

**DRAFT CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL
RESPONSE FROM THE CHURCH OF SCOTLAND**

The Church of Scotland welcomes the opportunity of responding to the draft Bill and the relative Consultation Paper issued by the Scottish Executive Voluntary Issues Unit.

The Church has a number of serious concerns regarding the Bill which it would wish to draw to Ministers' attention. In particular, the Bill, if enacted as currently framed, would innovate radically as to the constitutional position of the Church.

Provisions for "Religious Charities"

Whilst the Church welcomes the retention of the concept of what is essentially designated religious body status in terms of Section 53 of the Bill, this status is only, in future, to confer exemption for certain provisions of the Bill as set out in Section 53(5). Whilst these provisions roughly align to the provisions contained in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 ("the 1990 Act"), the Bill, of course, confers on OSCR considerably enhanced powers relating to the supervision of charities and the Bill does not disapply these in the case of designated religious charities.

There are a number of provisions which involve OSCR or the Courts exercising control over the internal management of the Church of Scotland in contravention of the historic Church/State settlement which is laid down in the Church of Scotland Act 1921 ("the 1921 Act"). This Act of the United Kingdom Parliament in large measure ended the disputes in Scotland concerning the relationship between Church and State which had caused dissent and disruption since the Reformation. While the Church recognises that society has changed over the years, there remains the potential for considerable controversy if the State should seek to exercise control over the internal government of the Church. The Church believes that it was the recognition of this potential difficulty which resulted in the introduction of designated religious body status into the 1990 Act.

The provisions which cause the Church particular concern are: sections 10, 11, 12, 13 14(2) and (3), 16(4), 24(2)-(5), 27(6)-(9), 30(4)(a), (f) and (g) and 50(5).

While the constitutional position of the Church of Scotland was referred to in the consultation document, the Church considers that that position has not been fully considered and dealt with in the Bill. The Church sets out below a brief summary of that position.

The Church of Scotland has a unique constitutional position dating from historic times. In this regard, reference is made to the Memorandum submitted to the Bill Team, a copy of which is annexed along with a copy of the Church of Scotland Act 1921, for ease of reference. Further information can also be found in the 'Stair Memorial Encyclopaedia on the Laws of Scotland', Volume 3, "Churches and Other Religious Bodies" Paragraphs 1501 to 1504, & Volume 3 (Re-issued), "Constitutional Law" 618 to 639, Cox's 'Practice and Procedure in the Church of Scotland' and Weatherhead's 'The Constitution and Laws of the Church of Scotland.' In the 1921 Act Parliament recognised that there are certain areas which are exclusively and, as of right, appropriated to the Church and that within these areas the civil authority, including Parliament and the judiciary, has no jurisdiction. Accordingly, it is accepted that the Church courts are the appropriate fora for adjudication of all matters of ecclesiastical law, including matters relating to discipline, government, membership and office in the Church, the constitution and membership of its courts, the mode of election of office-bearers and the definition of the boundary of the spheres of labour of its Ministers and/...

and other office-bearers. It is hard to imagine a power which could potentially interfere more with matters relating to the government of the Church than that contained in Section 27(6) which confers on OSCR power to give “a direction restricting the transactions which may be entered into or the nature or amount of payment which may be made, in the administration of the charity or body, without prior consent”. A further example relates to Section 13 “Changes which require OSCR's consent”. Reference is again made to the 1921 Act and to the Declaratory Articles which themselves contain the mechanism for amendment thereof and which also contain provisions relating to union with other denominations. The Bill if enacted would create a requirement to seek and obtain OSCR's consent to *inter alia* matters which would come within these two areas. More importantly and likely to be of much more practical import, section 13 would require proposals to unite or dissolve Church of Scotland Congregations (which are currently all separately recognised bodies in terms of the 1990 Act) to be subject to approval by OSCR. It should be noted that the leading case on interpretation of the 1921 Act (Ballantyne –v- Wigtown Presbytery 1936 SC 625) involved a challenge to steps taken by the Presbytery in conformity with Church legislation, to effect a union of two Congregations. The Court of Session held that the steps taken by the Presbytery fell within the powers of “government” contained in Article 4 of the Declaratory Articles as did matters relating to the rights of the Congregation to elect a Minister in a vacant charge. As such, these were issues over which the Church had supreme control and in regard to which the courts had no jurisdiction to interfere. The Bill if enacted would innovate radically on this position.

Apart from these provisions, the Church considers that it is clear and, indeed, self-evident that the other sections of the Bill also referred to fall within the Church's independent jurisdiction. However, it would be happy to provide further clarification/amplification of this.

