SCOTTISH EXECUTIVE
Central Research Unit

PUBLIC TRUSTS AND EDUCATIONAL ENDOWMENTS

A REPORT FOR THE SCOTTISH EXECUTIVE CENTRAL RESEARCH UNIT

CHARITY LAW RESEARCH UNIT
UNIVERSITY OF DUNDEE

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CHAPTER 1: INTRODUCTION

AIMS

1.1 This research project was ancillary to the larger project conducted for the Scottish Office on the effectiveness of Part I of the Law Reform (Miscellaneous Provisions) (Scotland) 1990 ("the 1990 Act") in the supervision of charitable bodies in Scotland generally. The 1990 Act overlaps to an extent with both the common law of public trusts and with the provision for regulation and reorganisation of endowments contained in Part VI of the Education (Scotland) Act 1980 ("the 1980 Act"). The aims of this project were (1) to identify any aspects of the combined provision—the common law, the 1990 Act and the 1980 Act—which might be improved and (2) to make recommendations for improvement.

METHODOLOGY—GENERAL

1.2 The methodology adopted in pursuit of these aims is as follows:

- consideration of the common law;
- consideration of the statutory provisions;
- consideration of equivalent English provisions for comparative purposes;
- identification of theoretical difficulties;
- formulation of questions for consideration at the empirical stage;
- empirical research in the form of interviews and questionnaires based on the desk research;
- formulation of options for improvement based on the desk and empirical research.

METHODOLOGY—TEXTS USED

1.3 The review of the existing provision has involved detailed examination of the relevant statutes and, where appropriate, of leading cases. Appropriate modern textbooks have also been consulted, and we would like to acknowledge indebtedness to the following in particular:

> Barker, C R *et al*., (1996) *Charity Law in Scotland*, W Green & Son;
> McLaren, J., *The Law of Wills and Succession* (3rd ed., 1894) Bell & Bradfute/Sweet & Maxwell.
> Norrie, K and Scobbie, E (1991) *Trusts*, W Green & Son;
> *Stair Memorial Encyclopaedia of the Laws of Scotland*, Volumes 3 ("Charities" and "Churches and Other Religious Bodies") and 24 ("Trusts, Trustees and Judicial Factors"), Law Society of Scotland/Butterworths;
> Warburton, J, (1993), *The Charities Act 1993, Text and Commentary*, Sweet & Maxwell;
> Warburton, J, and Morris, D, (8th edition, 1995), *Tudor on Charities*, Sweet & Maxwell;

Wilson, W A and Duncan, A G M, (2nd edition, 1995) *Trusts, Trustees and Executors*, W Green & Son.

METHODOLOGY—FORM OF CRITICAL REVIEW

1.4 The research findings are presented in the following form:

- a brief summary of the provisions;
- a list of the theoretical difficulties identified in the course of the review;
- a list of questions to be examined at the empirical stage;
- the findings of the empirical research;
- a list of recommendations.

METHODOLOGY—EMPIRICAL RESEARCH

1.5 The empirical stage of the research was carried out between April and December 1998. The survey questionnaires returned in phase one of the main project were examined. Approximately 400 indicated that they were public trusts and of these 80 indicated that education was either their only or their major objective. Requests for a copy of their founding document and latest statement of accounts were then made to 58 charities drawn from this sample of 80 which had indicated:

- that they would be willing to help in any further research;
- either did not charge for photocopying or charged only £5 or less;
- had given a contact telephone number.

1.6 A questionnaire was constructed from questions raised by the desk research and information elucidated from initial interviews with practising solicitors and other relevant personnel. The questions were designed to ascertain:

- the current knowledge of the relevant legislation for public trusts and educational endowments in the legal profession;
- any problems which still exist with *cy-près*, the 1990 Act and the 1980 Act;
- any problems with restrictions on powers of investment;
- suggestions for improvement with the existing legislation.

1.7 Questionnaires were sent to law firms in Edinburgh, Glasgow, Aberdeen,Dundee and to a cross section of firms operating in small towns. Thirty requests were sent out after initial telephone contact to determine the specialist in public trusts and obtaining their prior agreement to participate. Several other law firms contacted by telephone declined to take part admitting to a lack of experience in this area.

1.8 Questionnaires were also sent to four major banks in Edinburgh and Glasgow.

1.9 The same questionnaire was used as a basis for face to face interviews with

solicitors in Edinburgh, Dundee and Arbroath, and with the Law Department of the Church of Scotland. Interviews with other persons having relevant experience and expertise were also conducted, namely:

- the judge of the Court of Session nominated by the Lord President to deal with public trust, Scottish charity and educational endowment cases;
- the Scottish Charities Office (SCO) as representing the Lord Advocate;
- the Inland Revenue (FICO);
- the Scottish Charities Nominee;
- the Students Awards Agency (SAAS) at the Scottish Education Department.

1.10 The research team had received communications from the Church of Scotland's Law Department and (via the Scottish Charities Office) from a University Principal about difficulties they had encountered. A notice was also inserted in the *Journal of the Law Society of Scotland* describing the research and inviting submissions from others who may have encountered problems or undue expense. There was only one response to the notice.

1.11 All the unitary authorities were contacted by telephone asking for details of any educational endowments administered by them and for a copy of their latest statement of accounts. They were also asked for information about

- the number of educational endowments with an income of less than £5,000 per annum;
- any reorganisations undertaken under section 105 of the 1980 Act;
- any transfer problems under the local government reorganisation in 1996;
- difficulties with restrictions on powers of investment;
- any problems with the current legislation.

EMPIRICAL RESEARCH - RESPONSE RATE

1.12 We received trust deeds or other founding documents from 44 of the 58 charities we contacted, and 32 sets of accounts. (See Annex 1.1 for further details.) Details of the responses from law firms are given below in Table 1.1.

Table 1.1

City/Town	Number contacted	Returned questionnaire	Replied with comments	Replied no experience	No reply
Aberdeen	5	2	1	1	1
Blairgowrie	1				1
Cupar/Fife	1		1		
Dundee	1				1
Dumfries	2			1	1
Edinburgh	9	2	2	1	4
Glasgow	6	2		1	3
Perth	4	2			2
Stornoway	1	1			
TOTAL	30	9	4	4	13

1.13 Follow-up telephone requests on two subsequent occasions to the 13 law firms which failed to respond, despite having previously agreed to participate, did not increase the response rate.

1.14 The response from the four banks contacted is given in Table 1.2.

Table 1.2

City	Number Banks contacted	Returned questionnaire	Replied with comments	Replied no experience	No reply
Edinburgh	3	1		1	1
Glasgow	1			1	

1.15 The relatively poor response to the questionnaire survey meant that only qualitative issues could be examined. Data extracted from the questionnaire was added to information obtained from the face-to-face interviews. Fortunately, the quality and quantity of the information obtained from the relatively small number of specialist respondents gave us ample data with which to address the questions raised by the desk research.

1.16 Given the excellent response rate to the other parts of the empirical research and the expressed willingness of those contacted by phone to participate in this supplementary project, we are led to conclude that a lack of specialist knowledge in this field may have contributed to the low response to the questionnaire. An analysis of responses to the questionnaire is provided in Annex 1.2.

1.17 Our telephone survey of unitary authorities asking for details of any educational endowments administered by them together with their latest statement of accounts produced 22 responses, an analysis of which is provided in Table 1.3 below. Questions were also asked about the following:

- number of small educational endowments (income less than £5,000 per annum);
- any reorganisations undertaken under section 105 of the 1980 Act;
- any transfer problems under the local government reorganisation in 1996;
- difficulties with restrictions on powers of investment;
- information about any problems with the current legislation.

Table 1.3

Council Department	No. EEs	No. small EEs inc<£5,000	Major EE	Income Major EE	Supplied accounts	Transfer problems
Education	1	1	1	£3,500	No	yes
Education	0	0	-	-	n/a	yes
Education	1	1	1(split x3)	?	no	?
Education	50	50 (divided 4 trusts)	1	?	no	d/k
Finance	52	51	1	£35,000	yes	no
Education	0	0	-	-	n/a	no
Finance	5	5	1	£200	no	no
Education	2	1	1 (amal 40-50)	£12-14,000	no	No
Finance	27	majority	1	£13,000	yes	d/k
Finance	9	8	1 (split)	£37,000	yes	no
Education	63	63	no	-	yes	no
Finance	38	?			no	no
Education	42	?	1	?	no	no
Education	3	3	1	£3,500	yes	no
Education	0	0				yes
Education	1	1	1(split x4)	£2,000	no	yes
Education	0	0	0	0	n/a	no
Education	36	31	6	£3,000-£21,000	no	no
Finance	57	55	2(split)	£70-80,000	Yes	No
Finance	30	28	2(split)	£70-80,000	yes	yes
Education	1	1	1(amal)	£600	no	no
Education	33	27	?1-4	£28,000	yes	no

1.18 Most educational endowments under local authority control had an income of less than £5,000.

CHAPTER 2: DEFINITIONS

2.1 It may be helpful to set out at the start of the report definitions of the four classes of "body" or "organisation" to be examined: public trusts, Scottish charities, endowments and educational endowments.[1]

PUBLIC TRUST

2.2 Sections 9, 10 and 11 of the 1990 Act make provision for the variation of "public trusts", but the Act contains no definition of the term, which must accordingly be understood in its meaning in Scots common law.

2.3 A "public trust" in Scots law is one constituted for the benefit of the public or of a section of the public.[2] What distinguishes a public trust from a private trust is that it benefits the public rather than a group of named or otherwise designated individuals.

2.4 Examples of public trusts from recently reported cases are as follows: a trust for a school for "the education of children of Roman Catholic parents principally in or near Aberdeen"[3]; a trust to provide "rest and change of air" to professional persons[4]; a trust for "laying a foundation for a Gallery for the encouragement of the fine Arts"[5]; a trust for the relief of poverty among persons connected with the mining industry[6]; and a bequest to the Town Council of North Berwick for use "in connection with the Sports Centre in North Berwick or some similar purpose in connection with sport", the section of the public benefited being "the local sporting community"[7].

2.5 The purposes of public trusts are known generally as "public purposes"[8]—in the same way that the purposes of charitable trusts under English law are known as "charitable purposes"—but no convenient judicial classification of public purposes exists of the kind offered by Lord Macnaghten in *Income Tax Special Commissioners v Pemsel* in relation

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[1] See Main Report, Ch 6.

[2] McLaren, *Wills and Succession* (3rd ed., 1894), p 917; *Anderson's Trustees v Scott*, 1914 SC 942, per Lord Skerrington at 950 and 955-6; *Wink's Exors v Tallent*, 1947 SC 470, per Lord President Cooper at 477; *University of Edinburgh v The Torrie Trustees*, 1997 SLT 1009, per Lord Justice-Clerk Ross at 1014 (quoting *Stair Memorial Encyclopaedia of the Laws of Scotland*, Vol 24, para 86).

[3] *Winning and Others, Petrs*, 1999 SC 51 (trust set up in 1823).

[4] *Tod's Trs, Petrs*, 1999 SLT 308. (The Court was not called upon to determine whether the trust in question was in fact a public trust, but was clearly of the view that a trust for such a purpose, without any resulting trust in favour of the truster's heirs, would be a public trust).

[5] *University of Edinburgh v The Torrie Trustees*, 1997 SLT 1009 (trust provided for in will of 1824).

[6] *Mining Institute of Scotland Benevolent Fund Trustees, Petrs*, 1994 SLT 785.

[7] *Russell's Exor v Balden*, 1989 SLT 177, per Lord Jauncey at 180.

[8] *Davidson's Trustees v Arnott*, 1951 SC 42, per Lord Patrick at 60. It should be noted, however, that a bequest for "public purposes", without further specification, is void from uncertainty: *Blair v Duncan*, (1901) 4 F (HL) 1.

to charitable purposes.[9] It is clear, however, that the range of Scottish public purposes is in principle wider than the range of English charitable purposes, because there is no equivalent in Scots common law of the English restriction that, to be "charitable", trusts for the benefit of the public should fall within the "spirit", or "intendment", or "equity" of the preamble to the Charitable Uses Act 1601.[10] The normal rule for English charitable trusts is that they must, like Scottish public trusts, benefit the public or a section of the public, but their purposes must also be referable back in some way—whether by analogy or otherwise—to the list of "charitable uses" contained in the preamble to the 1601 Act.[11] Lord Macnaghten's division of charity into four "heads"[12]—the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community not falling under the preceding three heads—should be regarded as nothing more than a classification of convenience of charitable uses which can be seen to fall within the intendment of the preamble.[13]

2.6 Scottish public purposes certainly include "eleemosynary", "educational" and "religious" purposes,[14] and "charitable" purposes in the non-technical sense in which the term is used in Scots common law[15] (which covers more than simply the relief of poverty),[16] as well as "objects of public utility" generally.[17] An example of "an intelligible and tangible object of public utility" is the "provision of the means for rational and innocent public entertainment" in the form of a "popular astronomical and scientific institution".[18] Unlike English charitable purposes, Scottish public purposes include the straightforward provision of sporting facilities for a section of the public,[19] without the requirement for an educational element[20] or for compliance with the precise terms of the Recreational Charities Act 1958.[21] There are two types of English charitable trusts, however, which would not be treated as public trusts in Scotland: these are the admittedly

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[9] [1891] AC 531, at 583: "'Charity' in its legal sense comprises four principal divisions: trusts for the relief of poverty; trusts for the advancement of education; trusts for the advancement of religion; and trusts for other purposes beneficial to the community, not falling under any of the preceding three heads."

