SCIO Dissolution Working Group 2019

Recommendations to Scottish Government on preferred options to strengthen the Scottish Charitable Incorporated Organisation (Removal from Register and Dissolution) Regulations 2011

1. Introduction and background

Scottish Charitable Incorporated Organisations (SCIOs) were introduced in 2011 as a new corporate legal form unique to Scottish charities. SCIOs are a popular choice of legal form, both for new organisations setting up a charity and for existing charities who want to incorporate.

As at 9 March 2020 there were 4422 SCIOs on the Scottish Charity Register (the Register), comprising nearly 18% of all charities[1].

Over 60% of new applications to become a charity are for SCIOs and, at the current rate of growth, it is set to be the most common legal form for incorporated charities within the next few years.

The relative simplicity and informality of the SCIO, when compared with companies, undoubtedly accounts for much of its appeal. But in OSCR's experience these benefits also introduce a number of issues that risk denting public confidence in the SCIO model. With the growing number of SCIOs there is a corresponding increase in the number coming to the end of their operational life.

Among the SCIOs on the Register are some large charities, including 29 with an annual income exceeding £1 million and a further 28 with an income between £500,000 and £1 million. Moreover, many smaller SCIOs (in terms of income) hold title to heritable property, often through opportunities for community ownership under the Community Empowerment (Scotland) Act 2015. SCIOs are an effective vehicle in such cases provided the dissolution provisions work appropriately. Any changes to the Dissolution Regulations must therefore ensure compatibility with the wind-up requirements of community asset transfers.

The Scottish Charitable Incorporated Organisations (Removal from the Register and Dissolution) Regulations 2011 (SSI 2011/237) (the Dissolution Regulations) came into force on 1 April 2011.

[1] 24,855 total charities registered

SCIO Dissolution Working Group 2019

The arrangements put in place by the Dissolution Regulations to deal with insolvent SCIO dissolutions were intended to be a temporary measure to allow time for 'more detailed work on a bespoke approach to be undertaken separately'[2].

Since 2011 OSCR has invested resources in encouraging public trust and confidence in the SCIO form, raising awareness among funders, financial institutions, professional advisers and others to ensure that SCIOs are not disadvantaged by their novelty and are seen as safe, credible and reliable by potential investors and business partners. That credibility is underpinned by legislation, including the Dissolution Regulations, and OSCR's enforcement of them. SCIOs are the only corporate legal form for which OSCR is the sole regulator and OSCR regards facilitating compliance with the legislation as a matter of priority.

Through practical experience, OSCR identified a number of possible improvements in the regulation of SCIO dissolutions and the removal of SCIOs from the Register. The aims of OSCR's proposed amendments were:

- to provide greater protection for creditors and other parties with an interest in SCIOs at the time of their dissolution, particularly in the case of SCIOs that are insolvent,
- to preserve public confidence in the SCIO legal form, and
- to introduce efficiencies to OSCR's handling of SCIO dissolutions, reducing the regulatory burden upon SCIOs at the end of their life and ensuring greater accuracy of the Register.

In making its original proposals for improvement of the current Dissolution Regulations, OSCR was conscious of the original policy intention in 2010/11 that the SCIO form should offer a distinct and accessible alternative legal form for charities; one that provides the legal convenience and protection from personal liability of a corporate body within a regulatory framework designed specifically for Scottish charities.

[2] Notes of the final meeting of the Scottish Government SCIOs Working Group (16 March 2010)

The SCIO Working Group, in developing OSCR's original proposals further, remained equally conscious of the desire for the relative simplicity and accessibility of the SCIO as a legal form.

The SCIO is distinctly and deliberately not a company and sits outwith the general body of company law. It also differs in significant ways from its counterpart in England and Wales, the Charitable Incorporated Organisation (CIO).

2. SCIO Dissolution Working Group 2019

The SCIO Dissolution Working Group was established in August 2019 as a short life-working Group, to report to Scottish Government on the preferred options to strengthen the Dissolution Regulations. The membership of the Group can be found at **Annex 1**.