The Church would wish to emphasise the seriousness with which it views this attempt to impinge upon its independent jurisdiction given that the draft sections of the Bill above-mentioned, if enacted, would undermine the fundamental principles of the Church/State relationship. The creation of designated religious body status in the 1990 Act did result in a commendable solution to the perceived constitutional difficulties and it is hoped that, on reflection, the Scottish Executive will agree to amend the Bill by extending Section 53(5) so that the above listed provisions will also not apply to the Church and, indeed, to other religious bodies who currently are qualified as designated religious bodies and those which may in future be designated. As was pointed out at the time that discussions were ongoing with the Scottish Office in connection with the 1990 legislation, other religious bodies also assert the right to spiritual independence and, indeed, such rights are specifically recognised in the 1921 Act. As compared to most other charities, there are significant differences in structure and organisation of religious bodies. In addition there is the important distinction that, in the case of religious bodies, almost all income comes from Church members rather than from members of the public generally. The Church therefore submits that these factors make it appropriate that the present scheme of self-regulation continue and be extended to encompass exemption from the new OSCR powers, particularly as, in the intervening years since the enactment of the 1990 Act, this has been shown to have worked well and without difficulty.

The Church has contributed to the response which is being submitted by the Scottish Churches Committee and which the Church fully endorses. For the sake of brevity, points which have been covered by the Committee have not been repeated in this response.

Finally, there is annexed a response by the Church of Scotland Trust, one of the Church's statutory corporations which has had particular experience of matters relating to trust re-organisations, commenting on those aspects of the Bill.

BACKGROUND PAPER ON DESIGNATED RELIGIOUS BODIES

The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, Section 3 authorises the Secretary of State (now the First Minister) to designate by Order recognised bodies whose principal purpose is the promotion of a religious objective and whose principal activity is the regular holding of acts of public worship, provided such bodies satisfy conditions as set out in subsection 2 of the section namely that they have been established in Scotland for at least 10 years, they have a membership of at least 3,000 persons resident in Scotland over the age of 16 and that their internal organisation is such that there is proper supervision of the component elements of the body, particularly as to the keeping of accounting records and the auditing of accounts. Any body so designated is exempted from many of the requirements of Part 1 of the Act and, in particular, from the powers of the Lord Advocate to investigate and to suspend trustees. Such bodies, however, remain liable to produce their Accounts to the Lord Advocate or any third party although they are not subject to the detailed requirements as to the keeping of accounting records set out in Section 4 of the Act. The sanction for any misconduct or mismanagement is the loss of designated status.

The exemptions available are not limited to Christian organisations although it is understood that, at present, it is only the larger Christian denominations in Scotland which have applied for and received designation.

It has been commented to the Commission that designation was obtained as a result of effective lobbying on the part of the Churches. The position is, however, somewhat more complex and reflects the accepted distinctions between religious bodies and other charities and also the constitutional position of the Church of Scotland as the National Church.

The Church of Scotland's unique constitutional position arises from the history of tension and conflict between it and the State. The decision to embrace the reformed faith and reject the authority of the Pope was a political one taken by the Scottish Parliament in 1560 without the approval of the Sovereign and, indeed the Parliamentary Acts of Reformation did not receive Royal Approval until after Mary's abdication in 1567. Further Church/State tensions emerged during the reign of James VI and his two successors, all of whom had Episcopalian sympathies and endeavoured to control the Church by the imposition of Bishops. The Covenanting Wars ensued. Eventually, the Revolution Settlement of 1690 established the Church of Scotland as Presbyterian and provisions for its protection were "entrenched" in the Treaty of Union. This, notwithstanding, conflict persisted. The patronage system in terms of which legislation gave land owners the right to present ministers to vacant congregations was a particular bone of contention and was a significant factor in the secession of considerable numbers of Kirk ministers and members in the 18th century to set up denominations which ultimately became the United Presbyterian Church. The Disruption in 1843 when over one-third of the Kirk's ministers left to form the Free Church was triggered by the enacting by the General Assembly of legislation concerned with internal Church administration which was subsequently challenged in the civil courts and struck down as being allegedly *ultra vires* of the General Assembly. Faced with such a denial of the Church's right and freedom to manage its own affairs, the Disruption was inevitable.

