Scottish Law Commission
promoting law reform

Consultation Paper on Public and Charitable Trusts: Amalgamation of Functions and Common Investment Funds

July 2012

This Consultation Paper is published for comment and criticism and does not represent the final views of the Scottish Law Commission

NOTES

1. Please note that information about this Consultation Paper, including copies of responses, may be made available in terms of the Freedom of Information (Scotland) Act 2002. Any confidential response will be dealt with in accordance with the 2002 Act. We may attribute comments and publish a list of respondents' names.

2. Where possible, we would prefer electronic submission of comments. A downloadable electronic response form for this paper is available on our website.

3. The Consultation Paper is only available on our website at http://www.scotlawcom.gov.uk/. It has been processed for accessibility but it you have any difficulty in reading it, please contact us and we will do our best to assist.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965[1] for the purpose of promoting the reform of the law of Scotland. The Commissioners are:

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[1] Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Introduction

1. In our last full Discussion Paper in the trusts project, that on Supplementary and Miscellaneous Issues relating to Trust Law,[1] we raised a number of new issues that we had not previously considered in the course of the project,[2] and also a number of issues that had previously been the subject of discussion papers. We have subsequently published a Consultation Paper on one of the new issues raised in that discussion paper, namely Defects in the Exercise of Fiduciary Powers.[3] We have given further consideration to ways in which the law of trusts might usefully be reformed, and a further issue has occurred to us. This is the question of whether public and charitable trusts should be enabled to amalgamate their administrative functions and (in respect only of charities) their investments in such a way that the individual trusts benefit, principally from economies of scale, but at the same time do not lose their own identity. Our provisional view is that this would be of particular assistance to small and medium sized charitable and other public trusts. Many such trusts have a long history, and the trustees may be very reluctant to see them lose their long-established identity in a larger amalgamated trust. If amalgamation is confined to limited functions however, the separate trust purposes and trustees can remain in place; in that way the trust's history and traditions can be preserved. It would also benefit charities which are constituted other than as a trust, for instance as a company, unincorporated association or Scottish Charitable Incorporated Organisation (SCIO)[4].

2. It has come to our notice that a considerable number of charitable trusts are incurring administrative expenses that are disproportionate to their income and to the amounts that they are able to distribute for charitable purposes. This is obviously inefficient. For example, in Edinburgh a number of charities exist for the relief of poverty among categories such as the sick, the infirm, the old, the disabled and others. Many of these are experiencing the problem of administrative and investment expenses that are high in relation to the total income generated by the charity's funds. Another example would be groups of churches, which may be faced with similar problems regarding administration and the investment of funds.

3. A possible solution in such cases would be amalgamation of the charities into a new charitable trust. Such an arrangement is possible under the existing law, using either a *cy-près* scheme or a reorganisation scheme approved by OSCR under chapter 5 of the Charities and Trustee Investment (Scotland) Act 2005 ("the 2005 Act"). Thus a combined

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[1] DP No 148, April 2011.
[2] Information to be provided to beneficiaries and others, protectors, private purpose trusts, trusts to hold the controlling interest in companies and error and other defects in trustees' exercise of discretionary powers.
[3] Consultation Paper on Defects in the Exercise of Fiduciary Powers (Dec 2011), available at: http://www.scotlawcom.gov.uk/index.php/download_file/view/935/104/.
[4] SCIOs, which are bodies corporate, were introduced by ch 7 of part 1 of the Charities and Trustee Investment (Scotland) Act 2005. The relevant provisions were commenced on different times during 2011 and 2012: see The Charities and Trustee Investment (Scotland) Act 2005 (Commencement No 5) Order 2011 (2011/20 (C4)).

trust might be set up with the general purpose of relieving poverty in Edinburgh. There is some reluctance to do this, however; for one thing, the individual charities are often of great antiquity, and the trustees feel that they have assumed office to fulfil the purposes of their particular trust rather than to wind it up and have it merged into a new "super charity". In addition, the legal expenses involved in preparing the scheme and having it approved are likely to be substantial, and in many cases disproportionate to the charities' resources. While we have not carried out extensive empirical research, we suspect that this problem is extremely common, and that the reluctance of trustees to enter into a statutory or *cy-près* scheme that results in total amalgamation of their charity with others is widespread. We also consider that such reluctance is, in the main, entirely reasonable: charities should be allowed to operate on their own if that is what the trustees wish.