Purpose of the Working Group

The purpose of the Working Group was to ensure that public confidence in the SCIO as a credible legal form can be maintained by:

- supporting the development of a dedicated insolvency regime for SCIOs; and
- considering the practical implications of OSCR having power to strike off and dissolve unresponsive SCIOs and, where appropriate, restoring them to the Register.[3]

Remit of the Working Group

The Group's focus has been on developing OSCR's six outline proposals for the amendment of the Dissolution Regulations, aimed at addressing the practical deficiencies and risks identified:

[3] Removing a SCIO from the Scottish Charity Register means that the legal entity is dissolved and no longer exists.

- **Proposal 1(a):** require a solvent SCIO to have ceased operation before making an application to be dissolved and removed from the Register.
- **Proposal 1(b):** require a declaration of solvency to be validated by a supporting statement from a suitably qualified or experienced person.
- **Proposal 2:** allow OSCR greater discretion with regard to timescales and provision of information in respect of solvent SCIO applications to dissolve.
- **Proposal 3:** develop a bespoke procedure for the dissolution of insolvent SCIOs that improves the protection afforded to creditors.
- **Proposal 4(a):** allow OSCR to remove inactive and unresponsive SCIOs from the Register.
- **Proposal 4(b):** allow a removed SCIO to be restored to the Register.

Structure of the Working Group's report

This report presents (in **Section 3: Proposals for amending Regulations**) the recommendations of the Working Group for improvements to the Dissolution Regulations in respect of each of the proposals above. For each of these, the current situation and anticipated difficulties are described, followed by the original proposals, the Working Group's discussion and its agreed recommendations.

The Report also includes a number of recommendations that have arisen from the Working Group's discussions, which are not related to OSCR's original proposals, but which it believes are relevant to improving the SCIO dissolution regime overall. These are found in **Section 4: Additional proposed amendments**.

3. Proposals for amending Regulations

Proposal 1(a): Require a solvent SCIO to have ceased operation before making an application to be dissolved and removed from the Register

Current situation

A solvent SCIO can apply to OSCR at any time to be dissolved. Unlike other incorporated legal forms, there is no requirement for a SCIO to have ceased operation at the time of making its application. In contrast, a charitable company must have been dormant for three months before making an application to Companies House for voluntary strike-off but it need not be inactive at the time of applying to OSCR for consent to dissolve.

On application to dissolve a solvent SCIO, the trustees must provide OSCR with a signed declaration of solvency. As there is no requirement for a SCIO to have ceased operations it could in principle continue to operate as normal; entering into agreements with creditors, taking on assets and liabilities **after** it has applied to OSCR to be dissolved.

The SCIO's financial position may therefore have changed materially by the time of OSCR's decision on the application, calling into question the accuracy of a declaration of solvency.

Original OSCR proposal

OSCR proposed that Regulation 3 of the Dissolution Regulations is amended to require a solvent SCIO to have ceased operation prior to applying to be dissolved and removed from the Register.

Group discussion

The Group decided that the term ‘inactive’ rather than ‘ceased operations’ is more appropriate in a charity context.

The Group agreed criteria for what ‘inactive’ could mean in practice. An ‘inactive’ SCIO may have wound up its operations already or at least be in the process of doing so. Residual activity would only be for the purposes of:

- concluding the wind up (for example, settling remaining debts, terminating contracts);
- meeting constitutional obligations (for example, holding a members’ meeting) or complying with a resolution of the SCIOs members;
- complying with a statutory requirement (for example, preparing and filing accounts).

This might include the retention of one or more individuals for these purposes.

The Group discussed whether an application from a fully active SCIO to dissolve should be considered premature and whether the Dissolution Regulations should specify that that a SCIO would effectively need to be ‘inactive’ for OSCR to consider an application for dissolution.

The Group agreed that a three-month period of inactivity prior to making an application was reasonable (comparable to the requirement in company law to have ‘ceased operations’ for three months prior to applying for voluntary strike-off).

The Group discussed the merits of broadly replicating the provisions of Regulations 10 and 11 of the CIO Regulations as the criteria for an inactive SCIO, with details then clarified further in OSCR guidance. The Group acknowledged that as worded CIO Regulation 11(b) could be interpreted as requiring a charity to notify of any minor change in assets. As such the Group suggested that a broad provision to notify be included in Dissolution Regulations with specific asset levels and timescales being set out in OSCR guidance, for example monthly statements of changes and a final statement once concluded.