[10] *Wink's Exors v Tallent*, 1947 SC 470, per Lord President Cooper at 476. The 1601 Act is, however, relevant in Scotland for the purpose of applying UK tax relief. For discussion of the preamble to the 1601 Act as an element of the definition of charity see *Incorporated Council of Law Reporting for England and Wales v Attorney-General*, [1972] Ch 73, per Russell, LJ at 87 and 88.

[11] *Scottish Burial Reform and Cremation Society v Glasgow Corporation*, [1968] AC 138, per Lord Wilberforce at 154.

[12] *Income Tax Special Commissioners v Pemsel*, [1891] AC 531, at 583

[13] *Supra*, note 11.

[14] *Anderson's Trustees v Scott*, 1914 SC 942, per Lord Skerrington at 950 and 953. It should be noted, however, that a bequest for "religious purposes", without further specification, has been held void from uncertainty: *Grimond v Grimond's Trustees*, (1905) 7 F (HL) 90.

[15] McLaren, *Wills and Succession* (3rd ed., 1894), p 917.

[16] *Income Tax Special Commissioners v Pemsel*, [1891] AC 531, per Lord Watson at 558, and *Wink's Exors v Tallent*, 1947 SC 470, per Lord President Cooper at 478.

[17] McLaren, *Wills and Succession* (3rd ed., 1894), p 916 *et seq*.

[18] *Ness v Mill's Trustees*, 1923 SC 344, per Lord President Clyde at 353.

[19] *Russell's Exor v Balden*, 1989 SLT 177: Cf *Re Nottage*, [1895] 2 Ch 649.

[20] *IRC v McMullen*, [1981] AC 1.

[21] *Guild v IRC*, [1992] 2 AC 310 (which dealt with the tax treatment of the bequest for the provision of sporting facilities in *Russell's Exor, supra*.)

anomalous trusts in favour of poor relations or employees, which in England and Wales are treated as charitable notwithstanding that their beneficiaries do not amount—in the view of the courts—to a section of the public.[22] Such trusts are private trusts in Scots law, not public trusts.[23]

2.7 In summary, therefore, a Scottish public trust is atrust which benefits the public or a section of the public. A public trust is distinguished from a private trust in that it benefits the public rather than a group of named or otherwise designated individuals. Scottish "public purposes" overlap to a large extent with English "charitable purposes", but in principle cover a wider range because not artificially restricted by reference to the Charitable Uses Act 1601.

2.8 A trust for the "poor relations" or "poor employees" of a truster would not, however, be treated as a public trust in Scotland, although such trusts are charitable in England and Wales.

SCOTTISH CHARITY

2.9 The distinction between public purposes in Scots law and charitable purposes in English law is important because Scottish public trusts are regulated under the 1990 Act principally as "Scottish charities", not as public trusts. The term "Scottish charity" is defined indirectly by reference to the expression "charitable purposes" in its technical meaning in English law. A Scottish public trust whose purposes are not exclusively charitable in this sense will not fall within the definition of "Scottish charity" and will not, accordingly, be regulated as such.

2.10 Under section 1(7) of the 1990 Act only a body "recognised" by the Inland Revenue as eligible for income tax relief under section 505 of the Income and Corporation Taxes Act 1988 (ICTA 1988) is entitled to call itself a "Scottish charity". Relief under section 505 is granted to bodies with "charitable purposes". To be entitled to relief, the body's purposes or objects must be exclusively charitable. In accordance with the decision in *Pemsel*, the term "charitable purposes" appearing in a United Kingdom taxing statute is to be read in its technical meaning in English law.[24] In terms of section 1(7), the body must also be established under the law of Scotland (for instance as a public trust) or managed or controlled wholly or mainly in or from Scotland.

2.11 It should be noted that the effect of section 1(7) is that a body which is eligible to become a Scottish charity—by virtue of its exclusively charitable purposes and the necessary legal or *de facto* management or control connection with Scotland—does not become a Scottish charity unless it actually applies for and is granted recognition by the Inland Revenue.

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[22] *Dingle v Turner*, [1972] AC (HL) 601.
[23] *Salvesen's Trustees v Wye*, 1954 SC 440, per Lord President Cooper at 447.
[24] *Income Tax Special Commissioners v Pemsel*, [1891] AC 531, per Lord Macnaghten at p.587.

2.12 The definition of "Scottish charity" may, therefore, be applied to Scottish public trusts as follows: a Scottish public trust is by definition a body established under the law of Scotland[25]; if all of its "public" purposes are also "charitable purposes" under English law the trustees may apply to the Inland Revenue for recognition of the trust's eligibility for income tax relief under section 505 of the ICTA 1988; if the trustees do in fact apply for—and are granted—recognition, the trust will be a Scottish charity.

ENDOWMENT

2.13 Property held by the trustees of a Scottish public trust may also fall within the definition of an "endowment" for the purposes of the 1980 Act.

2.14 In terms of section 122(1) of the 1980 Act an "endowment" means:

> "any property, heritable or moveable, dedicated to charitable purposes, but shall not, except with the consent of the governing body, include the funds, whether capital or revenue, of any incorporation or society contributed or paid by the members of such incorporation or society by way of entry moneys or other fixed or stated payments, nor burgess or guildry fines paid to any such incorporation or society, nor funds bequeathed or given to any such incorporation or society for the benefit solely of members or widows or families of members of such incorporation or society";

2.15 In terms of section 122(1) the expression "charitable purposes" is to be "construed in the same way as if it were contained in the Income Tax Acts"—in other words, according to its technical meaning in English law[26]. The term "governing body" is defined by the section to mean "the managers, governors or trustees of any endowment or other person having the administration of the revenue thereof".

2.16 It will be seen that there is an obvious overlap between "endowment" and "Scottish charity". "Endowment" is defined by reference to "property" which may be dedicated to charitable purposes, "Scottish charity" by reference to the "body" whose income may be eligible for tax relief, but the common denominator is the English definition of "charitable purposes". A significant difference, however, is that there is no requirement of *de facto* recognition by the Inland Revenue in the case of an endowment. Property dedicated to charitable purposes becomes an endowment by the mere fact of dedication without any process of official recognition.

2.17 The 1980 Act envisages that property may be "dedicated" to charitable purposes through a variety of legal forms, including a public trust[27]. This means that property held

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[25] By virtue of section 15(1) of the 1990 Act "body" includes the sole trustee of any trust and, as regards court proceedings or orders under the Act, the trustees of a trust acting in their capacity as such.
[26] *Income Tax Special Commissioners v Pemsel*, [1891] AC 531, per Lord Macnaghten at p.587.
[27] The 1980 Act, section 114(1): other possible forms would be a company limited by guarantee, or a body incorporated by letters patent or Royal Charter.

by the trustees of a public trust whose "public purposes" are exclusively charitable amounts to an endowment in terms of the 1980 Act.

EDUCATIONAL ENDOWMENT

2.18 An educational endowment is a specific type of endowment. By section 122(1) of the 1980 Act:

> "educational endowment" means "any endowment which has been applied or is applicable in whole or in part, whether by the declared intention of the founder, or by the consent of the governing body, or in pursuance of any scheme approved under any Act or under any provisional order or by custom or otherwise, to educational purposes".

2.19 In terms of section 122(1) the expression "educational purposes" includes:

- payments towards the cost of professional training and apprenticeship fees;
- the provision of maintenance, clothing and other benefits; and
- the payment of grants for travel.

2.20 In terms of the definition, therefore, an educational endowment isproperty which is dedicated to purposes which are both exclusively charitable and educational. The effect of the words "*which has been applied or is applicable in whole or in part*" in the definition is to cast the net much wider than appears at first sight. There is nineteenth century authority to the effect that where a governing body has discretion to apply the capital or income of an endowment to educational purposes as well as to other specified charitable purposes, and has in fact done so at any time since the constitution of the endowment, then the endowment is an educational one for the purposes of the 1980 Act.[28] On one view, this would mean that that the trustees of any grant-making trust with general charitable purposes who have at any time made a discretionary payment towards an educational purpose—however small the amount—by doing so have converted the whole of the trust property into an educational endowment.[29]

SUMMARY

2.21 Some of the practical difficulties arising from the use of the above definitions will appear in the succeeding chapters. It may be helpful to resume the contents of this chapter by applying all four definitions to the case of a public trust.

2.22 A trust is a public trust in Scotland if it benefits the public or a section of the public

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[28] *Ferguson Bequest Fund v Commissioners on Educational Endowments*, (1887) 14 R 624, per Lord Adam at 632, discussing almost identical wording in the Educational Endowments (Scotland) Act 1882. The remark was strictly speaking*obiter*, but no objection was taken to it by the other judges of the First Division.

[29] It should be noted that the 1980 Act makes special provision for the "Carnegie Trust", for "theological endowments" and for "university endowments": section 122(1).

rather than named or otherwise designated private individuals.

2.23 The "public purposes" of a Scottish public trust may fall within the English definition of "charitable purposes". If so, the trustees may apply to the Inland Revenue for intimation that tax relief will be due under section 505 of ICTA 1988, and on receiving such intimation the trustees will become a "recognised body" in terms of the 1990 Act and entitled to call themselves a "Scottish charity".

2.24 Property held by the trustees of a public trust whose purposes are exclusively charitable is an endowment under the 1980 Act. In other words, the body of trustees will be eligible to become a "Scottish charity" under the 1990 Act, and the trust property will be an endowment under the 1980 Act.

2.25 If the trust property, or any part of it, is applicable or applied for charitable purposes which are also educational, the endowment will be an educational endowment for the purposes of the 1980 Act. On one view, even a single, partial application of funds to educational purposes, in the exercise of a discretion to apply funds for charitable purposes generally, will bring the trust property within the definition of educational endowment.

CHAPTER 3: REGULATION OF PUBLIC TRUSTS

SUMMARY OF PROVISIONS

Common law

3.1 At common law, the Court of Session has a supervisory jurisdiction over public trusts[30] which may be invoked by the Lord Advocate,[31] by *popularis actio*,[32] and in certain circumstances by the heirs of the truster.[33]

The 1990 Act

3.2 A public trust may be a Scottish charity and regulated as such under the 1990 Act. Regulation of a public trust as a charity is supplementary to its regulation at common law. Not all public trusts are Scottish charities and regulated by the 1990 Act. Those which are not will be regulated solely by the common law, unless they fall within the provisions of the 1980 Act for the regulation of educational endowments.

The 1980 Act

3.3 The property of a public trust may fall within the definition of an "educational endowment" under the 1980 Act. As such, the property will be regulated under the provisions of Part VI of the 1980 Act. These provisions are supplementary to those applying to the public trust at common law. If the trust is also a Scottish charity, it will be exempt, by virtue of section 15(9) of the 1990 Act, from the main regulatory provisions of applying to Scottish charities under that Act. It will, however, be subject to the provisions of section 1 of the 1990 Act, which deal with recognition by the Inland Revenue, release of information to the public by the Inland Revenue, and the obligation of Scottish charities to supply an "explanatory document" to a member of the public who requests it.

DIFFICULTIES IDENTIFIED

3.4 The definition of "recognised body", or "Scottish charity", in the 1990 Act is tied to *de facto* recognition of eligibility for charitable tax relief. Scots law permits the constitution of public trusts which are not recognised as charitable for tax purposes and which are not therefore regulated under the 1990 Act as Scottish charities, but which administer funds dedicated to public benefit none the less. Likewise, atrust which is eligible for recognition as a Scottish charity but does not in fact apply for recognition will escape the main regulatory controls of the 1990 Act.

3.5 A proportion of public trusts must, therefore, lie outside the scope of the principal

[30] *ITSPC v Pemsel*, [1891] AC 531.
[31] *Mitchell v Burness* (1878) 5 R 954; *Aitken's Trustees v Aitken* 1927 SC 374.
[32] *Andrews v Ewart's Trustees* (1886) 13 R (HL) 69; *Aitken's Trustees v Aitken* 1927 SC 374.
[33] *Hill* v *Burns* (1826) 2 W&S 80.

regulatory mechanisms applied to Scottish charities by virtue of the 1990 Act. The common law supervision of public trusts by the Court of Session and the Lord Advocate may be insufficient in modern conditions to protect the public's interest in such trusts.

3.6 A public trust which is both a Scottish charity under the 1990 Act and an educational endowment under the 1980 Act is subject to mush less stringent regulation than other Scottish charities.