4. As a final introductory point, the reforms which we consider in this paper are in the area of administration and of investment. The former would apply only to charitable trusts but the latter would be broader and would extend to all charitable bodies, however constituted. For the avoidance of doubt, "charity", whose definition is notoriously varied in different contexts, is generally used in this paper to mean a charity liable to registration with the Office of the Scottish Charity Regulator, or OSCR. Where we intend another definition in what follows we make this clear.

The present law: amalgamation of administrative functions

5. Under the current law trustees of two or more charitable trusts may decide to amalgamate some of their respective administrative functions. This is, of course, subject to the terms of the trust deeds and to general fiduciary obligations (so that, for example, it would not be appropriate if it would involve sharing information in circumstances where actual or potential beneficiaries might suffer). There are different ways in which this aim may be achieved. One, which has already been mentioned, is by means of a *cy-près* scheme or a reorganisation scheme approved by OSCR under chapter 5 of the 2005 Act. The benefit of this is that it provides a solid legal basis for the new arrangement. The disadvantages centre mainly around questions of cost, both in time and money, of setting up such an arrangement. Individual charities are only likely to be involved in such arrangements very infrequently (if at all) and therefore the paperwork is likely to have to be drawn up from scratch each time.

6. Less formal arrangements are also possible under the current law. For example, a trustee, or group of trustees, may agree to assist the trustees of a different trust with administrative duties on an *ad hoc* basis. This might be in respect of matters such as the completion of the annual returns to OSCR or to the tax authorities, or the identification of suitable training courses for trustees. Or – to take the example of two charities involved in alleviating poverty – assistance might be given by one set of trustees identifying possible beneficiaries and sharing this information with the trustees of the other trust. More typically, though, two or more sets of trustees may decide to instruct external individuals or bodies, for example fund raisers or accountants or printers, and to share the costs of doing so. Such arrangements have the advantage of flexibility but can give rise to problems if, for example, they suddenly come to an end (thereby leaving the assisted charity with the obligation to undertake work, at short notice, with which it has grown unfamiliar) or if the assistance is challenged by an interested party (leaving the charity with an uncertain basis on which to defend the claim).

7. Because of these arguments, we think that it may be appropriate to include in a new Trusts (Scotland) Bill a statutory mechanism that is designed specifically to enable groups of trusts to amalgamate their administrative functions. In effect this would mean that a style would be provided that could be used by any particular group of trusts. Modification would be possible to meet the needs of individual cases; consequently the style would be essentially a default provision. Nevertheless, the existence of such a style would produce a considerable saving in the expenses of drafting a co-operation arrangement; it would be unnecessary to prepare a *cy-près* scheme or a reorganisation scheme under chapter 5 of the 2005 Act. At the same time it should be possible to provide certain options in the statutory scheme to permit a degree of flexibility among different groups of trusts.

The present law: amalgamation of investment functions

8. It is well known that all trustees, including charitable trustees, have specific powers and duties in respect of investments. At present they are mainly contained in sections 4A to 4C of the Trusts (Scotland) Act 1921, as inserted by section 94 of the 2005 Act.

9. Whilst day to day management of a charitable trust's assets may be entrusted to a nominee or agent the trustees remain liable to keep any relevant arrangements under review. But what if trustees of charitable trusts A, B and C, whose individual assets are relatively modest in size, wish to combine their funds into a common pool for investment purposes? In doing so, they may reasonably hope to reap a number of benefits. There is, for example, the potential for saved costs (with investment advice, say, on a pool of £200,000 costing rather less than double the corresponding charge for two funds of £100,000 each). There is also the likelihood of a greater spread of investments such as can be achieved with an enlarged pool of assets.

10. We were initially attracted by the idea of proposing that such a pool might be created, and that it would be up to the trustees of the trusts which were involved to devise a way of determining the respective rights to the assets. It seemed to us that the most suitable method would be to adopt an approach similar to that of a unit trust, whereby a unit price would be set when the pool was created and subsequent additions to, and withdrawals from the pool would be on the basis of the value of the pool at that time.[5] We subsequently sought the initial views of interested parties, principally Her Majesty's Revenue and Customs and Her Majesty's Treasury, and we are now persuaded that a different approach to sharing the investment function – which we set out below – is preferable. For the following reasons we decided against proposing to provide a statutory method by which trustees of charitable trust A could pool their investment functions (in a way of their choosing) with those of trusts B and C:

- *Regulatory* There is a real possibility that the pool would be classified as a "collective investment scheme" within the meaning of section 235 of the Financial Services and

[5] Thus if charities A, B and C pool their funds, A having £100,000, B having £50,000 and C having £150,000, each would acquire a proportionate number of units. The initial value of each unit might be, say, £1,000. On that basis A would be allocated 100 units, B would be allocated 50 and C would be allocated 150 units. If B subsequently obtained a legacy of £25,000, it could purchase further units, valued on the basis of the market value of the fund as at the date when the units were purchased. Thus if by the time that B obtained the legacy the value of each unit had increased from £1,000 to £2,000, B would obtain a further 12½ units (£25,000 divided by £2,000). This is exactly the way in which unit trusts work, although for such trusts there are usually complex deductions for dealing expenses and the like. In respect of expenses, it would be the net value of the new funds contributed that was used to acquire units.