Group recommendations

The Group recommends that:

- A SCIO should be 'inactive' for three months prior to making a solvent dissolution application to OSCR. This should ensure the statement in respect of its solvency (see proposal 1(b) below) that the SCIO provides at the time of applying to OSCR remains accurate, and that the SCIO is unlikely to enter into credit agreements or take on further assets and liabilities. This in turn allows OSCR to make its decision to grant consent for a SCIO to dissolve based on accurate and up to date information.
- Restrictions on SCIO activities following application for dissolution should broadly follow the provisions as set out in **Regulation 10 of the CIO Regulations** – with the insertion 'proceeding with the wind up' rather than 'proceeding with the application' at regulation 10(a)(i).
- Requirements on a SCIO following application for dissolution to notify OSCR of any property received after making the application should broadly follow the provisions as set out in **Regulation 11 of the CIO Regulations**, with OSCR setting out in guidance the nature of notification.
- Broad criteria for what 'inactive' means should be set out in the Dissolution Regulations (as stated above) and OSCR should set out in guidance what 'inactive' may mean in practice. The Regulations need to be broadly worded to accommodate the wide range of operations charities undertake.
- Having made an application, a SCIO may not engage in any activity, except for residual activity that may be necessary to conclude its affairs.
- OSCR should be able to reject an application for dissolution from a SCIO which is still active on the grounds that the application is premature.

Proposal 1(b): Require a declaration of solvency to be validated by a supporting statement from a suitably qualified or experienced person

Current situation

A solvent SCIO can apply to OSCR to be dissolved; this application must be accompanied by a 'declaration of solvency' signed and dated by the charity trustees.

Trustees of a solvent SCIO might lack the expertise to make an accurate assessment of the SCIOs financial position or to manage complex dissolutions without access to professional supervision.

A declaration of solvency may be made by trustees with little or no financial experience or who are seeking to avoid certain liabilities. Also, in the current situation, where a SCIO does not need to be inactive before applying to be dissolved, the SCIOs financial position may have changed significantly by the time OSCR makes a decision on whether to grant consent for the SCIO to dissolve.

Third parties and creditors place absolute reliance on trustees making a declaration of solvency that is current and accurate. This situation risks affording inadequate protection to creditors and may undermine third party confidence in the SCIO as a secure legal form with which to transact.

Original OSCR proposal

OSCR proposed that a declaration of solvency must be countersigned or accompanied by a validating statement from a person with the requisite financial experience or qualification confirming that the statement is accurate. This is consistent with the requirements[4] for appointing an independent examiner or auditor of a charity's accounts.

[4] **The Charities Accounts (Scotland) Regulations 2006**

Group discussion

The Working Group discussed that rather than specifying in Regulations what validation should be required and who would be a suitably qualified or experienced person to provide it, the Dissolution Regulations could be amended to allow OSCR greater discretion to request additional information or validation as it thinks fit.

The circumstances when additional information might be sought to confirm solvency and the type of information required should be set out in guidance, taking into account the requirement for OSCR to act proportionately. The guidance should make clear when and why more information would be requested, to ensure confidence for creditors and promote understanding for trustees.

The Group suggested that Regulation 3(4) of the Dissolution Regulations could be amended to provide that an application must be accompanied by 'such additional requirements/information as OSCR specifies'.

Regulation 3(4)(c) might be amended so that OSCR may, where it thinks fit, require a declaration or statement regarding the SCIO's solvency to be validated by suitably qualified person. For example, OSCR might require a statement on similar lines to the report of an auditor or (more commonly) an independent examiner under the Charities Accounts (Scotland) Regulations 2006. However, the limitations of such validation were also noted. In particular, the information available to auditors and independent examiners may be insufficient to give an opinion and may either expose them to risks of liability or expose the SCIO to significant cost in obtaining professional advice.

The Group suggested that OSCR could also make greater use of the discretion it already has under Regulation 3(7) of the Dissolution Regulations to request additional information once an application has been received, but understood that there is a current lack of clarity regarding the scope of this discretion.