QUESTIONS FOR EMPIRICAL RESEARCH

a) Are there any recent instances of the Lord Advocate's involvement in a common law action for enforcement of a public trust?

b) Are there any recent instances of an popularis actio *for enforcement of a public trust?*

c) Does the Lord Advocate work through the Scottish Charities Office on all issues arising from public trusts, whether under the common law, the 1990 Act, or the 1980 Act?

d) Is it possible to quantify the number of "recognised bodies" on the Inland Revenue's index which are public trusts?

e) Is it possible to quantify the number of public trusts (other than educational endowments) which are eligible for tax relief under s.505 of ICTA 1988 but have not in fact applied for intimation that relief is due, and are not therefore Scottish charities?

f) Is it possible to quantify the number of public trusts which are not entitled to tax relief under s.505 of the ICTA 1988?

g) Is it possible to assess the significance in terms of asset value of the public trusts not recorded in the Inland Revenue's Index of Scottish charities?

h) Is it possible to quantify the number of educational endowments which are public trusts?

EMPIRICAL RESEARCH FINDINGS

a) SCO reported two recent cases where the Lord Advocate was involved in a common law action for the enforcement of a public trust. In one case the Lord Ordinary asked the Lord Advocate to assist and in the other the Lord Advocate had a minimal involvement using common law in a fixing exercise correcting a previous trust reorganisation.

b) SCO did not know of any recent instances of an *popularis actio* for enforcement of a public trust.

c) In practice the Lord Advocate directs work through the civil lawyer in the SCO on all issues arising from public trusts. SCO has detected a small number of inappropriate reorganisations of public trusts, usually because the trustees were unaware of the correct legal procedures - either after being given the wrong advice or through ignorance. SCO said that it is possible that there are other such reorganisations of public trusts which have not yet been detected. One solicitor in our sample also reported that an Edinburgh firm of solicitors had intervened just in time as the trustees were about to carry out an unlawful reorganisation.

Another interviewee said that some trustees were allocating funds to another group of beneficiaries because the original beneficiaries no longer exist. They were doing this without formally altering the trust objectives.

d) FICO said that while all trusts on the Index of Scottish charities are *public* trusts, at the moment FICO does not keep information on the legal form of recognised bodies. It is therefore not possible to quantify the number of public trusts on the Index. Information of this kind may be available in the future when the Inland Revenue's system is changed, but under the terms of the current legislation such information would not be available to the general public.

e) No central body would have information about public trusts eligible for tax relief but which have not applied for it. In the last 10 years, about five public trusts have been refused recognition as a Scottish charity by the Inland Revenue.

FICO considered that the considerable tax benefits to which charities were entitled made it unlikely that any eligible public trust would deliberately refrain from applying for recognition. One interviewee did know of two eligible public trusts which had not applied for recognition but said this was due to inefficiency on the part of the previous administrators and not through any desire to evade their accountability under the 1990 Act. The experience of the Scottish charities nominee, however, has been that there are substantial numbers of bodies which are charitable but have not been *de facto* recognised as Scottish charities and are therefore outwith his powers in relation to dormant accounts:

> "A number of dormant accounts reported to me appear from their titles to be held for charitable purposes but the relevant bodies do not appear to have obtained recognition. The Nominee has no powers in respect of such accounts."[34]

f) Another respondent was aware of a substantial number of public trusts which were not on the Index of Scottish charities. These included trusts which had been set up solely to maintain gravestones and other monuments and which were usually administered by church congregations and local authorities. Such trusts tend to be very small and operate by accumulating income until there are sufficient funds to perform their objectives, such as cleaning stonework. As these trusts are often in respect of particular families rather than

[34] Scottish charities nominee, *Annual Report for Year ended 31 August 1999*, p.12. See also p.6.

for the benefit of the public at large it is unlikely that they would be entitled to tax relief under ICTA 1988. However, it was not possible for us to quantify the number of public trusts falling into this category. Two other solicitors were aware of a few trusts which were not recognised Scottish charities and were therefore not listed on the Index, but it was unclear whether or not these would be eligible for charity tax relief.

g) As we were unable to identify all the public trusts not recorded in the Index of Scottish charities it was not possible to assess their significance in terms of asset value.[35]

h) The Index does not record whether a given public trust is also an educational endowment. Some educational endowments are recorded on a register at SAAS but the register does not include any Scottish charity numbers and itwas very difficult for the researchers to cross-check between the two systems because an educational endowment often has a slightly different name from the "parent" recognised body. Also, some educational endowments gain charitable status through a school or other educational establishment. It was therefore not possible for us to quantify the number of educational endowments which are public trusts.

i) It was clear that there was considerable unfamiliarity with this area of law amongst trustees and solicitors and our respondents suggested that there should be readily available guidelines about the provisions, in particular for trustees with no legal background.

OPTIONS FOR IMPROVEMENT

3.7 We suggest that the reliance of the definition of "Scottish charity" on *de facto* recognition of eligibility for charity tax relief should be re-examined.

3.8 We suggest that the Index of Scottish charities should be replaced by a Register of Scottish charities, capable of recording, among other things, the legal form in which each registered body is constituted.

3.9 We suggest that the regulatory powers of the Lord Advocate and Court of Session under the 1990 Act should be extended to public trusts which fall outside any amended definition of "Scottish charity". We suggest that such trusts should be exempt from registration and should be known as "non-registerable public trusts." We further suggest that the "register of persons removed by the Court of Session"[36] should include persons removed from being concerned in the management or control of a non-registerable public trust.

[35] The case of *Guild v. Inland Revenue Commissioners* [1992] 2 AC 310 demonstrates the existence in modern times of at least one substantial public trust not eligible for charitable tax relief. Although the bequest was eligible for relief at the date of the testator's death, the trust purposes were subsequently altered by scheme to purposes no longer qualifying for relief.

[36] See Main Report.

CHAPTER 4: REORGANISATION OF PUBLIC TRUSTS

SUMMARY OF PROVISIONS

Methods of reorganisation available

4.1 Public trusts may be reorganised (1) under the Court of Session's *cy-près* jurisdiction, (2) under sections 9, 10 and 11 of the 1990 Act, (3) as non-educational endowments under sections 108 and 108A of the 1980 Act, and (4) as educational endowments under section 105 of the 1980 Act.

Reorganisation *cy-près*

General

4.2 The *cy-près* jurisdiction is an exercise of the *nobile officium* of the Court of Session and formerly required a decision of the Inner House. Following a recent change in the Rules of Court (1994) a *cy-près* petition may now be disposed of by a Lord Ordinary. The Lord Ordinary may, however, remit the petition to the Inner House at any stage. Under the *cy-près* jurisdiction the court may alter the terms of a public trust when it has become impossible to pursue the truster's original object in the way intended, or where strong expediency demands that a change is made.[37] The trustees present a petition for approval of a *cy-près* scheme adjusting the terms of the trust. The petition must be intimated to the Lord Advocate, who may enter appearance in the public interest. In approving a scheme the court will seek to adhere as closely as possible in the changed circumstances to the truster's original wishes.

Public collections and subscriptions

4.3 On occasion, a public collection will "fail" in circumstances which do not permit application of the funds *cy-près*, and there is no clear provision as to how small or anonymous contributions, which cannot readily be returned to the donors, are to be dealt with.[38]

Reorganisation under the 1990 Act

4.4 Public trusts may be reorganised under sections 9, 10 and 11 of the 1990 Act.

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[37] *Clephane v Magistrates of Edinburgh*, (1869) 7 M (HL) 7; *Davidson's Trustees v Arnott*, (1951) SC 42; *Mining Institute of Scotland Benevolent Fund Trustees, Ptrs,* 1994 SLT 785, per Lord President Hope at 786.

[38] See Wilson and Duncan, *Trusts, Trustees and Executors,* pp.96 *et seq*.

Reorganisation by court

4.5 Section 9 provides a statutory alternative to the *cy-près* jurisdiction by allowing approval by a Lord Ordinary of a scheme for (1) variation or reorganisation of the purposes of the trust, (2) transfer of the trust's assets to another public trust, or (3) amalgamation of the trust with one or more public trusts. The Lord Ordinary may remit the application to the Inner House at any stage. The section lays down precise conditions for its application and a petition can only be granted by the court if they are precisely met.[39] The section specifies various forms of redundancy of trust purposes which may give rise to a petition but expediency alone will not bring the section into play.[40] The court must take various matters into account in approving a scheme, including the spirit of the trust deed or other document constituting the trust. A scheme approved under the section may incorporate adjustments to the administrative provisions of the trust.[41] Applications under section 9 are to be intimated to the Lord Advocate, who may enter appearance in any proceedings.

4.6 There is provision whereby section 9 may be extended to the Sheriff Court (as from such day as the Lord Advocate may by order appoint) in respect of trusts within an income limit to be specified by the Secretary of State.

Reorganisation by trustees – small trusts

4.7 Section 10 provides a further statutory alternative to the reorganisation of public trusts under the *cy-près* jurisdiction. Under section 10, the trustees of a public trust having an annual income not exceeding £5,000 may themselves reorganise the purposes of the trust. The approval of the court is not required, but the interest of the public is protected by public notice and objection procedures and by a right of veto vested in the Lord Advocate.

4.8 A reorganisation by trustees under section 10 may take the form of (1) a modification of the trust purposes, (2) a transfer of the whole assets of the trust to one or more other public trusts or (3) an amalgamation with one or more other public trusts. There is provision for amendment from time to time of the income threshold of £5,000 by order of the Secretary of State. The section prescribes the various forms of redundancy of trust purposes (the same as for section 9) which may give rise to the resolution procedure and specifies various matters (such as broad adherence to the original purposes of the trust) to be addressed by the trustees before a resolution is made. Specific provision is made to ensure that the assets of a trust which is a Scottish charity, ie is recognised as eligible for charity tax relief, continue to be held on completion of the reorganisation in a trust which is a Scottish charity. The section does not authorise adjustment of the administrative provisions (s opposed to purposes) of a trust. Reorganisations under the section are overseen by the Lord Advocate in terms of regulations which prescribe *inter*

[39] *Mining Institute of Scotland Benevolent Fund Petrs.*, 1995 SLT 785.
[40] *ibid.*
[41] *ibid.*

alia the detail of the notice and objections procedures.[42]

Expenditure of capital – small trusts

4.9 Section 11 provides a further but limited form of reorganisation for public trusts having an annual income not exceeding £1,000. There is provision for amendment from time to time of the income limit of £1,000 by order of the Secretary of State. Where the terms of a qualifying trust prohibit the expenditure of capital, the trustees are authorised, in certain circumstances, to proceed none the less with expenditure of capital. The approval of the court is not required, but the interest of the public is protected by requirements (1) to give public notice of the intention to expend capital and (2) to notify the Lord Advocate. The Lord Advocate may, if it appears to him that there are insufficient grounds for the expenditure of capital, apply to the court for an order prohibiting such expenditure.

4.10 Sections 9, 10 and 11 of the 1990 Act do not apply to educational endowments.

Reorganisation under the 1980 Act

4.11 The 1980 Act contains provision for reorganisation of both educational endowments and non-educational endowments. An "endowment" under the 1980 Act is "any property, heritable or moveable, dedicated to charitable purposes".[43] An "educational endowment" is an endowment "which has been applied or is applicable in whole or in part… to educational purposes". (The term "charitable purposes" in this context is to be construed according to its meaning in income tax legislation, ie its meaning in English charity law). A public trust is one of the legal forms through which property may be dedicated to charitable purposes, educational or otherwise, and it is clear that some bodies may have a dual character as both (1) a public trust under the general law and the 1990 Act and (2) an "endowment" (educational or non-educational) under the 1980 Act.

Educational endowments

4.12 Section 105 of the 1980 Act contains extensive provision for the reorganisation of educational endowments, either by the local educational authority or by the Court of Session. Where the body concerned is both a public trust and an educational endowment, the provisions of the 1980 Act apply in preference to those of the 1990 Act. (The provisions for the reorganisation of educational endowments are dealt with in Chapter 7 below.)

Non-educational endowments

4.13 Section 108 of the 1980 Act contains provision for the reorganisation of non-educational endowments. Schemes for the reorganisation of non-educational endowments

[42] Public Trusts (Reorganisation) (Scotland) (No. 2) Regulations 1993. SI 1993 No. 2254.
[43] These definitions are set out in section 122 (1) of the 1980 Act.

may in certain circumstances be given effect by the Court of Session. Where the body concerned is both a public trust and a non-educational endowment, it appears that the provisions of both the 1990 Act and the 1980 Act are available. There is no express repeal of the earlier provisions, and it is submitted that no repeal is implied because, while there is some overlap, it is only partial. It is submitted, therefore, that either piece of legislation could be used in cases where a body is both a public trust and a non-educational endowment.

Petition by governing body

4.14 Section 108 specifies various forms of redundancy of purposes (similar but not identical to those of sections 9 and 10 of the 1990 Act) which may give rise to a petition to the court by the governing body of the endowment (i.e., the trustees of a public trust). The possible forms of reorganisation are set out in section 105 and include adjustment of certain administrative provisions in addition to adjustment of redundant purposes. Section 105 authorises, in particular, alteration of the constitution of the governing body in various ways, including incorporation;[44] and altering the powers of investment of the endowment.[45] Section 105 specifies the various matters which the court must take into account in giving effect to a scheme, including the "spirit of the intention of the founders" of the endowment. Petitions made under section 108 are to be intimated to the Lord Advocate, who may enter appearance in any proceedings.

