulatory impact in our previous response to the Scottish Law Commission:

In respect of unincorporated associations which are charities -

“We believe that registration with the Office of the Scottish Charity Regulator (OSCR) or another UK charity regulator should be sufficient for an unincorporated association to acquire legal personality. The advantage of this approach is that there would be no additional regulatory burden placed on charities, except certain charities which are not required to register with the Charity Commission for England and Wales, and no costs in terms of establishing and maintaining a new register. However, we envisage that there are likely to be resource implications for charity regulators in terms of publicising the change in the law and for charities in terms of updating their constitutive documents, property deeds, share certificates and informing business contacts and financial supporters. Some thought would need to be given as to how the constitutive documents of all unincorporated charities should be updated to reflect their new status with any additional provisions which may be required being kept to a minimum.”

In respect of non-charitable unincorporated associations -

“We favour [optional acquisition of legal personality by expression of intention] as an unincorporated non-charitable association would know with certainty that it has acquired legal personality rather than acquiring separate legal personality de facto on meeting specific criteria. We are of the view that it would be undesirable for legal personality to be imposed on an association where this may not be wanted or could be inappropriate. This option also means that there will be no additional costs incurred in establishing and maintaining a new register.

The absence of a Registrar to demand compliance with a recognised form and structure, in our view, places additional emphasis on the need for minimum provisions within the constitutive document. We set out our views on what these minimum provisions should be in our response to question 4. Communication of a change in status to relevant third parties, for example, counterparties to contracts, other suppliers and banks will be required but we have not concluded as to whether or not notification should be a legal requirement. Ideally, associations should communicate the acquisition of separate legal personality as a matter of good practice.”

Question 11

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

Response

We have the following additional comments to make.

- **Trusts.** We believe that the draft Bill does not apply to Trusts. However, neither the Scottish Law Commission consultation nor this consultation clarifies this: we have a particular interest in this issue from the perspective of charitable trusts. Trusts do not have legal personality and trustees have personal liability and to that extent trusts are in the same position as unincorporated associations. Therefore, we would welcome a statement from the Scotland Office clarifying whether or not trusts are excluded from the scope of the Unincorporated Associations and Partnerships (Scotland) Bill.

We are aware that the Scottish Law Commission's ongoing project on trusts and its intention to publish a draft Trusts (Scotland) Bill to replace existing legislation during 2012 and the issue of the liability of trustees to third parties may be addressed within this Bill.

- **Cross border issues.** We believe that similar reforms should be introduced across the UK. From the perspective of a SALP this would prevent the inadvertent loss of legal personality from a change in location.
- **Direct taxation.** Unincorporated associations which are subject to direct taxation are subject to the UK's corporation tax regime. While we believe that the introduction of the SALP will not change the tax status of associations, we recommend that the Scotland Office liaises with HMRC about the proposals to ensure that there are not unintended tax consequences arising from the proposed Bill.