The Group concluded that where a SCIO applying for dissolution is clearly inactive (as the Group recommends it should be, see above) this could negate the need for external

validation of the declaration of solvency and minimise the risk of false information being provided to OSCR unintentionally.

The Group concluded that the requirement for a declaration of solvency may have been seeking to introduce a comparator to other regimes and is not wholly necessary in a SCIO context.

The Group therefore suggested that the requirement for a 'declaration of solvency' be removed. OSCR could instead require a statement that the SCIO had settled all outstanding debts or had provided for its liabilities in full, and a statement of the proposed disposal of residual assets (in accordance with its constitution). In the event such a statement resulted in OSCR having further questions (for example, where the nature of the SCIOs liabilities is particularly complex), OSCR should be able to request further information from the applicant SCIO.

Group recommendations

The Group recommends that:

- The current requirement for a 'declaration of solvency' in the Dissolution Regulations Regulation 3(4)(c) be removed.

- Regulation 3(4)(e) be amended to encompass the existing statement of all assets and liabilities, a statement by or on behalf of the charity trustees that any debts and liabilities of the SCIO had been settled or otherwise provided for in full, together with the proposed disposal of residual assets in accordance with the SCIOs constitution– as per **Regulation 5(b)(2ii)and (iii)of the CIO Regulations**.

- The Dissolution Regulations (Regulation 3(4)) be amended to allow OSCR discretion to specify any additional information it requires for applications to be made for solvent SCIO dissolutions. OSCR should specify in guidance what additional information may be required and under what circumstances, including when additional information would be required to confirm solvency, taking into account the

requirement for OSCR to act proportionately.

- The scope of OSCR's discretion to require more information once an application has been received (Regulation 3(7)) should be clarified (bearing in mind the need for OSCR to act transparently and proportionately), to enable this discretion to be used effectively to assist decision making.

These recommendations should allow OSCR to be proportionate and adapt information requirements depending on the specifics of the application. Outlining the key information in Regulations provides consistent requirements for all applications, whilst specifying further requirements in guidance allows flexibility and discretion for individual cases.

Proposal 2: Allow OSCR greater discretion with regard to timescales and provision of information in respect of solvent SCIO applications to dissolve

Current situation

The current Dissolution Regulations set out the information a solvent SCIO must send to OSCR when applying to dissolve. An application is deemed to be incomplete unless all of the information stipulated in the Dissolution Regulations is received by OSCR. Once a complete application is received OSCR must publish a notice of the proposed dissolution (in the prescribed format of Schedule 2 of the Dissolution Regulations) on its website within 14 days. This notice, published for 28 days, gives all interested parties notice of the intended dissolution.

Following expiry of the publication period OSCR must make a decision within 21 days whether or not to grant consent for the SCIO to dissolve.

By contrast, the Charity Commission for England and Wales (CCEW) has greater discretion over the format of published notices and flexibility in respect of publication and decision timescales.

OSCR's practical experience is that the Dissolution Regulations give little flexibility over the timescales for receiving the required information, agreeing changes with applicants, publishing notices of proposed dissolutions and reaching decisions. In some cases, OSCR has no option other than to publish a SCIO dissolution notice in the full knowledge that consent to dissolve will be refused on a technicality. For example, a resolution of a SCIO's members to dissolve must not pre-date an application to OSCR by more than 21 days. In practice, many applicants omit one or more of the required documents and the time taken to gather the missing information (in order for the application to be considered complete) renders the members' resolution invalid.

The reality is that solvent SCIOs seeking to dissolve are often in their final throes and struggle to meet the requirements of the application process, particularly convening a members' meeting to pass the necessary resolution. Where OSCR must revert to them or require them to make a new application there is a risk that they do not complete the process, resulting in SCIOs which are inactive and no longer providing public benefit remaining on the Register. (However, see section 4 'Additional proposed amendments', regarding the Group's recommendations for simplifying the resolution requirements.)

The prescribed format of the publication notice permits little scope for it to be adapted to the circumstances of a particular application and risks the notice being uninformative to interested parties.