Petition by Lord Advocate

4.15 Section 108A contains further machinery for the reorganisation of endowments, both educational and non-educational. Where the Lord Advocate, on any of the grounds specified in section 108 as to redundancy of purposes, is of opinion that a scheme should be made for the future government and management of "any endowment", he may present a petition for such a scheme to the Court of Session. When considering a petition under section 108A the court is not bound by the provisions of section 105. Instead, "the Court shall have power to make a scheme for the future government and management of the endowment and for the application of the capital or income of the endowment to any purposes, as nearly as may be analogous to those contained in the governing instrument, as the Court thinks fit." Where the body concerned is both a public trust and a non-educational endowment, therefore, section 108A provides a yet further procedure for reorganisation, in addition to those of the *cy-près* jurisdiction, the 1990 Act, and section 108.

4.16 The Rules of Court provide that all petitions for reorganisation under the 1980 Act should be heard by a nominated Lord Ordinary, who has discretion to remit the petition to the Inner House at any stage.

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[44] For an example as applied to an educational endowment, see *Governors of Dollar Academy Trust v Lord Advocate*, 1995 SLT 596. *Cf.* Part VII of Charities Act 1993, which regulates incorporation of charity trustees.

[45] For an example as applied to an educational endowment, see *Glasgow University Petrs*, 1991 SLT 604.

DIFFICULTIES IDENTIFIED

General

4.17 A variety of overlapping methods exists for the reorganisation of public trusts. The overlap between the *cy-près* jurisdiction and the provisions of the 1990 and 1980 Acts is likely to be a source of confusion and consequently of expense.

4.18 The various provisions for reorganisation each deal differently with adjustment of administrative provisions in particular, and the position overall is unsatisfactory.

4.19 Any reorganisation involving court approval is likely to be complex and expensive, especially if the case is referred to the Inner House.

Reorganisation *cy-près*

4.20 The *cy-près* rules in particular are complex and consequently expensive to apply.

4.21 While a *cy-près* petition may now be dealt with to completion by a single judge there is always the possibility of a reference, with consequent additional expense, to the Inner House.

4.22 The *cy-près* jurisdiction does not provide provides a fully satisfactory method of adjusting administrative provisions.[46]

4.23 The *cy-près* jurisdiction does not deal satisfactorily with the problem of failed public collections.

Reorganisation under the 1990 Act

4.24 The value of a section 9 application has been reduced by the subsequent change in the Rules of Court allowing a *cy-près* petition to be disposed of by a single judge.

4.25 There is a shortage of Court of Session decisions under the section to form a "template" for sheriff court decisions.[47]

4.26 The primary concern of section 9 is with reorganisation of trust purposes and the section does not provide a convenient jurisdiction for adjusting administrative provisions.

4.27 Parallel difficulties arise in relation to section 10: -a primary concern with purposes, with no authority to the trustees to adjust administrative provisions; and the

[46] Section 5 of the Trusts (Scotland) Act 1921 is of limited assistance in this connection.

[47] The only case reported is the *Mining Institute* case, *supra*, in which the application was refused as not falling within section 9 though suitable for the *cy-près* jurisdiction.

complexity (and consequent expense) of the resolution, notice and objection procedures.

4.28 The section 10 provisions are confined to public trusts (whether or not Scottish charities), with the result that a transfer or amalgamation involving a Scottish charity constituted in another legal form is excluded.

4.29 In relation to section 11 in particular, the expense of giving public notice in due form may be disproportionate to the value of the reorganisation exercise.

4.30 The provisions of the 1990 Act, in particular the "small trusts" provisions of sections 10 and 11, are not available to educational endowments.

Reorganisation under the 1980 Act

4.31 The provisions of the 1980 Act permit the reorganisation of public trusts in ways which are not available under the 1990 Act, but the fact that the provisions are contained in an Education Act may lead to their being unfamiliar to non-specialist practitioners.

QUESTIONS FOR EMPIRICAL RESEARCH

Reorganisation *cy-près*

a) Have any cy-près schemes in fact been approved in the Outer House since the change in the Rules of Court (1994) without reference to the Inner House?

b) Would the costs of a cy-près petition to an Outer House judge be significantly different from those of an application to a Lord Ordinary under section 9 of the 1990 Act?

What (roughly) is the cost of a cy-près petition to the Outer House?

What (roughly) is the extra cost if the petition is referred to the Inner House?

c) What recent experience has there been of difficulties with "failed" public collections?

Reorganisation under the 1990 Act

d) How many cases have in fact reached court under section 9, if any, other than the Mining Institute[48] *case ?*

e) How many trusts has SCO advised on section 9 applications?

f) Does the section 9 procedure provide significant advantages over a cy-près petition to a single judge?

[48] *Supra*.

g) Are there any plans to extend the section 9 jurisdiction to the Sheriff Court?

Would the costs of an application to the Sheriff Court be significantly lower than those of an application to a Lord Ordinary (which was not referred to the Inner House)?

Is the Sheriff Court an appropriate forum for proceedings of this kind?

h) How many attempted reorganisations have been dealt with by SCO under section 10?

What proportion of attempted reorganisations under section 10 has succeeded?

How much time does the SCO spend on a typical section 10 case?

What are the expenses involved in a typical section 10 case (eg professional, advertising, etc.)?

Reorganisation under the 1980 Act

i) Is it possible to quantify the numbers of reorganisations under sections 108 and 108A?

j) Is it possible to identify the legal form principally involved in such reorganisations?

k) Is it possible to establish the level of familiarity with the provisions in the legal profession generally?

EMPIRICAL RESEARCH FINDINGS

Reorganisation *cy-près*

a) SCO said that a few *cy-près* schemes had been approved in the Outer House since the change in the Rules of Court but had no record of how many. Of our other respondents only the Church of Scotland Law Department had been involved in a*cy-près* scheme approved in the Outer House.

b) Our respondents were unable to provide much information about the costs of *cy-près* petitions. Estimates of a petition to the Outer House ranged from £500-£10,000, and an estimate of the extra cost if the petition were referred to the Inner House (supplied by just two solicitors in our sample) was £1,500.

c) None of our respondents had any experience of failed public collections.

Reorganisation under the 1990 Act

d) SCO estimated that approximately 30-50 cases had reached court under section9, but they do not keep a count. Only two of our respondents had taken a case to court under section 9.

e) SCO had only assisted with one section 9 case and do not normally give advice under this section of the 1990 Act.

f) SCO did not comment on the relative merits of the section 9 and a *cy-près* petition. However, the Church of Scotland Law Department had been advised in a number of cases by (different) Counsel to use the *cy-près* jurisdiction instead of section 9 because of the wider powers of *cy-près*.

g) SCO said there were no current plans to extend the jurisdiction to the Sheriff Court and expressed doubt whether sheriffs would have sufficient experience with public trusts. SCO felt that there had not yet been enough cases through the Court of Session to provide guidelines for the Sheriff Court. Views from our other respondents about the potential use of the Sheriff Court were mixed. Most shared SCO's doubts about sheriffs having sufficient expertise in this relatively specialist area of law, particularly in view of the fact that many sheriffs are temporary. However, one firm of solicitors in our sample was waiting for the jurisdiction to reach the Sheriff Court before proceeding with reorganising trusts in the expectation that it would be considerably cheaper.

h) SCO has dealt with about 209 reorganisations, 90% of them under section 10 and the remainder under section 11. Most have succeeded; only one was known to have failed. Since draft proposals are submitted to SCO for prior vetting, most reach the full resolution stage. Costs are minimised because the initial screening tends to prevent unsuccessful applications. SCO has found that the time taken to scrutinise section 10 and 11 applications is variable depending on the expertise of the trustees. Some drafts can be "a diabolical mess" through not using professional help. It is important for small trusts not to waste resources going to public notice without being sure of success.

i) The majority of the interviewees and other respondents spoke very highly of this service from SCO. However, there were a few adverse comments from trustees who complained that SCO had been "too inflexible"; for example, by insisting that the trustees employ the services of a solicitor.[49] There were also concerns that the assistance currently being given might not continue were there to be a change of staff in SCO.

j) The fees charged by solicitors varied considerably, but averaged at £500, with some solicitors acting on a *pro bono* basis. We were informed of one section 10 reorganisation which was abandoned because the trustees felt the solicitor's fees were too high, given the value of the trust concerned, and other respondents had not proceeded with the

[49] The reasons for this may be explained by the comments in the previous paragraph.

reorganisation of small public trusts "as it's not worth the effort".

Requirement to advertise

4.32 SCO reported that the requirement to advertise has caused problems because of the cost of placing advertisements, particularly in national newspapers. Many of the trusts are so small - for example, with an annual income of less than £5 - that even where an agent acts free of charge the costs of advertising still make the power to reorganise redundant in a number of cases.

4.33 SCO has advised (as part of its counsel and assistance operation) that where an agent has responsibility for a number of such trusts a joint advertisement in an evening paper or, in the case of a local trust, in a (cheaper) local paper will suffice in terms of the Act. SCO reported that the largest single grouping of trusts in a single advertisement contained more than 80 entries.

4.34 The problem of the cost of placing newspaper advertisements (as much as £500) was confirmed by our other respondents who pointed out that

- there is no provision in the legislation for grouping advertisements or for combining notices under sections 10 and 11;[50]
- even very small trusts often have purposes which extend beyond the local and therefore require a notice in a national newspaper;
- the required length of the statutory notice adds to the cost;
- newspapers are aware that the advertisement is a statutory requirement and this may be influencing the charges levied;
- there are very few responses to advertisements;
- the time limit of 7 days as required by the Public Trusts (Reorganisation) (Scotland) (No.2) Regulations 1993 for the production of voucher copies from newspapers is impractical.[51]

Other difficulties

4.35 Our respondents, while generally enthusiastic about the provisions introduced by sections 10 and 11 of the 1990 Act, identified certain other problems which they had encountered

- the limits of £5,000 and £1,000 respectively were regarded as too low;
- some practitioners found the wording too complex;
- finding suitable trusts with which to amalgamate can be a problem;
- not being able to amalgamate with a charitable body which is not a public trust;

[50] Although SCO said both were possible, adding that the Regulations provide only astyle which is not a prescribed form and which can be adapted.
[51] SCO said that in practice a relaxed attitude is taken to the 7-day limit.

- the requirement to go to the Court of Session to obtain additional powers for trustees, even in respect of trusts with an income below £5,000;
- it is still too costly for some trusts to reorganise;
- many trusts do not have a dissolution clause;
- the definitions of "public trust", "educational endowment", and "income" were regarded as too imprecise.

Reorganisation under the 1980 Act

4.36 SCO's estimation is that there are about 10 petitions a year under sections 108 and 108A. The legal form involved is principally a public trust. None of the respondents in our sample had presented a petition under these provisions.

4.37 It was evident both from our empirical study and from the experience of SCO that the provisions are not widely known within the legal profession. For example, only one of our respondents from firms of solicitors was reasonably conversant with the 1980 Act. The rest described their knowledge as being "close to zero".

OPTIONS FOR IMPROVEMENT

4.38 Retain the present *cy-près* jurisdiction as a "fall-back" jurisdiction, but rationalise and reform the existing statutory provision for the reorganisation of public trusts.

4.39 Provide wide grounds (drawing on the existing provisions of both the 1990 Act and the 1980 Act) permitting application to the court (ie the nominated judge) to approve a scheme of reorganisation, the court to have authority to approve reorganisations of both purposes and administrative provisions as necessary.

4.40 Retain the existing provisions of the 1990 Act as to "small trusts", but subject to the detailed recommendations in the following paragraphs.

4.41 Increase the financial levels in sections 10 and 11 of the 1990 Act - the respondents in our empirical study considered that they should at least be doubled.

4.42 Extend the scope of subsections 10(2)(b)&(c) of the 1990 Act to make it open to trustees to determine that the entire assets of the trust should be transferred to another public trust *or Scottish charity* or that the trust be amalgamated with one or more public trust *or Scottish charity*. ("Any Scottish charity" could be qualified by the words "in regard to which the Lord Advocate may make inquiries" in terms of section 6(1) of the 1990 Act.) The nominated judge would determine whether the transfer or amalgamation was appropriate.

4.43 Reduce or remove the requirement to advertise for trusts under £1,000.

4.44 Reduce the required length of the newspaper advertisement.

4.45 Extend the time limits in the 1993 Regulations, in particular regarding the production of voucher copies from newspapers - the suggestion from our empirical study being 14 days rather than 7. Although in practice a relaxed attitude may be adopted by the regulatory agencies concerned, for the sake of clarity it would clearly be preferable to amend the Regulations.

4.46 Consider a more radical rationalisation of the reorganisational provisions for public trusts, Scottish charities and endowments (as outlined in Chapter 9 below).

CHAPTER 5: REORGANISATION OF SCOTTISH CHARITIES OTHER THAN PUBLIC TRUSTS

5.1 It may be helpful to include for comparative purposes a brief note on the reorganisation provisions for Scottish charities other than public trusts.