Markets Act 2000.[6] This would trigger the need for authorisation by the Financial Services Authority (FSA),[7] unless an exemption could be invoked. Two possible exemptions are:

- The trustee-investors exercise day to day control over the management of the property. This is a relatively strict test,[8] and the level of involvement with decision-making which is required is likely to be incompatible with the benefits which might otherwise be expected to accrue from setting up a pool.

- Trustees of the pooled fund are the same as those of each of the contributing charities.[9] As with the preceding exemption, this is unlikely to afford any useful benefit. It is essentially to allow charities within the same "family" to pool funds under the supervision of the collective bodies of trustees.

- *Taxation* There is a strong likelihood that the pool, if considered to be a taxable entity, would not be classed as charitable for taxation purposes. This is because investment is not generally recognised as a charitable purpose, even if solely for the benefit of charities. If so, that would have unwelcome consequences. (As we consider later in the paper, this problem has been directly addressed in the case of Common Investment Funds and Common Deposit Funds, which are in effect collective pools of assets which are deemed by charities legislation to be charities for taxation purposes.)

Proposals for reform: general

11. We are of opinion that there are three areas which should be covered. These are as follows:

(i) *Accounting functions, including the making of statutory returns*. This would cover returns to OSCR and to the tax authorities. While a separate return would be required for each trust, the fact that a single individual or firm of accountants was responsible for a significant number of returns would produce economies of scale.

(ii) *Other administration*. This would cover non-accounting records, the identification of potential beneficiaries and the making of payments to beneficiaries. For example, with charities for the relief of poverty in Edinburgh, one or more representatives of the co-operating charities could identify potential recipients, and the trustees of the individual charities could then decide which ones they wanted to benefit. This would be likely to produce considerable savings in administrative costs. It would, however, remain the responsibility of the trustees of the particular charity to decide whether or not to benefit the individual in question.

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[6] Separately, "collective investment schemes" are a reserved matter under the Scotland Act 1998 (see "financial services" at section A3 of Part II to Sch 5). This raises questions of legislative competence in relation to the Scottish Parliament, a topic to which we return below.

[7] The duties of the FSA will be reassigned under the Financial Services Bill currently before the UK Parliament. It is inevitable, though, that the need for regulatory authorisation will persist.

[8] See, eg, *Andrew Brown and Others v InnovatorONE plc and Others* [2012] EWHC 1321 (Comm) at [1170].

[9] See para 44 of the Sch to the Financial Services and Markets Act 2000 (Exemption) Order 2001 (SI 2001/1201).

(iii) *Investments*. The expenses of taking and implementing investment advice are very considerable, especially in relation to a fairly small fund. While there might be scope for sharing investment services, the best option will almost certainly be the pooling of funds. This should produce very considerable savings and our proposals would bring the Scottish charities investment market into line with that currently in place elsewhere in the UK.

12. The foregoing arrangements would, however, be subject to certain important limitations:

(i) The trust purposes, as against powers, of the individual trusts would not be affected.

(ii) Obviously the trustees of each of the trusts would have to reach a decision to enter into such arrangements under the new statutory power. A question arises as to whether there should be a specific statutory power to withdraw from the arrangements; we think that this would probably be desirable, to deal with possible changes of circumstances, although we suspect that it would rarely be used.

(iii) The discretion of trustees in selecting beneficiaries or other objects would be retained for each trust. In this way the fundamental functions of the trustees would not be affected by the arrangements. We think that this is essential in order to preserve the identity of the individual trusts.

(iv) The supervisory functions of the individual sets of trustees would be retained. This would include their fiduciary duties as trustees. Once again we think that this is essential to preserve the independent existence of each trust.

(v) It follows from the last feature that the general duties of each set of trustees would be retained, with only the execution of some aspects of those duties being delegated to others through the pooled arrangements. Thus the arrangements would in effect involve a form of statutory delegation of certain functions of the trustees of each of the participating charities.