Original OSCR proposal

That Regulation 3 of the Dissolution Regulations is amended to allow greater discretion to gather information proportionately in support of applications and to publish notices and make decisions on applications to a timescale and in a manner that minimises the

risk of them failing on a technicality. This will also require amendment of Schedule 2 of the Dissolution Regulations (notice of application) to allow for the content of notices to be more flexible and informative.

Group discussion

There was general consensus that the Dissolution Regulations should be amended to allow OSCR greater discretion regarding the information it can request, the timescales for gathering information and for publishing notices of proposed dissolutions. This would reduce the likelihood of applications failing on technical breaches of procedure and ensure that the notices are accurate and informative for interested parties.

The Group discussed the publishing periods for notices and where the notices are published. It was suggested that greater protection for creditors might be afforded by also publishing in the Edinburgh Gazette rather than just on the OSCR website, and that OSCR should also be able to publish the notice in a way that might draw it to the attention of beneficiaries and other stakeholders. The Group agreed that the publishing period should be extended from 28 days to three months, as seen in other regimes (such as for CIOs and companies).

Overall, the Group agreed that allowing OSCR discretion with regard to timescales and provision of information/publication that mirrored the discretion afforded to CCEW in the CIO Dissolution Regulations was desirable.

Group recommendations

The Group recommends that:

- OSCR should make greater use of the discretion it already has under the Dissolution Regulations (Regulation 3(7)) to request additional information once an application had been received, which may require clarification of the scope of this discretion (see also recommendation under proposal 1(b)).

- The timescales in the Dissolution Regulations for publishing notices and for making decisions on applications are relaxed and made explicitly to apply only in respect of complete/competent applications, so allowing OSCR the opportunity to request and receive information relevant and necessary to progress the application.

- The Dissolution Regulations be amended to give OSCR discretion over the format of notices, allowing these to be more informative for interested parties.

- The notices are published on the OSCR website (as is currently the case) and in the *Edinburgh Gazette*, as well as anywhere else OSCR considers appropriate in order to provide greater protection for creditors and inform beneficiaries and other stakeholders of the intended dissolution.

- The publication period for notices of applications for dissolution should be extended in the Dissolution Regulations from 28 days to three months.

- The provisions in the CIO Dissolution Regulations, giving the CCEW greater discretion over the format of published notices and flexibility in respect of publication and decision timescales are considered when amending the relevant provisions of the SCIO Dissolution Regulations.

Proposal 3: Develop a bespoke procedure for the dissolution of insolvent SCIOs that improves the protection afforded to creditors

Current situation

The current regime for insolvent SCIO dissolution adopts the procedure of Scots bankruptcy law as it applies to the sequestration of the estate of a body corporate.

The Group understands that this regime was agreed in 2011 as an interim arrangement to allow time to develop a bespoke insolvency procedure for SCIOs.

A SCIO with outstanding debts of at least £1,500 may apply to OSCR for dissolution and removal from the Register. Determination of the debtor application is handled by the Accountant in Bankruptcy (the AiB) on payment by the SCIO of a £200 application fee. Where awarded, sequestration is handled by the AiB which acts as trustee in bankruptcy including, where applicable, distributing any surplus assets for charitable purposes. OSCR removes the SCIO from the Register on receipt of final accounts from the AiB.

A SCIO with outstanding debts of less than £1,500 cannot use the insolvent dissolution route. Neither can its trustees make a declaration of solvency. Potentially this may lead to a SCIO accruing further debt before the AiB can consider it (this is addressed at the end of proposal 4a).

Original OSCR proposal

OSCR did not make any detailed proposals for how to amend the insolvent dissolution regime. OSCR proposed that the Group consider designing a bespoke process for dissolving insolvent SCIOs that addresses the identified issues in the current regime and gives more robust assurance to creditors and the public.

OSCR outlined some of the potential issues in the regime that need to be addressed to ensure the following:

- Adequate protection for SCIOs creditors and others
- Protection for insolvent SCIOs employees
- Access for SCIOs to professional insolvency advice
- Information sharing between the AiB and OSCR
- Provisions for wrongful or fraudulent trading by an insolvent SCIO
- Penalties for not complying with legal requirements
- Protect the brand reputation of the SCIO
- How to deal with a SCIO with debts of less than £1,500 (this is addressed at the end of proposal 4a).