SUMMARY OF PROVISIONS

Reorganisation under the 1990 Act

5.2 Section 14 of the 1990 Act regulates the alteration of purposes and winding-up of "charitable companies". Section 14 applies to any Scottish charity which may be wound up by the Court of Session under or by virtue of Parts IV or V of the Insolvency Act 1986. Part IV of the 1986 Act governs the winding-up of companies registered under the Companies Acts. Part V governs the winding-up of "unregistered companies". The expression "unregistered company" includes "any association and any company" but not a registered company. The scope of the term "association" in this context is uncertain.[52] On one view it may cover unincorporated associations, including those constituted for charitable objects, many of which may have power to later their objects by resolution of the members. The intention in principle seems to be that section 14 of the 1990 Act should regulate at least a majority of Scottish charities formed other than as public trusts, even if the section may not be exhaustive. In the ordinary case, a Scottish charity constituted as a public trust will require the consent of the court (or of the Lord Advocate in the case of a "small trust") to a reorganisation.

5.3 Section 14 provides that where a body to which the section applies "has power to alter the instruments establishing or regulating it, it shall not alter any charitable purposes in those instruments except in such a way as will enable the body to continue to be granted" charity tax relief. Section 14 also empowers the Lord Advocate to present a petition for winding-up (under the 1986 Act) of any body to which section 14 applies.

Reorganisation under the 1980 Act

5.4 Sections 105, 108 and 108A of the 1980 Act provide for the reorganisation of endowments, educational and otherwise, regardless of the legal form in which the particular endowment is held. The sections apply equally to public trusts and to bodies constituted in other forms through which property may be "dedicated to charitable purposes". The powers of the Court of Session under these sections provide a method of altering the purposes of bodies which do not themselves have power to alter the instruments which establish and regulate them. (Examples might be bodies constituted by Royal Charter or by Act of Parliament.)

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[52] WW McBryde, *Bankruptcy*, (2nd ed. 1995), paras 4-31 and 4-35; *Palmer's Company Law*, para 15.204; *Palmer's Company Insolvency in Scotland* (1993); J Warburton, *Unincorporated Associations*, (2nd ed, 1992), Ch 9; *Re Sick and Funeral Society of St John's Sunday School, Golcar,* [1973] Ch 51.

DIFFICULTIES IDENTIFIED

5.5 The existing position is confused, with limited and uncertain provision under the 1990 Act for reorganisation of Scottish charities other than trusts, and different provision under the 1980 Act for bodies meeting the definition of "endowment".

5.6 The provision for close official supervision of the reorganisation of public trusts is unevenly matched by the provision for reorganisation of Scottish charities constituted in other forms.

5.7 While the 1990 Act provides that Scottish charities with power to alter their own establishing instruments should do so only in such a way as to remain eligible for charity tax relief there is no provision for direct official supervision of any reorganisation which may be undertaken. In particular, a body of this kind would be free to depart radically from its original purposes so long as its reorganised purposes remained within the (wide) range of purposes available under the English definition of "charitable". For example, in our empirical research we discovered one "educational endowment" which is now operating as a retirement home.

5.8 No special provision is made for reorganisation of bodies constituted by Royal Charter or Act of Parliament.

QUESTIONS FOR EMPIRICAL RESEARCH

a) Do interviewees feel rationalisation of the position would be helpful?

b) Do interviewees feel there is any reason of principle why Scottish charities formed as trusts should be harder to reorganise than Scottish charities formed as (say) companies?

c) Should the reorganisation of Scottish charities as such be subject to some form of central supervision independent of controls related to legal form?

d) Should there be special treatment of bodies constituted by Royal Charter or Act of Parliament?

EMPIRICAL RESEARCH FINDINGS

a) All but one of our respondents expressed the view that rationalisation of the current position was essential. It was regarded as an anachronism that there were different regulations for educational endowments, and our respondents recommended extending the small trust provisions of the 1990 Act to educational endowments. The reorganisation provisions of the 1990 Act were welcomed as being much cheaper, more flexible, and giving trustees more control. Our respondents expressed the view that if these provisions were extended to educational endowments then many of the current problems would

disappear.

b) The existence of the re-organisational provisions in the 1980 Act for non-educational endowments did not appear to be widely known.

c) Our respondents expressed the view that there should be a uniform system of supervision for the reorganisation of all Scottish charities, regardless of legal form.

d) Our respondents were generally against the special treatment of bodies constituted by Royal Charter or Act of Parliament, although some felt it was inevitable.

OPTIONS FOR IMPROVEMENT

5.9. The existing provision for the reorganisation of all Scottish charities should be rationalised and reformed. A suggested scheme of reform is set out in Chapter 9 below.

CHAPTER 6: THE REGULATION OF EDUCATIONAL ENDOWMENTS

SUMMARY OF PROVISIONS

Regulation under the 1980 Act

6.1 The origins of Part VI of the 1980 Act lie in the educational reforms of the nineteenth century.[53] Part VI deals principally with the reorganisation of educational endowments, and to a lesser extent with their regulation. The provisions are concerned as much with the education system in Scotland as with the "charities" system.

6.2 The 1980 Act makes certain limited provision for the regulation of educational endowments.

6.3 Section 104 provides for the maintenance by the Secretary of State of a public register of all educational endowments. The governing body of every educational endowment is bound to furnish for inclusion in the register (1) the name of the endowment, (2) the locality to which it belongs, (3) a summary of the purposes to which it is applicable and the conditions pertaining to beneficiaries and (4) the name and address of the official correspondent of the governing body.[54] University endowments, theological endowments, the Carnegie Trust, and educational endowments held or administered by learned or scientific societies for the benefit of their members are exempted from this requirement.[55]

6.4 Section 107 makes special provision for the reorganisation of "mixed" endowments (ie endowments of which part is "applicable or applied" to charitable purposes other than educational), but such endowments are none the less educational endowments for the purposes of regulation.

6.5 Section 111 makes provision for the preparation of accounts by educational endowments. The section applies to any educational endowment which is administered (1) under a scheme by the Court of Session which provides for the audit of the accounts, or (2) under a scheme made under Part VI of the 1980 Act, or under a provisional order or scheme made under the various earlier statutory provisions for reorganisation. Endowments of which a local authority or some of its members as such are the sole trustees are specifically excepted from the provisions, and are subject instead to the local authority's own accounting disciplines. Section 111 provides for the keeping of proper accounts and records, and preparation of an annual statement of account; for auditing of

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[53] See generally R D Anderson, *Scottish Education since the Reformation* (1997), Ch 3.
[54] Register of Educational Endowments (Prescription of Information) (Scotland) Order 1981 (SI 1981. No.1564).
[55] Section 104 (3) and The Register of Educational Endowments (Prescription of Information) (Scotland) Regulations 1981.

the accounts by a qualified auditor (as defined in subsection (3)); and for public inspection of the audited accounts (by their being made available by the governing body at all reasonable times).

6.6 Section 120 makes provision for the enforcement of schemes of reorganisation made under the 1980 Act or previous legislation where the governingbody have failed to give a scheme effect. On the application of the Lord Advocate, the governing body may be summarily compelled by the Court of Session to give the unimplemented scheme effect.

6.7 The 1990 Act also makes certain limited provision for the regulation of educational endowments. Section 1 of the 1990 Act applies to educational endowments which are Scottish charities in the same way as to other Scottish charities. Section 1 allows the Inland Revenue to release certain otherwise confidential information about any Scottish charity to the Lord Advocate; requires every Scottish charity to provide its explanatory document to any person requesting it; and entitles a Scottish charity (ie a body recognised by the Inland Revenue as eligible for charity tax relief) to describe itself as such.

Reorganisation under the 1990 Act

6.8 The rest of the regulatory provisions of the 1990 Act do not apply to educational endowments.[56] Among the most significant provisions of the 1990 Act which have no true equivalent under the 1980 Act are (1) the powers of the Lord Advocate to investigate and suspend persons concerned with management and control;[57] (2) the powers of the Court of Session to intervene in the event of misconduct or mismanagement and for the protection of assets,[58] (3) the provisions as to disqualification of persons concerned in management or control[59] and (4) the powers of the Scottish charities nominee in respect of dormant bank accounts.[60]

DIFFICULTIES IDENTIFIED

6.9 The regulatory provisions for educational endowments under the 1980 Act are generally less stringent than those for Scottish charities under the 1990 Act.

6.10 Educational endowments which are Scottish charities are subject to only minimal regulation under the 1990 Act.

6.11 Educational endowments which have not been *de facto* recognised as eligible for tax relief are exempt altogether from the regulatory provisions of the 1990 Act.

6.12 It appears that certain educational endowments, which have not been the subject of

[56] Section 15 (9).
[57] Section 6.
[58] Section 7.
[59] Section 8.
[60] Section 12.

a scheme or provisional order, will escape the accounting requirements of both the 1980 Act and the 1990 Act.

6.13 The definition of "educational endowment" is very wide and brings within the scope of the 1980 Act certain "charitable" bodies only marginally connected with education. The wide definition of "educational endowment" means that a public trust with general "charitable" purposes (in the English sense), whose trustees enjoy a discretion to apply funds *inter alia* to educational purposes, will become an educational endowment in terms of the definition if and as soon as funds are in fact applied for educational purposes.

6.14 The result is that such bodies are subject to the regulatory provisions of the 1980 Act instead of those of the 1990 Act, as would be more appropriate.

6.15 The overall position is unclear and in need of rationalisation.

QUESTIONS FOR EMPIRICAL RESEARCH

a) Is it possible to identify and classify from the register of educational endowments the various legal forms in which educational endowments are held?

b) Does the register of educational endowments record whether or not a given educational endowment is also a Scottish charity?

c) Does the Index of Scottish charities record whether or not a given Scottish charity is also an educational endowment?

d) How effective is the register of educational endowments as a tool of regulation?

e) Are "mixed endowments" (ie bodies with general charitable purposes whose governing body has at some time in the past applied funds to educational purposes) in fact routinely registered as educational endowments?

f) If so, is it satisfactory that they are regulated as educational endowments and not ordinary Scottish charities?

g) How significant is the proportion of educational endowments not subject to the accounting requirements of section 111 of the 1980 Act (ie endowments which are not constituted by provisional order or scheme)?

h) How important in practice is the theoretical "regulatory deficit" for educational endowments?

EMPIRICAL RESEARCH FINDINGS

a) It is not possible to identify and classify from the register of educational endowments

the various legal forms in which educational endowments are held as this information is not included on the register.

b) The register of educational endowments does not record whether or not a given educational endowment is also a Scottish charity. A significant proportion (two-thirds) of the educational endowments on the SAAS register do not appear *under the same name* on the FICO Index of Scottish charities.

c) As noted above, the Inland Revenue's Index of Scottish charities does not record whether or not a given Scottish charity is also an educational endowment.

d) The register of educational endowments, maintained by SAAS (part of The Scottish Office Education Department) as a resource for students, is not designed or used as a tool of regulation; it is maintained solely for the convenience of students applying for grants. The register contains only approximately 200 educational endowments. There are many others which have never been listed on the register or which have been removed because they failed to respond to correspondence from the Students Awards Agency (and are therefore unlikely to respond to students). It is left to the governing bodies of educational endowments to send details for inclusion on the register, and requests for updated information are sent out at regular intervals (every two years) when existing details are sent to all those on the register with a request for any changes to be returned to SAAS.

e) Some "mixed endowments" (ie bodies with general charitable purposes whose governing body has at some time in the past applied funds to educational purposes) are included on the register of educational endowments. In particular, a public trust with general "charitable" purposes (in the English sense) whose trustees enjoy a discretion to apply funds *inter alia* to educational purposes, will become an educational endowment in terms of the definition if and as soon as funds are in fact applied for educational purposes.

Problems experienced

6.16 Educational endowments are excluded from the jurisdiction of the Scottish charities nominee under section 15(9) of the Act as they are defined in sections 122(1) of the Education (Scotland) Act 1980. They are therefore exempted from all but section 1 of the 1990 Act. The nominee reports that numerous dormant accounts appear to belong to educational endowments.

6.17 Rather than following the accounting requirements of section 111 of the 1980 Act it appears that a number of educational endowments are filing accounts which conform to the requirements of the 1990 Act and the 1992 Accounting Regulations.[61]

6.18 Many bodies established as educational endowments have since changed their purposes and are no longer involved in education although they retain their status as an educational

[61] The Charities Accounts (Scotland) Regulations 1992. (SI 1992 No. 2165)

endowment - one, for example, is now a retirement home.

Local authority educational endowments

6.19 Some local authorities have experienced transfer problems under the reorganisation they have undergone in recent years. For example, some educational endowments have still not been transferred since the 1996 reorganisation, and a number of founding documents appear to have been mislaid in the process of reorganisation so that it is unclear whether some public trusts are educational endowments or not.

6.20 Because of successive reorganisations some educational endowments are now split between two to three councils, although the administration is carried out by one council. Also, in some councils different educational endowments are administered by separate departments, one department not knowing about the other's involvement with educational endowments.

6.21 Councils reported that many educational endowments have not kept up with inflation with the result that some educational endowments are worth under £1 (one was only worth 50 pence). This means that they no longer have any practical use as prizes, others established for schools are now defunct since the original documentation describing their purposes has been lost. Some educational endowments were said to be too specific and as a consequence are no longer used and would be difficult to reactivate.

