

**SCOTTISH EXECUTIVE
Draft Charities and Trustee Investment
(Scotland) Bill**



Consultation Response

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1. GOVERNANCE OF CHARITIES

While concurring (page 16, Para 3) with the view that a rigid standard structure is inappropriate, there is a very great need to ensure that National Charities, operating through a devolved structure, are both able and seen to exercise ultimate control over all of the funds and assets raised or acquired in their name.

There has been an unfortunate response to the “ambulance chasing/claims culture” in that certain UK National Charities have encouraged local branch Limited Company incorporation as a means of protecting national funds against law suits that might succeed against one branch or other of the charity.

Similarly, in Local Government and EU funded projects, there have been instances of “Local Empowerment Policy” devolving assets to local charitable companies, whereby the loss of control over these publicly-funded assets has resulted in serious loss to both the public purse and to the communities in question.

While many charities do not hold massive funds in relation to the responsibilities they seek to discharge, these funds and their related assets frequently amount to many hundreds of thousands of pounds and have on occasions in the past been targeted by individuals in pursuit of their own ends, including:

- specific projects, not necessarily compatible with the grantor or charity’s objectives;
- personal ambition;
- employment and nepotism;
- personal financial gain; and
- fraud.

It is implicit throughout the consultation paper that Trustees should not personally benefit from their office and what is important is that the structure of charities should be such as to actively prevent the Trustees of devolved groups from benefiting personally – or from pursuing their own agenda. Notwithstanding that the individual’s agenda may be well-meaning, the National Charity must be able to exercise absolute control over the devolved entity, including:

- the right to determine the composition of devolved Boards (and to be able to unilaterally dismiss any Trustee or Director – without reason and without liability); and
- the right to instantly remove all funds and negotiable assets to safe-keeping should they consider it desirable.





2. CONFLICT BETWEEN LOCAL EMPOWERMENT AND OBJECTIVES OF CHARITIES AND/OR GRANTORS

Devolved local structures have developed for a combination of legal protection and Local Empowerment of volunteers. While leaving local volunteers with the flexibility to respond to local situations in the community, it is essential that such organisations (and their assets) be protected against the consequences of inexperience and other factors, including wrong-doing. For this reason, the grantors and/or National Charities should maintain the right of active and immediate intervention in order to prevent the endangerment of local facilities, assets and funds.

3. OWNERSHIP OF SHARES IN DEVOLVED COMPANIES

Where a devolved corporate structure is used, it is essential that the ownership of the shares in these devolved companies should rest with the National Charities. While there are concerns regarding the implications of a National Charity operating as a shadow Director of a subsidiary, the corporate structure backed by the Charities legislation should be able to counter any such fears.

4. CONFLICT ACROSS DIFFERENT STATUTES

There are inherent conflicts between the objectives of charities and the responsibilities of Directors under the Companies Act. This can also extend to the areas of Employment Protection and Child Protection legislation and these areas of conflict are extensive and will require careful integration with the proposed charities legislation.

5. POSITIONS OF DIRECTORS, TRUSTEES AND MEMBERS OF MANAGEMENT COMMITTEES

Within charities these functions, and their attendant levels of authority and responsibility, are often confused and this confusion can give rise to very serious problems.

For example, an experienced company Director giving his/her time to a charity and finding him/herself at odds with a well-meaning but inexperienced group of co-Directors may find him/herself faced with an insoluble dilemma:

1. In terms of the Companies Act, if (s)he has concerns for the solvency of the company and his/her views are being ignored, then (s)he has no alternative but to resign. However, in doing so there is presently no body to whom (s)he can report his concerns (possibly the DTI but the route is unspecified).
2. Equally, if (s)he considers the company to be operating without regard to financial reality, (s)he may well find it impossible, as a matter of conscience, to resign and leave matters in the hands of the remaining Directors. In other words, inherent in every Director appointment, there lie the seeds of conflict. In particular, you can have the situation whereby, say, 6 members of a Board are people of negligible or no assets while the "more professional" Director is of considerable financial substance and would regard him/herself as the first target in the event of legal pursuit.

In other words, the present structure, particularly with regard to devolved corporate entities, can operate to deprive such entities of experienced and professional guidance at precisely the time when it is most needed. For this reason the new legislation should contain provisions whereby individual Directors have a clear route to express their concerns to the National Charity, the officers of whom have:

- the inalienable right to intervene; and
- a degree of protection when reporting situations of concern to the OSCR.



6. CONCLUSIONS RE CHARITIES AND GOVERNANCE OF DEVOLVED STRUCTURES

The inherent conflicts of Company and Charities law in relation to devolved structures constitute a danger of funds and assets, raised and granted in the name of national organisations, being lost through a combination of inexperience, incompetence and personal objectives. Whatever structure emerges in the forthcoming legislation should be such as to prevent National Charities being obliged (for their own protection) to permit such devolved structures and thereby enable them to maintain ultimate control over all assets, funds and investments raised in their name.

The right of Regulators and/or national Charities to intervene and safeguard assets should be vested in the Charities regulator **without having to go through the Court process**. For example, this could be done in the same way as a lender under a Security or Floating Charge can appoint a Receiver to do so at very short notice.