Refined proposals for Group

Four possible options for a modified insolvent dissolution process were identified, following initial discussions, and presented to the Group:

Option A: Adapted version of the Charitable Incorporated Organisation[5] model, in place in England and Wales (adapted for Scots Law)

Option B: Enhanced version of the current sequestration regime

Option C: A new bespoke regime for insolvent SCIOs

Option D: Adopting an existing regime of corporate insolvency in its entirety

The Group assessed all four options. Options C and D were thought to be resource intensive to develop and implement and have the potential to create additional and disproportionate regulatory burdens on SCIOs. The Group dismissed options C and D early in the process and focused on Options A and B. Accordingly more detail has been provided on Options A and B.

Option A: Adapted version of the Charitable Incorporated Organisation model, in place in England and Wales (adapted for Scots Law)

The model for Charitable Incorporated Organisations (CIOs) is based on the Insolvency Act 1986 and adopts most aspects of the insolvency provisions under company law, though the Regulations make many changes to the 1986 Act in order to be applicable to CIOs. A number of provisions of the 1986 Act are omitted completely as they would not apply to CIOs.

Option A was set out in terms of the perceived advantages and disadvantages in addressing the issues identified by OSCR and the Group.

[5] **The Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012**

Advantages

- It was generally acknowledged by the Group that the CIO Regulations provide a 'cleaner' process for insolvent dissolutions. This is because it is based on the established company model, and therefore Insolvency Practitioners and accountants are familiar with the process.

- This option would apply the offences of wrongful and fraudulent trading (offences under the Insolvency Act 1986) to SCIOs.

- It provides a level of assurance for creditors, a deterrence against malpractice, and brand protection. This would give creditors protection against wrongful and fraudulent trading, and creditors may feel better protected if they know that SCIO trustees could potentially be personally liable for the debts of the SCIO or face criminal sanctions.

- This option typically ensures the SCIO has the professional support of an Insolvency Practitioner, allowing them to dissolve in an orderly and managed fashion. Insolvency Practitioners support and assist in navigating the issues concerning employees, pensions, heritable property, etc. The specific expertise of an Insolvency Practitioner may also give added assurance to creditors and employees.

- Option A would provide a series of options for an insolvent SCIO which would include:
    - SCIO voluntary arrangement (company voluntary arrangement)
    - Administration
    - Members voluntary winding up
    - Creditors voluntary winding up
    - Compulsory winding up.

Disadvantages

- **The cost of the funding of corporate insolvency in Scotland:** In England and Wales, the Official Receiver acts in compulsory liquidations where a company has no funds to pay for an Insolvency Practitioner. The AiB fills that role in Scotland for personal insolvency, where no Insolvency Practitioner has been appointed as Trustee, but as there is no Official Receiver in Scotland there is no equivalent for company insolvency. Option A would therefore require there to be a funding model for SCIO insolvencies so that an Insolvency Practitioner can be funded when the SCIO has no means of paying. There is no set fee for a liquidation, fees vary depending on the complexity of the work, and the time involved. As an example, in a relatively small and straightforward compulsory liquidation, a fee of £5,000 plus VAT and outlays would be considered reasonable. Under the current regime SCIOs pay an upfront fee of £200. Further costs are then met as a first call on the charity's estate – and if that is insufficient to cover those costs, are covered by the public purse (through The AiB).The higher costs of the process can also mean that creditors may get less back from the process.

- **Legal competence:** The assessment of whether applying parts of the Insolvency Act 1986 to SCIOs is within competence and vires of the Regulations will require detailed legal analysis of the provisions. Initial legal analysis indicates that the introduction of new offences for wrongful/fraudulent trading and making false declarations would not be possible through the Regulations (and would likely require primary legislation).

- **Scottish Government policy:** Option A was considered by the original Working Group, as reflected in the **SG consultation analysis report in 2010**. Scottish Government may be reluctant to return to an option rejected previously.

- **Proportionality:** One of the original key drivers for the SCIO model was to keep the model of incorporation relatively simple: many SCIOs are very small, even in comparison to small companies. The requirements of the Insolvency Act 1986,

together with the related secondary legislation may be viewed as overly burdensome for such small charities.