In 1900 the United Presbyterian Church and the Free Church united to form the United Free Church and in 1929 the United Free Church and the Church of Scotland were re-united to form today's Church of Scotland. (The two bodies nowadays known as the Free Church and the United Free Church comprise a small remnant of congregations that declined to enter one or other union). The 1929 re-union was made possible through the abolition of patronage./...

patronage the removal of the Kirk's right to have certain churches and manses maintained at the expense of third parties and the adoption by the Church of Scotland of its Declaratory Articles which achieved a resolution of the Church-State question by their reference to the Church, not as "established", but as "a national church, representative of the Christian faith of the Scottish people". Those entering the union from the United Free Church side who might be nervous of any suggestion of a state church were reassured firstly by the inclusion in the Declaratory Articles of the declaration that the Church has "the right and power, subject to no civil authority, to legislate and to adjudicate finally in all matters of doctrine, worship, government and discipline in the Church." Secondly, prior to the union taking place, the Westminster Parliament enacted the Church of Scotland Act 1921, a copy of which is appended, to which the Declaratory Articles were annexed as a Schedule. The Act itself, in accordance with the statement in the Declaratory Articles above quoted, does not purport to give the Church its constitution or to grant it spiritual independence but instead declares the Declaratory Articles as drawn up by the Church to be lawful and to prevail over all State statutes or laws then in force affecting the Church. By the 1921 Act, Parliament accordingly explicitly recognised that there exists an area where its writ does not run, namely the government of the Kirk in matters spiritual through the Courts of the Church, the Act being therefore a unique legislative recognition of a limitation on the sovereignty of the UK Parliament (and by extension the Scottish Parliament).

Amongst the matters falling within the Church's exclusive spiritual jurisdiction is the right to determine all questions concerning membership and office in the Church as to which the State has no right to intervene. At the time of the presentation of the Law Reform Bill to Parliament, representations were made by the Church pointing out that some of the matters which were the subject of the proposed legislation were matters which fell within the exclusive jurisdiction of the Kirk and that, if the legislation were passed in the form proposed, there would inevitably be cases involving dispute where neither the Church nor the State was willing to accept the jurisdiction of the other.

Although the Church of Scotland is the only religious body in the UK to have specific legislation recognising its exclusive jurisdiction in spiritual matters, other denominations also claim such a separate jurisdiction and Section 2 of the 1921 Act acknowledges the rights of other churches. Concurrently with representations made by the Church of Scotland, the Scottish Churches Committee made similar representations on behalf of its member denominations.

The representations also drew attention to the significant and fundamental distinctions which exist between Church bodies on the one hand and other charities (large and small) on the other. In addition to distinctions in their governing structures, the income of Churches essentially comes from their members not from public appeals and is contributed mainly as congregational income. In the case of the Church of Scotland, the great bulk of that income (approximately 85%) is spent within the parochial area served by the congregations concerned with there being procedural arrangements which enable the members providing the income to exercise direct supervision over the manner in which the income is dispersed. The same essential principles of direct supervision apply in regard to the proportion of income remitted for central expenditure.

The representations submitted on behalf of the Church of Scotland and other Churches were accepted in principle by the Government and negotiations with officials of the Scottish Office followed, resulting in the formulation of what is now Section 3 of the Act.

THE CHURCH OF SCOTLAND ACT, 1921

[11 & 12 GEO.5]
CHAPTER 29

An Act to declare the lawfulness of certain Articles declaratory of the Constitution of the Church of Scotland in matters spiritual prepared with the authority of the General Assembly of the Church.

[July 28, 1921]

Whereas certain articles declaratory of the constitution of the Church of Scotland in matters spiritual have been prepared with the authority of the General Assembly of the Church, with a view to facilitate the union of other Churches with the Church of Scotland, which articles are set out in the Schedule to this Act, and together with any modifications of the said articles or additions thereto made in accordance therewith are hereinafter in this Act referred to as "the Declaratory Articles":

And whereas it is expedient that any doubts as to the lawfulness of the Declaratory Articles should be removed:

s 1

The Declaratory Articles are lawful articles, and the constitution of the Church of Scotland in matters spiritual is as therein set forth, and no limitation of the liberty, rights and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby declared that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.

s 2

Nothing contained in this Act or in any other Act affecting the Church of Scotland shall prejudice the recognition of any other Church in Scotland as a Christian Church protected by law in the exercise of its spiritual functions.

s 3

Subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual, nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature.

S 4

This Act may be cited as the Church of Scotland Act 1921.

SCHEDULE/...

SCHEDULE

ARTICLES DECLARATORY OF THE CONSTITUTION OF THE
CHURCH OF SCOTLAND IN MATTERS SPIRITUAL

Para I

The Church of Scotland is part of the Holy Catholic or Universal Church; worshipping one God, Almighty, all-wise, and all-loving, in the Trinity of the Father, the Son, and the Holy Ghost, the same in substance, equal in power and glory; adoring the Father, infinite in Majesty, of whom are all things; confessing our Lord Jesus Christ, the Eternal Son, made very man for our salvation; glorying in His Cross and Resurrection, and owning obedience to Him as the Head over all things to His Church; trusting in the promised renewal and guidance of the Holy Spirit; proclaiming the forgiveness of sins and acceptance with God through faith in Christ, and the gift of Eternal life; and labouring for the advancement of the Kingdom of God throughout the world. The Church of Scotland adheres to the Scottish Reformation; receives the Word of God which is contained in the Scriptures of the Old and New Testaments as its supreme rule of faith and life; and avows the fundamental doctrines of the Catholic faith founded thereupon.