13. We are of opinion that trustees should be able to make use of the statutory power notwithstanding any express provisions in the trust deed. That is the legal position when an application is made to OSCR under section 39 of the 2005 Act or a *cy-près* petition is presented to the court. It should also be unnecessary to prepare any formal application to the court or to OSCR. We are concerned to keep the expenses of participating charities as low as possible. Moreover, what is proposed does not bring about any change in the fundamental trust purposes; it merely involves a pooling or amalgamation of certain administrative and investment functions.

14. It might nevertheless be desirable for an appropriate body, presumably OSCR, to be given power to veto or cancel any such arrangement. The grounds on which such a veto might be exercised should, we think, be relatively flexible. A workable formulation might be that the power to cancel a proposed amalgamation of administrative and investment functions may be exercised if, in the opinion of OSCR, it is contrary to the interests of one or more of the trusts involved. The reference to 'interests' is deliberately wide. A reference to

purposes would not suffice, as it is intended that the power to amalgamate functions should be available even in cases where the amalgamation is contrary to the express trust purposes. We think that it is unlikely that such a power would be used very often, since the basic structures used would be laid down in statute, but a power of veto in OSCR might help to prevent any use of the statutory power that was clearly inappropriate. We do not think it necessary, however, that OSCR should require to examine each use of the power as it occurred. What we propose is that the need to consider the exercise of a veto in relation to any amalgamation would only arise if a complaint were made.

15. After these preliminary remarks we now turn to the specific reform proposals, beginning with those in respect of administrative and other similar functions and then moving on to investment matters.

Amalgamation of accounting and other administrative functions

16. As the main barriers here (such as the cost of preparing the relevant documentation) are practical rather than legal we consider it could be of assistance to include statutory styles which may be used, with adaptation if desired, by trustees who wish to take advantage of this option. Any such styles would be in a schedule to the draft Trusts (Scotland) Bill which will be annexed to our report. Alternatively, commercially produced style books might include suitable styles.

17. In order to ascertain views on these matters we ask the following questions and make the following proposals:

1. Should Scots law provide a statutory facility to enable charitable and other public trusts to amalgamate those administrative functions identified in paragraph 11(i) and (ii)? Should any other matters be included?

2. Are the limitations on any such facility set out in paragraph 12 appropriate?

3. Would it be helpful to have statutory styles to assist in drafting formal agreements to amalgamate functions or would this need be better met in other ways, for example by the inclusion of suitable styles in published style books?

4. For the reasons set out in paragraph 13 it should be possible for trusts to make use of the new facility notwithstanding any express provision in the trust deed.

5. (a) For the reasons set out in paragraph 13 the facility should be available without any application to the court or OSCR.

(b) Should OSCR nevertheless have a discretionary power to veto or cancel any such amalgamation in the event that a complaint is made by an interested party?

(c) If so, should a time limit, for example four weeks from the date when the amalgamation takes effect, be imposed for the making of such a complaint?

(d) Would the appropriate criterion for the exercise of such a power of veto or cancellation be that the proposed amalgamation is, in the opinion of OSCR, contrary to the interests of one or more of the trusts involved (as we propose in paragraph 14)? Or would any alternative formulation be more appropriate?

Common Investment Funds and Common Deposit Funds

18. Our central proposal is to allow for the creation of Collective Investment Funds (CIFs) and Collective Deposit Funds (CDFs) in Scotland. These would be specialist investment funds for charities which marry the twin benefits of professional fund management, often with large asset pools under management at any one time, and charitable status for taxation purposes. The contributing charities need not be trusts, but could be in the form of, say, a company, an unincorporated association or a SCIO.

19. CIFs and CDFs are both already available elsewhere in the UK. In oversimplified terms, CIFs are similar to unit trusts and CDFs are like an interest-paying current account. They are each established either by the High Court or the Charity Commission for England and Wales (or Northern Ireland, as the case may be). The Charity Commission has some regulatory functions, though it is possible that that role will pass to a body such as the FSA (or its successor body) in the future.[10]

20. CIFs and CDFs have long been available in England and Wales,[11] and CIFs have been available for almost as long in Northern Ireland,[12] with provision for CDFs being made subsequently. Until recently, the relevant legislation was drafted in such a way that it only applied to charities recognised within the particular territorial jurisdiction. So charities within the meaning of English law could only invest in CIFs and CDFs set up under English law, and Northern Irish charities were restricted to CIFs established under Northern Irish law.