6.22 There were many comments from local authorities about the disproportionate administrative burden of small educational endowments: "Small endowments are an administrative burden and in real terms provide little assistance to full-time students."

6.23 One council had 5 educational endowments, only two of which were active and paying £90 per annum.

6.24 The following quotation summarises the views of local authorities: "The vast bulk of educational endowments are small, time-consuming and expensive to administer, as the level of work often bears no relation to the size and value of the fund".

6.25 Another local authority elaborated upon the disproportionate administrative burden imposed by educational endowments:

> "The financial administration of educational endowments is a cost currently borne by local authorities and the trust deed of a large educational endowment specifically bars local authorities from recovering their costs from the trust. In the Best Value regime being introduced to Local Government, it is questionable whether this subsidy should continue."

6.26 Three local authorities appeared to have no educational endowments. One was still awaiting transfer from another council.

OPTIONS FOR IMPROVEMENT

6.27 In our view the definition of "Scottish charity" should be extended to include all educational endowments, whether or not *de facto* recognised as eligible for charity tax relief, thus bringing them within the same regulatory regime as Scottish charities as currently defined in the 1990 Act.

6.28 Educational endowments should in principle be subject to the same regulatory provisions as other Scottish charities, including the jurisdiction of the Scottishcharities nominee.

6.29 In particular, educational endowments should appear in any definitive register of Scottish charities to be established as well as in any register of educational endowments maintained by the Secretary of State.

6.30 The separate definition of "educational endowment" should be done away with and educational charities should be treated no differently from other Scottish charities.

CHAPTER 7: REORGANISATION OF EDUCATIONAL ENDOWMENTS

SUMMARY OF PROVISIONS

Reorganisation under the 1980 Act

7.1 The 1980 Act contains extensive provision for the reorganisation of educational endowments. The provisions for reorganisation of public trusts contained in the 1990 Act do not apply to educational endowments. There is special provision in the Local Government etc. (Scotland) Act 1994 for reorganisation of educational endowments by the Secretary of State to take account of changes in local government brought about by that Act.

"Local" and "non-local" endowments

7.2 Section 105 of the 1980 Act sets out the main provision for reorganisation of educational endowments. A distinction is made between (1) what might conveniently be called "local endowments", which form part of or contribute to the educational provision for a given locality managed by the appropriate local education authority and (2) "non-local endowments", being endowments which have a national significance, or at least are not directly connected with the local education authority's provision for any given area.[62] Non-local endowments include university endowments, the Carnegie Trust, and theological endowments. For the purposes of reorganisation "new endowments" (endowments which have been in existence for less than 20 years) are treated in the same way as non-local endowments. Local endowments may be reorganised by the relevant education authority, and non-local endowments by petition of the governing body to the Court of Session.

Reorganisation by education authority

7.3 Section 105 empowers an education authority to prepare draft schemes for the "future government and management" of local endowments in their area. Schemes may provide for the alteration of purposes, rationalisation of endowments by grouping, amalgamation, etc., for reorganisation of the governing body (including by incorporation), and for alteration of the powers of investment of the endowment.[63]

7.4 In preparing a scheme an education authority must take into account *inter alia* the spirit of the intention of the founders, the interest of the locality, the possibility of effecting economy in administration, and the need for continuing provision for competitive bursaries

[62] The terms "local endowment" and "non-local endowment" are not used in the Act but are adopted here for convenience.

[63] The Trustee Investments Act is not specifically disapplied in the case of reorganisations by an education authority, as it is in the case of reorganisations given effect by the Court of Session under section 105.

at universities and other central educational institutions. An endowment which makes express provision for the education of children "belonging to the poorer classes" must continue to do so after reorganisation. There are further detailed provisions as to the treatment of the vested rights of individuals in any endowment (for instance as pensioners),[64] as to the selection criteria for beneficiaries, and as to dismissal of teaching staff.[65]

7.5 Section 112 sets out the procedures to be followed by the education authority in preparing a draft scheme. There is provision for intimation to the governing body, for public notice by newspaper advertisement,[66] for receiving objections and in certain circumstances holding a public local inquiry, and for review of the scheme by the Court of Session. The court may review both the merits and the "legality" of a scheme. On a review of the merits, the court may amend the scheme or substitute a new one. If the court finds the scheme to be "contrary to law" (ie not in conformity with the Act), the scheme is remitted back to the education authority, who are free to restart the process of reorganisation if they think fit.

7.6 Section 107 makes special provision for "mixed endowments" (ie endowments "applicable or applied" partly to educational purposes and partly to other charitable purposes). The object of the section is to prevent the part of a mixed endowment dedicated to non-educational purposes from being diverted to educational purposes, except with (1) the consent of the governing body, or (2) where the non-educational purposes have become redundant. To meet the situation where a governing body may have discretion as to how to apply funds between educational and non-educational purposes, the section specifies an averaging formula to fix the relative proportions for the purposes of reorganisation.

Reorganisation by court

7.7 The provision for reorganisation of non-local endowments under the authority of the Court of Session is contained in section 105. Section 105 provides that on the petition of the governing body of a non-local endowment the court may give effect to a scheme for the future government and management of the endowment. In terms of the sectionthe court must in general apply the same criteria to reorganisation of a non-local endowment as the education authority must to a scheme for a local endowment, but the public notice, objections and public inquiry procedures do not apply. The provisions for mixed endowments do, however, apply to schemes given effect by the court.

7.8 Section 106 gives the court special powers to provide for the sale of land forming part of an endowment which is subject to a revertor condition under the School Sites Act 1841. Under such a condition land originally granted as a school site is to revert to the

[64] Section 109.
[65] Section 110.
[66] Where the endowment has an annual value of less than £500 the education authority may give notice "in another [less expensive] manner".

grantor if it ceases to be used for its original purposes. The section provides for waiver of the revertor condition in certain circumstances, including payment of compensation where appropriate.

Non-availability of provisions of 1990 Act

7.9 The provisions for reorganisation of public trusts contained in the 1990 Act do not apply to educational endowments,[67] and in particular the provisions for reorganisation of "small trusts" do not apply. There is no alternative provision in the 1980 Act for informal reorganisation of small educational endowments.[68]

Local Government etc (Scotland)) Act 1994

7.10 Section 17 of the Local Government etc. (Scotland) Act 1994 provides for the reorganisation of educational endowments by the Secretary of State to take account of the changes in local government brought about by that Act. The powers of the Secretary of State are limited to making changes "which appear to him to be necessary or expedient in consequence of the alteration of local government areas effected" by the Act.[69]

DIFFICULTIES IDENTIFIED

7.11 The provision for reorganisation of educational endowments in the 1980 Act is designed as part of the Scottish education system and sets up comparatively complex procedures to ensure that all relevant interests are taken into account. These procedures may not be appropriate in all cases.

7.12 In particular, the 1980 Act contains no provision for the informal reorganisation of "small" educational endowments (whether constituted as public trusts or otherwise) by resolution of the governing body.

7.13 Educational endowments held through the medium of a public trust have a dual character as both educational endowment and public trust, but may not reorganise under the provisions of the 1990 Act, and in particular may not reorganise under the "small trusts" provisions.

7.14 The wide definition of "educational endowment" brings within the scope of the 1980 Act certain charitable bodies only marginally connected with education. Such bodies will be subject to the reorganisation provisions of the 1980 Act, which in many cases may not be appropriate. The "mixed endowment" provisions do not address this problem adequately.

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[67] 1990 Act, section 15 (9).

[68] Section 115 of the 1980 Act provided for reorganisation of "small endowments" (with an annual income of less than £500) by approval of the Secretary of State but was repealed by the Education (Scotland) Act 1981.

[69] Section 17 (7).

QUESTIONS FOR EMPIRICAL RESEARCH

a) Is it possible to quantify existing endowments in terms of "local" and "non-local" endowments?

b) Is it possible to quantify the numbers of reorganisations under section 105 of the 1980 Act (of both local and non-local endowments) which have taken place over (say) the last five years?

c) Is it possible to quantify the number of "small endowments" in existence (ie endowments with an annual income of less than (say) £1,000)?

EMPIRICAL RESEARCH FINDINGS

a) It is difficult to quantify all existing endowments in terms of "local" and "non-local", although local authorities do maintain lists of the endowments for which they are responsible.

b) As noted above, SCO estimates that there are about 10 petitions a year under sections 108 and 108A.[70] None of the respondents in our sample had presented a petition under these provisions.

c) The absence of a complete list of educational endowments means that it is not possible to quantify the number of "small endowments" in existence (ie endowments with an annual income of less than (say) £1,000).

d) Some councils had already amalgamated their educational endowments into a larger trust but one was worried about the expense of amalgamating, expecting a legal bill of thousands of pounds. Only two of our local authority respondents were currently attempting to reorganise their educational endowments.

e) Local authorities expressed the view that it should be made easier for them to consolidate outdated and very small educational endowments, and a University Principal similarly suggested that educational endowments should be brought within the purview granted by the 1990 Act in order to deal more efficiently with obsolete conditions.

f) The following comment summarises the views of our respondents: "I would appreciate it if the reorganisation of small endowments was simpler and less expensive."

OPTIONS FOR IMPROVEMENT

7.15 We suggest that educational charities should be treated no differently from other

[70] See para. 4.39.

Scottish charities.

7.16 Provision should be made for the informal reorganisation of small educational endowments.

7.17 For small educational endowments which are public trusts, the (reformed) provisions for the reorganisation of "small trusts" should be made available, possibly with additional safeguards in the form of consent of the relevant education authority (for local endowments) or of the Scottish Executive (for non-local endowments).

7.18 The recommended provision for the reorganisation of "small Scottish charities/non-registerable public trusts" (seeparas 4.43-4.46) should be made available to small educational endowments, again possibly subject to additional safeguards in the form of appropriate consents.

CHAPTER 8: APPLICATION TO POWERS OF INVESTMENT

SUMMARY OF PROVISIONS

8.1 The issue of reorganisation of the powers of investment of trustees is of sufficient importance to merit separate treatment.

8.2 Considerable changes in financial and investment management have taken place in recent decades. This has meant that the investment powers available to the trustees of many older trusts are ill-suited to the modern financial world. Common difficulties (where adequate provision has not been made in the trust deed) are (1) the over-restrictive provisions of the Trustee Investments Act 1961, (2) the absence of power to delegate day-to-day investment decisions and (3) the absence of power to hold stock through nominees.[71]

8.3 Since the initial desk and empirical research for this supplementary project was carried out, the Law Commission and the Scottish Law Commission have reported jointly on trustees' powers of investment under the 1961 Act, making recommendations for reform which would (on the Commissions' provisional view, at least) apply equally to English charitable and Scottish public trusts as to other trusts.[72] We have, however, retained our original material on this subject in case it has any contribution to make to the discussion on implementation of the Commissions' proposals.

8.4 The willingness of the Court of Session to take modern investment practices into account is illustrated by recent cases such as *University of Glasgow, Petitioners*[73] and *Scott v Occidental Petroleum (Caledonia) Ltd*.[74] None the less, the procedures by which such matters may be brought before the court by the trustees of public trusts remain cumbersome. The *cy-près* jurisdiction requires "impossibility" or "strong expediency": section 9 of the 1990 Act requires redundancy of purposes within the limits defined by the section and restrictive provisions also apply to applications in respect of endowments made under the 1980 Act.[75] Reorganisations of "small trusts" by resolution of the trustees under section 10 of the 1990 Act are *prima facie* confined to alteration of purposes, and exclude change to administrative provisions.[76] Applications to the court are inevitably expensive.

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[71] These issues cannot be fully analysed here. They affect private as well as public trusts, and are the subject of ongoing debate on the reform of trust law in both England and Scotland. See the Report by the Law Commission & Scottish Law Commission (LAW COM No 260) (SCOT LAW COM No 172) *Trustees' Powers and Duties*, London: The Stationery Office, 1999.

[72] See *Trustees' Powers and Duties*, Parts I and II, especially para 1.20.

[73] 1991 SLT 604. (Trustee Investments Act 1961: the Court adopted a liberal approach similar to that of the English High Court in charity cases: see *British Museum Trustees v Att. Gen.* [1984] 1 WLR 418; *Steel v Wellcome Custodian Trustees Ltd.* [1988] 1 WLR 167.)

[74] 1990 SLT 882. (Delegation of investment management in a private trust.)

[75] The assistance given by section 5 of the Trusts (Scotland) Act 1921 is limited.

[76] An education authority may, however, alter the investment powers of an educational endowment without reference to the court, though probably within a narrower field of discretion.

8.5 By contrast, a Scottish charity which is not a trust but a body which has power in terms of its establishing instruments to alter its own investment powers is free to do so without seeking official consent.

8.6 Also by contrast, the Charities Act 1993 permits the Charity Commissioners to establish schemes for the administration of English charities. Such schemes may, and commonly do, provide for extension of the charity trustees' powers to meet the various exigencies of modern investment practice, each scheme being settled according to the circumstances of the particular case. The Commissioners publish statements of their general policies on such matters from time to time.[77]

DIFFICULTIES IDENTIFIED

8.7 It is likely that the trustees of a significant proportion of public trusts are unable to take full advantage of modern investment techniques because of inadequate or restrictive powers of investment.