Para II

The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church. Its government is Presbyterian, and is exercised through Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies. Its system and principles of worship, orders, and discipline are in accordance with "The Directory for the Public Worship of God," "The Form of Presbyterial Church Government," and "The Form of Process," as these have been or may hereafter be interpreted or modified by Acts of the General Assembly or by consuetude.

Para III

This Church is in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707. The continuity and identity of the Church of Scotland are not prejudiced by the adoption of these Articles. As a national Church representative of the Christian Faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry.

Para IV

This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church, including the right to determine all questions concerning membership and office in the Church, the constitution and membership of its Courts, and the mode of election of its office-bearers, and to define the boundaries of the spheres of labour of its ministers and other office-bearers. Recognition by civil authority of the separate and independent government and jurisdiction of this Church in matters spiritual, in whatever manner such recognition be expressed, does not in any way affect the character of this government and jurisdiction as derived from the Divine Head of the Church alone, or give to the/...

the civil authority any right of interference with the proceedings or judgments of the Church within the sphere of its spiritual government and jurisdiction.

Para V

This Church has the inherent right, free from interference by civil authority, but under the safeguards for deliberate action and legislation provided by the Church itself, to frame or adopt its subordinate standards, to declare the sense in which it understands its Confession of Faith, to modify the forms of expression therein, or to formulate other doctrinal statements, and to define the relation thereto of its office-bearers and members, but always in agreement with the Word of God and the fundamental doctrines of the Christian Faith contained in the said Confession, of which agreement the Church shall be sole judge, and with due regard to liberty of opinion in points which do not enter into the substance of the Faith.

Para VI

This Church acknowledges the divine appointment and authority of the civil magistrate within his own sphere, and maintains its historic testimony to the duty of the nation acting in its corporate capacity to render homage to God, to acknowledge the Lord Jesus Christ to be King over the nations, to obey His laws, to reverence His ordinances, to honour His Church, and to promote in all appropriate ways the Kingdom of God. The Church and the State owe mutual duties to each other, and acting within their respective spheres may signally promote each other's welfare. The Church and the State have the right to determine each for itself all questions concerning the extent and the continuance of their mutual relations in the discharge of these duties and the obligations arising therefrom.

Para VII

The Church of Scotland, believing it to be the will of Christ that His disciples should be all one in the Father and in Him, that the world may believe that the Father has sent Him, recognises the obligation to seek and promote union with other Churches in which it finds the Word to be purely preached, the sacraments administered according to Christ's ordinance, and discipline rightly exercised; and it has the right to unite with any such Church without loss of its identity on terms which this Church finds to be consistent with these Articles.

Para VIII

The Church has the right to interpret these Articles, and, subject to the safeguards for deliberate action and legislation provided by the Church itself, to modify or add to them; but always consistently with the provisions of the first Article hereof; adherence to which, as interpreted by the Church, is essential to its continuity and corporate life. Any proposal for a modification of or addition to these Articles which may be approved of by the General Assembly shall, before it can be enacted by the Assembly, be transmitted by way of overture to Presbyteries in at least two immediately successive years. If the overture shall receive the approval, with or without suggested amendment, of two-thirds of the whole of the Presbyteries of the Church, the Assembly may revise the overture in the light of any suggestions by Presbyteries, and may transmit the overture when so revised to Presbyteries for their consent. If the overture as transmitted in its final form shall receive the consent of not less than two-thirds of the whole of the Presbyteries of the Church, the General Assembly may, if it deems it expedient, modify or add to these Articles in terms of the said overture. But if the overture as transmitted in its final form shall not receive the requisite consent, the same or a/...

a similar proposal shall not be again transmitted for the consent of Presbyteries until an interval of five years after the failure to obtain the requisite consent has been reported to the General Assembly.

Para IX

Subject to the provisions of the foregoing Articles and the powers of amendment therein contained, the Constitution of the Church of Scotland in matters spiritual is hereby anew ratified and confirmed by the Church.