21. Scottish charities were unable to take advantage of any of these investment vehicles. This was subject to criticism from various quarters.[13] Changes made in 2006 had the effect that CIFs or CDFs established under any particular UK jurisdiction became able to receive funds from a charity established under the laws of that, or any other, UK jurisdiction.[14] This means that the managers of such funds can accept assets from any charity established in the UK. We have no evidence as to the degree to which trustees of Scottish charities have

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[10] Current Charity Commission requirements are that CIFs are to be managed by a Manager and a Trustee, both of whom must be bodies corporate and authorised by the FSA: see http://www.charitycommission.gov.uk/charity_requirements_guidance/charity_governance/managing_resources/cifs.aspx#2. Similar requirements apply to CDFs.

[11] See s 22 of the Charities Act 1960.

[12] See s 25 of the Charities Act (Northern Ireland) 1964. The Charities Act (Northern Ireland) 2008 provides for both CIFs and CDFs: see ss 43 – 45.

[13] See, eg, Patrick Ford, "Common Investment Funds: Why are Scottish Charities Excluded?", (2000) 5 Scottish Law & Practice Quarterly, 269-288; and the Report of the Scottish Charity Law Commission, 2001, available at http://www.scotland.gov.uk/Resource/Doc/1136/0010186.pdf.

[14] This is subject to the proviso that the contributing body is recognised as a charity for tax purposes. See, for E&W, s 23 of the Charities Act 2006, now re-enacted in ss 97, 101 and 104 of the Charities Act 2011. For NI see ss 43 – 45 of the Charities Act (Northern Ireland) 2008.

availed themselves of these new opportunities but we expect that many have either done so or at least have considered doing so. The funds under CIF management are significant: for example, in December 2011 the total was approximately £8.5bn.[15]

22. By comparison with the pre-2006 position, the market for the investment of charity funds has opened up very considerably as viewed from the perspective of Scottish charity trustees (and indeed those in control of Scottish charities generally, whether constituted as trusts or not). But it remains the case that CIFs and CDFs may only be established under the laws of England and Wales or Northern Ireland. This means that, from the perspective of potential Scottish charity fund managers, there is still an imbalance. As part of the present consultation we wish to gain evidence as to whether this is something which interested parties would be keen to see rebalanced. In other words, would there be a demand for Scottish CIFs and CDFs, managed and promoted by Scottish fund managers (or indeed by others who wished to do so)? We have no reason to doubt this, especially given the investment expertise which is to be found in the Scottish economy at large. We therefore ask the following question:

6. Do you consider that there would be a demand in practice for Common Investment Funds (CIFs) and Common Deposit Funds (CDFs) established under Scots law? If so, do you have in mind the position of those interested in managing CIFs/CDFs or of those interested in investing in them, or both? Any evidence you have in support of your answer would be welcomed, however general or specific it may be.

23. If it is thought that there is a demand for the provision of CIFs and CDFs as a matter of Scots law (and, for what follows, we proceed for the moment on that basis) there will need to be certain legislative provisions enacted. As we discuss more fully in the next paragraph, some of these will, in our view, fall clearly within the legislative competence of the Scottish Parliament but it is likely that others will not. The full range of statutory amendments which will be required is a matter on which detailed work will be needed, but the following main provisions will need to be included:[16]

a) Power to make CIFs and CDFs. As already mentioned, the current legislation in England and Wales and Northern Ireland allows both the High Court and the relevant Charity Commission to make schemes for the establishment of CIFs and CDFs. We envisage that this, for Scotland, this power would appropriately be exercisable by the Court of Session or OSCR. If, however, the regulatory role currently exercised in the rest of the UK by the relevant Charity Commission passes in the future to another body (such as the FSA or its successor) then we consider that such body should assume any responsibility which OSCR may have.[17]

b) Provision deeming Scottish CIFs and CDFs to be charities for tax purposes.

c) Power to permit charities established under either Scots law or the law of any other part of the UK to participate.

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[15] See http://www.civilsociety.co.uk/docs/cif_dec_2011.pdf.
[16] This list is based on the current English and Welsh and Northern Irish legislation in, respectively, ss 96 – 104 of the Charities Act 2011 and ss 43 – 45 of the Charities Act (Northern Ireland) 2008.
[17] This assumes that the body – whether the FSA or its successor or another body – has UK wide jurisdiction, which we think is inevitable.

d) Provision for the remuneration of the fund manager.

In addition, various supplementary provisions will be needed. The current legislation in place in England and Wales and Northern Ireland will be a suitable model for this.