8.8 The existing provision for reorganisation of trustees' powers of investment is confused and cumbersome.

QUESTIONS FOR EMPIRICAL RESEARCH

a) Is it possible to ascertain the number of public trusts whose powers of investment (1) are restricted to those of the 1961 Act, (2) do not permit delegation of day-to-day management of investments and (3) do not permit the use of nominees?

b) How many recent petitions have there been, under any of the possible procedures, seeking an enlargement of investment powers?

c) Do the interviewees have any comments on the provisions?

EMPIRICAL RESEARCH FINDINGS

a) (1) Seven respondents administered public trusts whose powers of investment were restricted to those of the 1961 Act. (2) Four had experience of public trusts not permitting day to day management of investments, and (3) two solicitors administered public trusts which did not permit the use of nominees.

b) Only one respondent had presented a petition seeking an enlargement of investment powers and another was about to do so. Another had decided against doing so because of

[77] It should also be mentioned that the option available to English charities of investing through a common investment fund or common deposit fund established by scheme under sections 24 and 25 of the Charities Act 1993 is not available to Scottish public trusts and Scottish charities.

the expense involved. One reported having received Counsel advice that the trustees would be acting *ultra vires* if they agreed to discretionary management.

c) As many trusts were restricted by outdated conditions there was a call for reform in the area of investment powers, particularly as the rapidly changing markets required a quick response, which was often impossible for trustees to give. Our respondents felt that reform was needed with regard to day to day management and the use of nominees.

d) Most local authority educational endowments do not appear to have any restrictions on investment. Investments tend to be in council funds or treasury stock. One authority commented that educational trusts not invested with the education authority are often invested in low interest bank and building society accounts.

e) Knowledge about the relevant legislation was said to be practically non-existent in education and finance departments.

OPTIONS FOR IMPROVEMENT

8.9 We respectfully suggest that the problems identified here as arising from the restrictive provisions of the Trustee Investments Act 1961 would be fully dealt with by implementation in Scotland of the recommendations of the Law Commissions' joint Report.[78]

8.10 We also respectfully suggest that the issues of delegation of day-to-day investment management and the use of nominees need to be pursued further in the context of Scottish public trusts.

[78] See draft clauses annexed to the Report proposing implementation by amendment of the Trusts (Scotland) Act 1921.

CHAPTER 9: PREFERRED SCHEME OF REFORM

INTRODUCTION

9.1 The preceding chapters have proposed options for the improvement of specific provisions or sets of provisions, but the purpose of this chapter is to suggest an overall scheme of reform, incorporating those options where relevant, but directed principally at the need identified in both the desk and the empirical research for a more fundamental rationalisation of the existing provisions for reorganisation. The chapter deals briefly with the issues of definition and regulation, then offers a new scheme of reorganisational provisions which it is intended should be looked at in conjunction with the wider proposals for reform of Scottish charities legislation contained in Chapter 8 of our Main Report.

9.2 The scheme is set out below under headings (in bold type) of the kind which might form headnotes in possible reforming legislation: under each heading are set out our basic proposals, followed by (in italics) a brief commentary giving the rationale for the proposals.

DEFINITIONS

9.3 We propose that for regulatory and reorganisational purposes there should be only two types of organisation, the Scottish charity and the public trust. Those public trusts which fall outside the definition of "Scottish charity", because not having charitable purposes in the sense of English law, would be known as "non-registerable public trusts". The concept of the "endowment," whether educational or non-educational, would be abandoned.

The rationale for these proposals is set out fully in Chapter 7 of the Main Report.

REGULATION

9.4 We propose that the main regulatory provisions of the 1990 Act (or any statutory replacement) should apply to all Scottish charities, including those with educational purposes. Those provisions would include an obligation to register in a definitive Register of Scottish charities to be maintained by a Registrar of Scottish charities. We propose that certain of the regulatory provisions of the 1990 Act should be extended to non-registerable public trusts, in particular the powers of investigation and intervention of the Lord Advocate and Court of Session.

The rationale for these proposals also is set out in Chapter 7 of the Main Report.

SCHEME OF REFORMED REORGANISATIONAL PROVISIONS

Future treatment of endowments

9.5 We propose that the separate treatment of "endowments", educational and non-educational, should be dropped and that organisations at present subject to reorganisation as endowments should instead be subject to reorganisation as Scottish charities or non-registerable public trusts.

The object is to do away with the existing duplication between the 1990 Act and 1980 Act provisions. It is submitted that any special interests relating to educational funds could be sufficiently taken into account in the general reorganisational provisions proposed.

Scottish charities having power to alter their own instruments

9.6 We propose that Scottish charities having power to alter the instruments by which they are established or regulated should be permitted to alter their purposes only in such a way that they remain within the definition of "charitable" as interpreted in UK revenue law.

9.7 For the avoidance of doubt, we propose that this provision should apply not only to charitable companies, but also, *inter alia*, (1) to any Scottish charities formed as public trusts whose trustees may have power to alter the purposes of the trust and (2) to any Scottish charities formed as unincorporated associations whose property is held in trust for the purposes of the association and whose constitutions empower alteration of those purposes.

9.8 We propose that any resolution to alter the purposes of such a Scottish charity should become effective only on registration in the register of Scottish charities, such registration to be subject to the Registrar's being satisfied that the resolution is *intra vires* of the organisation.

The fundamental distinction to be made, we submit, is between organisations having power to alter their own instruments (typically, but not exclusively, organisations formed as companies limited by guarantee) and organisations which do not have such power and which must apply to the court for authority to reorganise (typically, but not exclusively, public trusts). The unincorporated association formed for public objects is something of a special case: its assets are held in public trust, but its members may have power in terms of its constitution to alter the terms of the trust. The principle adopted here (from section 14 of the 1990 Act) is that Scottish charities which have power to alter their own objects should be free to do so, so long as their assets continue to be held for charitable purposes after the change has taken place. The public would have a right to know of the change through the Register of Charities, but not a right to oppose it. The Registrar would carry out a routine check when recording the change to ensure that the change was in fact within the powers of the organisation and that the purposes remained charitable

after the change.

An alternative would be to insist that all proposed changes of charitable objects should receive official consent – perhaps through the Lord Advocate. That is the principle adopted in section 64 of the Charities Act 1993, by which the consent of the Charity Commissioners must be obtained to any alteration of the objects clause of a charitable company or corporation.

Scottish charities not having power to alter their own instruments

9.9 We propose that Scottish charities not having power to alter the instruments by which they are established or regulated should be entitled to apply to the Court of Session for approval of a scheme (a "reorganisation scheme") altering the terms of those instruments, either in respect of the purposes of the organisation (in the event that the existing purposes are redundant) or its administrative provisions (in the event that changes are required to improve the effectiveness of the organisation), or both. (We envisage that a reorganisation scheme might include proposals for the transfer of assets from one Scottish charity to another or for amalgamation between two or more Scottish charities.)

9.10 For the avoidance of doubt, we propose that this provision should apply to all Scottish charities, whether or not formed as public trusts, not having power to alter the instruments by which they are established or regulated, including those constituted by Royal Charter or by or under statute.

9.11 We propose that any application to the court made under this provision should be intimated to the Lord Advocate, who should be entitled to enter appearance as a party in any proceedings on such an application.

We are proposing, in effect, a consolidation of the provisions of the 1990 Act for the reorganisation of public trusts and of the 1980 Act for the reorganisation of endowments. The 1980 Act (section 114) recognises that certain types of organisation other than a public trust may lack power to alter their own objects and may require the assistance of the court. The interest of the original founder or founders (to have their original wishes respected) is protected by the supervision of the court. The interest of the public is protected by notice to the Lord Advocate. The grounds on which the court might entertain an application for reorganisation could either be left wholly discretionary, or could be adapted from the current grounds specified in section 9 of the 1990 Act and section 108 of the 1980 Act.

Power of Lord Advocate to propose schemes for Scottish charities

9.12 We propose that the Lord Advocate should have power to apply to the Court of Session for approval of a reorganisation scheme for any Scottish charity, either *ex proprio motu* as chief Law Officer or on behalf of the Scottish Executive.

9.13 We propose that this provision should apply to all Scottish charities, whether or not having power to alter the instruments by which they are established or regulated, including those constituted by Royal Charter or by or under statute.

9.14 We propose that any application to the court made by the Lord Advocate under this provision should be intimated to the persons having the general control and management of the administration of the organisation ("the governing body"), who should be entitled to enter appearance as parties in any proceedings on such an application.

We are proposing, in effect, a re-enactment of section 108A of the 1980 Act, empowering the Lord Advocate to take the initiative in the reorganisation of any Scottish charity, subject to notice to those in management or control - called here (as in the 1980 Act) "the governing body". We envisage the possibility of pro-active consolidation and rationalisation of charitable resources under the supervision of the court: the Scottish Executive might, for instance, propose a scheme for the amalgamation of a large number of small charities operating in the same field of charitable activity.

Right of persons interested to propose schemes for Scottish charities

9.15 We propose that any person interested in a Scottish charity should have power to apply to the Court of Session for approval of a reorganisation scheme.

9.16 We propose that for the purposes of this provision the term "person interested" should include, *inter alia*, any potential beneficiary of the organisation (as the organisation is constituted at the time of the application), and any local authority affected by the organisation.

9.17 We propose that this provision should apply to all Scottish charities, whether or not having power to alter the instruments by which they are established or regulated, including those constituted by Royal Charter or by or under statute.

9.18 We propose that any application to the court made under this provision should be intimated to the governing body and to the Lord Advocate, who should be entitled to enter appearance as parties in any proceedings on such an application.

9.19 We propose that the court should have discretion to award the expenses of any proceedings on an application under this provision wholly or partly against the applicant.

More controversially, perhaps, we are proposing a variation of the ancient popularis actio*, under which members of the public could approach the court for a reorganisation of any charity in which they had an interest as potential beneficiaries. As a means of preserving the current right of initiative of a local education authority to promote the reorganisation of an educational fund, "person interested" might be defined to include such authorities specifically. The attraction of the provision, we suggest, would be that it would provide an additional mechanism for rescuing neglected charities from*

redundancy. Its obvious disadvantage would be the possibility of "vexatious" or opportunistic applications to the court, perhaps even by charity "carpetbaggers". The threat of a punitive award of expenses might go some way to discouraging abuse of what would be intended as a public right – and one to be exercised only in the public interest.

Small Scottish charities not having power to alter their own instruments

9.20 We propose that "small" Scottish charities not having power to alter the instruments by which they are established or regulated should be empowered, notwithstanding anything to the contrary in those instruments, to pass resolutions of the following kinds:

- a resolution to transfer assets to another Scottish charity;
- a resolution modifying the purposes of the organisation to other "charitable purposes";
- a resolution modifying the administrative provisions of the organisation;
- a resolution to spend capital on the purposes of the organisation.

9.21 We propose that the consent of the Lord Advocate should be required to any resolution made under this provision.

9.22 We propose that for the purposes of this provision a small Scottish charity would be defined as one whose annual income does not exceed £10,000, or such other sum as the Scottish Executive may specify by order from time to time.

9.23 We propose that this provision should apply to all small Scottish charities, whether or not formed as public trusts, not having power to alter the instruments by which they are established or regulated, but *under exception of* those constituted by Royal Charter or by or under statute.

These provisions amount in essence to the introduction in Scotland of the "small charities" provisions of the Charities Act 1993. Their attraction is that, unlike the current provisions for small public trusts under the 1990 Act, they permit adjustment of administrative provisions. They would apply to what are at present educational endowments in exactly the same way as to other Scottish charities.

Application of provisions to non-registerable public trusts

9.24 We propose that the foregoing provisions should apply to non-registerable public trusts in the same way as to Scottish charities constituted as public trusts, subject to the modification that the purposes of any non-registerable trust, following a change effected either by resolution or scheme, should not be required to fall within the definition of "charitable" as interpreted in UK revenue law, so long as the trust remains a public trust as defined in Scots common law.

9.25 We propose that the application of these provisions to public trusts should be

without prejudice to the existing common law power of the Court of Session to approve a *cy-près* scheme in relation to any public trust.

There seems to us to be no reason why a public trust whose purposes are not charitable in the English sense – so that it is neither entitled not bound to seek registration as a Scottish charity – should not have the benefit of the same reorganisational provisions as Scottish charities. We also recommend that the existing cy-près jurisdiction provision should be retained as a fall-back.

Application of provisions to public charitable collections

9.26 We propose that the foregoing provisions should apply to the proceeds of any public collection as if they were held in a public trust in respect of which the trustees had no power to alter the purposes.

The underlying principle is that a public charitable collection is presumed to be taken for the purposes for which it is solicited. If those who have collected the funds wish to alter the purposes, they must apply to the court. The assumption is also made that those who part with their money to a public collection do not expect to see it back: they expect it to be applied to the advertised objects, which failing, to similar objects authorised by the court or (in the case of a small fund) by the Lord Advocate.