RESPONSE OF THE CHURCH OF SCOTLAND TRUST

to

THE CHARITIES & TRUSTEE INVESTMENT (SCOTLAND) BILL CONSULTATION PAPER

The Church of Scotland Trust's response is restricted to the areas in the draft Bill relating to the reorganisation of charities/public trusts and educational endowments. The Church of Scotland Trust is fully aware of and concurs with the responses submitted by the Church of Scotland and the Scottish Churches Committee in relation to the other areas in the draft Bill.

The Church of Scotland Trust is fully supportive of the intention, as stated in the Consultation Document, that the proposed Act "will create a simpler, cheaper process for charities seeking to change their constitutions, merge or wind up". The Trust is pleased to note that the draft Bill takes into account some of the points raised in the Church of Scotland Trust's response to the Consultation Paper of the Scottish Charities Law Review Commission. In particular it welcomes:

- The inclusion of educational endowments within the ambit of the proposed new Act, thereby allowing such educational endowments to benefit from the reorganisation provisions;
- The provision of a procedure to allow a single reorganisation process to deal with both the modification of Trust purposes and the expenditure of capital, thereby reducing the costs which a small charity or public trust would incur when reorganising.
- The proposal that re-organisations for medium sized charities will take place in the Sheriff Court. However, it is concerned whether this proposal will come into force as the provision allowing applications under section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 in the Sheriff Court have never come into force.
- The suggested threshold of an annual income of less than £10,000 for applications under sections 57 and 58, as indicated in the Consultation Paper, would be welcomed.

However, the Trust is of the view that there are other matters which require to be addressed by the proposed Bill to create the "simpler, cheaper process" that is intended:

- Charities or public trusts which are constituted under a Royal Charter or Warrant or under any enactment are excluded from the provisions of section 57 of the draft Bill. The provisions of section 57(4)(a) would result in such charities or public trusts being unable to be the recipient of funds transferred in terms of section 57(3)(b). Further, if such a charity or public trust found itself in the position that it qualified as a "small" charity or public trust on income grounds, for the purposes of section 57 it would have insufficient funds to promote the necessary private legislation for a reorganisation. The Trust is aware of a public trust whose trustees identified a suitable charity to be the beneficiary of its funds, as the purposes were very similar, but the transfer was unable to proceed under the 1990 Act because the beneficiary charity was incorporated by Royal Charter and was not a public trust.
- The Trust would welcome a new modification procedure for very small public trusts or charities which would enable the 'appropriate persons' to make an application for reorganisation, and in particular the expenditure of the capital of a permanent endowment, without/...

without the necessity of publishing their intentions to do so in a public notice. The cost of a public notice is outwith the means of many small charities and public trusts due to their limited resources. The cost of a Public Notice in the prescribed style for a section 10 or Section 11 application under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 can range from £150 to £750, depending on the newspaper circulating in the locality. The Trust would advocate that a section in similar terms to the proposed new Section 75 of the Charities Act 1993 (Section 33 of the Charities Bill, Part 2, Chapter 11) should be included in the draft Bill for Scotland. Failing this the Bill should be amended to give OSCR the power to dispense with the need for a Public Notice. If such a procedure is not made available there will be many small charities and public trusts which are unable to make an application to reorganise with a view to obtaining permission to expend capital as they have insufficient funds to cover the costs involved in such an application. For example, if a Glasgow based small public trust has a permanent endowment fund of £1,000 and an income of say £50 per annum, the 'appropriate persons' in terms of the draft Bill are not in a position to make an application under section 57 because they cannot resolve that an application to expend capital "would enable the resources of the charity or trust to be applied to better effect consistently with the spirit of its constitution". The costs of the application would utilise more than 50% of the funds under their charge and would be difficult to justify as an appropriate use of charitable resources. In such a case a procedure similar to that being proposed for England and Wales or a simple authorisation procedure involving possibly the exchange of letters with OSCR is required.

- The Trust would welcome OSCR being given a discretion as to whether a public notice is required in respect of any resolution passed under section 57(2). It is suggested that any resolution under section 57(2) should be sent to OSCR with a statement explaining the reasons for the passing of the resolution. OSCR would then have a discretion to direct whether a public notice was required and only if such a direction was given would there be a 28 day period from the publishing of the public notice for any person with an interest to make representations. Such a discretion would be similar to the discretions given to the Charity Commission in the proposed amended sections to the Charities Act 1993 - s74(7), s74B(7) and s75A(6) [Sections 30, 31 and 33 of the Charities Bill].

It is hoped that these suggestions could be incorporated into the final version of the Bill and thereby fulfil the objective of providing "a simpler, cheaper process for charities seeking to change their constitutions, merge and wind up".

The Trust now awaits with interest the Bill to be laid before Parliament and the draft Regulations pertaining thereto.