24. If proposal 6 above receives a favourable response, the question of the legislative competence of the Scottish Parliament in respect of the desired provisions will arise.[18] We do not consider that we need to address it in detail here, but in general the law of trusts and of charities is not reserved.[19] It is not clear, though, that this would mean that the whole legislative package would therefore be within the Scottish Parliament's competence. In particular, it seems probable to us that any provision to enact (b) in the preceding paragraph would be outwith competence. This is because it relates to the reserved matter of taxation. It is, however, arguable that it is properly a part of Scots charity law and only incidentally applies to tax. Similarly, a provision to enact (c) might fall foul of legislative competence insofar as it applies to charities established outwith Scotland. This is because it regulates the powers of bodies established under English and Welsh or Northern Irish law and, to that extent, is arguably forming part of the law of a country other than Scotland.[20] Even if, on detailed examination, it were considered that some of the necessary provisions fell outwith legislative competence it would, of course, still be open to this Commission to recommend that such provisions be enacted, and we expect that appropriate agreement would be reached between those in the UK and Scottish Governments as to which legislature should pass which provisions.

25. Against this background, we make the following proposal and ask the following question:

7. Subject to satisfactory evidence as to the likely demand in practice, it would be desirable to permit CIFs and CDFs to be set up under Scots law. This would have the effect of making the CIF and CDF regime uniform across the UK.

8. Do you agree with our analysis of the likely fiscal and regulatory liabilities arising on the creation of Scottish CIFs and CDFs? If you disagree, what such liabilities do you foresee arising?

26. Separately, an issue would arise as to which "charity tests" would need to be met by a charity wishing to invest in a Scottish CIF or CDF.[21] This stems from the requirement that each investor in a CIF or CDF, wherever those funds may be established, must meet the "charity test" under UK tax law.[22] In addition, the investor will, of course, also qualify as a charity within any jurisdiction within which it is registered. But what requirements will be imposed on those charities registered in England and Wales or Northern Ireland wishing to invest in a Scottish CIF or CDF? By way of example, and assuming that our proposals as to Scottish CIFs are enacted, suppose that a charity registered with the Charity Commission for

[18] Section 29 of the Scotland Act 1998 sets out the limits of legislative competence.
[19] There is a specific exception for the creation, operation, regulation and dissolution of charities at Section C1 of Part II of Sch 5 to the Scotland Act 1998. The Scots law of trusts is part of "Scots private law" for the purposes of the Scotland Act: see its s 126(4)(d).
[20] And therefore in breach of s 29(2)(a) of the Scotland Act 1998.
[21] As mentioned in para 4 above, the definition of "charity" varies according to the context in which it occurs, though the variations are relatively slight.
[22] We have already alluded to this in fn 14.

England and Wales wishes to invest in a Scottish CIF. It would need to meet the English law test (which, of course, is shown to be satisfied by dint of registration with the Charity Commission) and also the test under UK tax law (as is the case for all investors in any CIF). The question is whether it would also require to meet the Scots law charity test in order to be eligible to invest in the CIF.[23] One possible argument in this direction is that, as the CIF would be a Scottish charity on OSCR's register, all of its investors should also be subject to OSCR's jurisdiction. If so, would a requirement of this nature fall short of a formal requirement to register with OSCR, but merely involve meeting the test which would apply if registration were needed?[24] We would welcome views on this and accordingly we ask:

9. If CIFs and CDFs were to be established under Scots law, would UK charities established outwith Scotland need to satisfy the Scots law charity test in order to be eligible to invest? If so, could this be achieved without formal registration as a Scottish charity?

27. Finally, we would welcome any further comments that consultees may have about this area of law.

[23] In outline, the charity test under Scots law, contained in s 7 of the 2005 Act, requires a body both to have purposes which are wholly charitable and also to provide public benefit. The definition of a charity in England and Wales, contained in s 1 of the Charities Act 2011, is an institution which both is established only for charitable purposes and also falls under the jurisdiction of the High Court. Each of the relevant statutes provides its own list of "charitable purposes"; the lists are broadly similar but there are some differences (and in the 2011 Act a purpose must not only fall within a category on the statutory list but also be for the public benefit). See further Gloag & Henderson, *The Law of Scotland* (Lord Coulsfield and Hector MacQueen, eds, 12th ed, 2007), paras 42.20-42.23.

[24] Some charities – around 750 at the present time – are in fact registered both with the Charity Commission for E&W and also with OSCR. This is because they operate on both sides of the border and are therefore required to register with both regulators.