ANNEX 1.1: TABLE OF THE 44 RESPONDENT TRUSTS

ID	Date	Ltd Co	Deed	Scheme	A/cs	Income/Funds	Education Act	Comments
1a	1995	Yes	Yes	No	Yes	158,498		Changed from a trust in 1997
1e	1990	Yes	Yes	No	Yes	77,338		
1c	1991	Yes	Yes	No	Yes	61,052		
1f	1991	Yes	Yes	No	Yes	264,188		
1g	1987	Yes	Yes	No	Yes	422,822		
1b	1944	No	Yes	No	Yes	360,894		Association/Educational Charity
1d	pre 1992	No	Yes	No	Yes	38,232		Association
2b	1930	No	Yes	Yes	Yes	193?	1928	
2i	1957	No	Yes	Yes	No	45,310 **	1939/1056	Educational Endowment; **amount disbursed to be
2d	1982	No	Yes	Yes	Yes	564,827	1980	Residential Home for Elderly People
2h	1983	No	Yes	Yes	Yes	17,632	1946/1962/1981	originally founded in 1861
2c	1960	No	Yes	Yes	Yes	18,865,695	1939/1956	amended in 1989
2e	1969	No	Yes	Yes	Yes	209,881	1962	
2f	1968	No	Yes	Yes	No		1962	
2g	1961	No	Yes	Yes	Yes	18,917**	1939/1956	**note investments totalling £444,351
2a	1981	No	Yes	Yes	Yes	414,788	1980	
4g	pre 1992	No	Yes	No	Yes	208,465		
4f	1960	No	No	No	Yes	99,333		
4c	1983	No	No	No	Yes	560,316		
4e	unknown	no	No	No	No			only information received was the CLRU questionna
4a	pre 1981	No	No	No	Yes	1,205		limited information provided
4d	unknown	?	No	?	No			very limited information provided
4b	1921?	?	No	?	No	17,506		very limited info provided: states IR 'accepts' Trust a
5f	1987	Yes	Yes	No	No			very limited information provided
5b	1996**	No	Yes	No	Yes	8,960		amalgamation of two earlier organisations
5e	1637	No	Yes	No	Yes	246,503		
5h	1923	No	Yes	No	Yes	39,923		caravan park, income used for benefit of local reside
5g	1920 ish	No	No	No	No			
5d	1982	No	No	No	Yes	860		managed by local health board
5a	pre 1992	No	No	No	No			very little information provided
5c	18th C	No	No	No	No			only questionnaire returned, no other info
3e	1966	No	Yes	No	Yes	28,701		trust for benefit of people with cerebral palsy
3k	1990	No	Yes	No	Yes	3,410,065		
3c	1987	No	Yes	No	Yes	5,435		
3f	1979	No	Yes	No	No			gives approx £3,000-4,000 in donations each year
3a	1943	No	Yes	No	No			
3g	1993	No	Yes	No	Yes	22,299		
3h	1979	No	Yes	No	Yes	19,591		bursaries for school pupils
3d	1985	Yes	Yes	No	No	5,804		
3j	1874	No	Yes	No	Yes	633		bursaries for university students
3i	1984	No	Yes	No	Yes	15,940		grants for agricultural students
3b	1977	No	Yes	No	Yes	7,910		promotion of the Gaelic language
5i	1953	No	Yes	No	Yes	4,880		not happy with the cost of altering the Trust's terms
5j	1997	No	Yes	No	Yes	17,000	1980	original trust changed by cy-pres scheme effective fr

ANNEX 1.2: QUESTIONNAIRE AND INTERVIEW RESULTS

Public Trusts - reorganisation by cy-près

	Pre 1990	Post 1990	D/K	Never
Last time lawyers gave advice on a cy-près scheme	three	eight	one	three
Cy-près scheme proceeded with?	two = yes one=no	three=yes one = current four = no	no	

Lawyer's involvement in any cy-près schemes which have been approved in the Outer House since the changes in the Rules of Court (1994) without reference to the Inner House	Only one lawyer from the Law Department of the Church of Scotland has experience of this.
Estimation of the extra costs of a cy-près petition to the Outer House from those of an application to a Lord Ordinary under section 9 of the 1990 Act?	One lawyer thought that section 9 is cheaper. The others could not comment.
Estimation of the current cost of a cy-près petition to the Outer House?	Most were ignorant of the relevant costs except for one lawyer. Estimates varied from £500-£10,000+
Estimation of the extra cost if the petition is referred to the Inner House?	Two lawyers estimated about £1500. One said very little extra. No other comments.
Experience of failed public collections?	None

Public Trusts - reorganisation under the 1990 Act

Number of cases taken to court under section 9	Two = yes (SCO quoted 15-50)
Advantages of section 9 procedure over a cy-près petition to a single judge	Two respondents said that section 9 was advantageous. One was advised by different counsel to use cy-près ?others
Extension of the section 9 jurisdiction to the Sheriff Court	nine = yes, two = no, four = no comment SCO doubtful due to lack of knowledge
Waiting for the extension of the section 9 jurisdiction to the Sheriff Court	one = yes (Glasgow)
Relative costs of an application to the Sheriff Court and an application to a Lord Ordinary (not referred to the Inner House)	ten felt that the costs would be lower five = no comment
Number of reorganisations under section 10	seven had used section 10 (SCO estimated 190)
Success rate for section 10 cases	one abandoned due to costs
Typical costs for a section 10 case eg professional, advertising etc	Advertising £50-£500 depending on paper.
£5,000 limit for a section 10 case should be increased	eight = yes (£10,000-£25,000), two = no SCO = £10,000
Reorganisation under section 11	seven = yes (SCO estimate 20)
Success rate for section 11 cases	all (SCO=overwhelming majority)
Typical costs for a section 11 case eg professional, advertising etc	Advertising £50-£500 depending on paper.
£1,000 limit for a section 10 case should be increased	nine = yes (£2,500-£5,000), two = no SCO =?no
Knowledge of public trusts eligible but not applied for tax relief under section 505 of the ICTA Act 1988	one = yes
Knowledge of public trusts not recorded on the Inland Revenue Index	three = yes
Knowledge of public trusts not entitled to tax relief under s.505 of the 1988 Act because they do not satisfy the English definition of "charity"	two lawyers knew a few, mostly small trusts
Clarity of the wording of the provisions in sections 9, 10 and 11	five= wording should be simpler, two= too restrictive, one=ok
Response from the public after advertising under sections 10 and 11	three lawyers reported a response but none were serious objections
Advantages of using the provisions of the 1990 Act as compared to cy-près schemes.	eight respondents said quicker and cheaper

Public Trusts - reorganisation of powers of investment

Lawyers reporting difficulties with public trusts whose powers of Investment are:	Yes	No
Restricted to those of the Trustee Investments Act 1961	seven	
Do not permit delegation of day-to-day management of Investments	four	
Do not permit the use of nominees	two	
Any attempts of seeking an enlargement of powers?	two	one too expensive

Reorganisation under the Education (Scotland) Act 1980

Number of presentation of petitions under section 108	None
Number of reorganisations under section 105, whether by local education authority or the court in the past 5 years	One in 1983 two = yes
Knowledge of the reorganisation provisions of this Act amongst the legal profession	one respondent was knowledgeable, others said 'limited' and 'close to zero'
Experience of educational endowments not public trust in form	three = yes
Experience of educational endowments not subject to the accounting requirements of section 111	none
Knowledge of the exemption of educational endowments from all but section 1 of the 1990 Act	d/k
Experience of small educational endowments ie income < £5,000 pa	seven involved with small educational endowments
In favour of the extension of the "small trust" provisions of sections 9,10 and 11 of the 1990 Act to educational endowments	eight in favour, seven no comment

General Questions

Received advice from the Scottish Charities Office about reorganising public trusts and educational endowments	nine had received advice
Decided not to proceed with the reorganisation of a public trust due to the expense involved	seven were involved in cases where decided not to proceed.
In favour of rationalisation of the different provisions for the reorganisation and regulation of public trusts and educational endowments	twelve in favour, one said not essential, two = no comments
In favour of Scottish charities formed as trusts being harder to reorganise than other legal forms of Scottish charities	eight = not in favour, three in favour.
In favour of the reorganisation of Scottish charities being subject to some form of central supervision independently of controls related to legal form.	seven = yes , five = no comments about too much bureaucracy
Need for special treatment of bodies constituted by Royal Charter or Act of Parliament	ten = no
Experience of the working of the equivalent English provisions	two solicitors had some experience
Comments on the English provisions	comments voiced about not wanting a Charity Commission or too much bureaucracy
Knowledge of any earlier "illegal" reorganisations of public trust by trustees before receiving professional advice	one carried out in Aberdeen some time ago. One detected on Edinburgh just in time.

ANNEX 1.3: REORGANISATION OF ENGLISH CHARITIES

1.3.1 It may be helpful to include for comparative purposes a brief note on the reorganisation provisions for English charities.

SUMMARY OF PROVISIONS

1.3.2 The High Court exercises an inherent *cy-près* jurisdiction in respect of charitable gifts given in trust (to "charities" whatever their legal form) similar to that of the Court of Session over public trusts. The grounds on which the inherent jurisdiction may be exercised have been extended beyond "impossibility" and "impracticability" by section 13 of the Charities Act 1993 (by reference to various forms of redundancy similar but not identical to those of section 9 of the 1990 Act).

1.3.3 Section 13(5) of the 1993 Act places a duty on the trustees of a trust for charitable purposes (where the case permits and requires the trust property or some part of it to be applied *cy-près*) to take the necessary steps to secure effective use of the property.

1.3.4 Section 14 of the 1993 Act makes provision for the application *cy-près* of gifts of donors "unknown or disclaiming" where a public collection has failed *ab initio*.

1.3.5 The High Court also has an inherent jurisdiction to establish schemes for the administration of a charity (whatever its legal form), independently of any alteration of purposes. A scheme might, for instance, vary the powers of investment of trustees.

1.3.6 Section 16 of the 1993 Act gives the Charity Commissioners concurrent jurisdiction (subject to certain controls) to establish schemes, whether altering purposes or administrative provisions.

1.3.7 Sections 15 of the 1993 Act makes special provision for schemes affecting bodies constituted by Royal Charter and section 17 for bodies constituted or regulated by Act of Parliament.

1.3.8 Section 64 of the 1993 Act provides that the consent of the Charity Commissioners is required to any change in the objects clause of any charity which is a company or other body corporate.

1.3.9 Section 74 of the 1993 Act allows "small charities", whatever their legal form, to reorganise by resolution of the charity trustees.[79] A "small charity" is one with an annual income of less than £5,000.[80] A reorganisation may involve both purposes and administrative provisions. Section 75 permits certain charities with an annual income of less than £1,000 to expend capital from "permanent endowment" (provided the permanent endowment does not comprise land) by following a specified procedure. Public notice

[79] This term is not confined to "trustees" in the strict sense: see Charities Act 1993, section 97 (1).
[80] Charities Act 1993, section 74(1)

must be given of resolutions under sections 74 and 75 and the consent of the Charity Commissioners is required.

DIFFICULTIES IDENTIFIED

1.3.10 The comparative material under this heading is included to help identify gaps in the Scottish system and to suggest possible ways of filling them. Deficiencies noted have been taken into account under the other headings as relevant.

QUESTIONS FOR EMPIRICAL RESEARCH

a) Have the interviewees had any practical experience of the working of the English provisions?

b) If so, do they have any comments to make? Do the interviewees feel there are features of the English provisions which could be usefully adopted in Scotland?

EMPIRICAL RESEARCH FINDINGS

a) None of the respondents had any experience of working with these particular provisions of the English legislation, but two had some experience of working under the general charity law regime in England and Wales.

b) They expressed the view that the system there was far too bureaucratic and hoped that Scotland would not introduce a Charity Commission and the related bureaucracy.[81] They were unable to comment specifically on the reorganisation provisions for English charities.

OPTIONS FOR IMPROVEMENT

1.3.11 Rationalisation of the reorganisation provisions for Scottish public trusts and Scottish charities generally should be carried out in the light of the English provisions.

1.3.12 Consider making Scottish provision for the eventuality of failed public collections, along the lines of section 14 of the 1993 Act.

1.3.13 The Scottish system should permit schemes for the alteration of administrative provisions independently of alteration of purposes.

1.3.14 Consideration should be given to introducing an equivalent of the Charity Commissioners' concurrent jurisdiction with the High Court to settle schemes, as a means of reducing the costs of reorganisation.

1.3.15 The reformed Scottish provision should facilitate, and regulate, reorganisation of

[81] See Annex 1.2. Given the small numbers involved, this clearly cannot be interpreted as a representative view.

Scottish charities of all legal forms.

1.3.16 Consideration should be given to the question whether all Scottish reorganisations not involving approval of the court, including those within a body's own powers, should require a form of official consent equivalent to the consent of the Charity Commissioners under the 1993 Act (e.g., of the Lord Advocate).

1.3.17 Consideration should be given to introducing special provision for bodies constituted by Royal Charter or Act of Parliament.

1.3.18 The reformed provision for reorganisation of "small trusts" and "small Scottish charities" should permit alteration of administrative provisions.

1.3.19 Consideration should be given to placing a statutory duty on trustees (or the relevant office-bearers of Scottish charities of other legal forms) to reorganise when necessary.