- **Largely untested in England and Wales:** The Charity Commission for England and Wales has received very few notifications of insolvent CIO dissolutions and the efficacy of the **CIO (Insolvency and Dissolution) Regulations 2012** is as yet unknown.

- **Practicalities:** The Group has recognised this insolvency model is often not ideal for smaller companies, and similar problems would arise in applying this approach to the majority of SCIOs which are relatively small. The Group acknowledges that some Insolvency Practitioners have a limited understanding of the charity sector and training would be required in order to ensure that the profession is in a position to understand SCIOs and their regulatory regime.

Option B: Enhanced version of the current sequestration regime

The Group identified a number of issues in the current sequestration regime as it is applied to SCIOs. In Option B OSCR has proposed possible ways to address these issues and strengthen the current regime.

- **Adequate protection for creditors and others:** The current regime offers certain elements of protection for creditors that are similar to the protections afforded by other options. If sequestration is awarded, on receiving notification from the Trustee in Bankruptcy, OSCR must publish notice of the sequestration on its website. The proposed requirement (see Proposal 2) to extend the locations where an insolvent SCIO dissolution application is published and increasing the publication to three months should help mitigate the concerns over creditor protection.

- **Protection for employees**: following enquiries it was confirmed that SCIO employees have the same rights as the employees of companies and CIOs to claim from the Redundancy Payments Service in respect of unpaid wages and

redundancy pay should a SCIO become insolvent.

- **Access to professional advice (once insolvent dissolution application has been made):** The current regime does not automatically result in the appointment of an Insolvency Practitioner (IP). However, the AiB has confirmed that they are able to access and instruct appropriate professional expertise given the circumstances of the individual case. The majority of cases that come to the AiB are dealt with by IPs under contract. Should a very large SCIO insolvency arise, then the expertise and capacity of the IPs will be appropriate, and there is provision in the AiB contract to allow for the requirements of big, highly complex cases to be met. On the conclusion of such a case, AiB would pay the IP, with AIB's costs being recovered from the estate where possible.

- **Access to professional advice prior to making an insolvent dissolution application:** most larger firms of Insolvency Practitioners have an FCA (Financial Conduct Authority) licence to provide advice. SCIOs will therefore be able to get IP advice (albeit possibly not from all IPs), for a cost.

- **Information sharing between the AiB and OSCR:** There is currently no requirement in the Dissolution Regulations for The AiB to keep OSCR apprised of the progress of sequestrations or to make reports to OSCR where it identifies apparent charity trustee misconduct. As a result of the Working Group's discussions The AiB and OSCR have now committed to putting formal arrangements in place to agree specific instances of potential trustee misconduct that The AiB will flag to OSCR, as well as procedures for routine updates between the two organisations on individual cases.

- **Wrongful/fraudulent trading – creating a new offence:** The Dissolution Regulations do not prevent the trustees of an insolvent SCIO from continuing to trade/operate while insolvent. The Group discussed the creation of an offence akin to 'wrongful trading', but were aware that this would require changes to primary

legislation (as it is not possible to create an offence in the Regulations). This is discussed in more detail in **section 4 Additional Amendments**.

- **Addressing 'wrongful trading' – reporting by the Trustee in Bankruptcy:** In the absence of such an offence, a possible way to address this weakness would be for OSCR to consider whether the SCIO trustees' actions of this nature amounted to misconduct (s.66 of the 2005 Act) and use the existing civil enforcement powers in the Charities and Trustee Investment (Scotland) Act 2005 (the 2005 Act). Alternatively, such behaviour might entail providing false information to OSCR or concealing or destroying information, which is an offence under s.26 of the 2005 Act. However, in order to be able to take appropriate action, OSCR first needs to be informed of the wrongful behaviour that might give rise to enforcement action. To that end, it was proposed that the trustee in bankruptcy handling the SCIO dissolution (be that the AiB or an IP, whether appointed by the AiB or by the Court on application by the SCIO directly - **section 4 Additional Amendments**) be required to report to OSCR any behaviours similar to those listed in **s.156 of the Bankruptcy (Scotland) Act 2016**. Alternatively, a general reporting duty could be created for the Trustee in Bankruptcy which could be specified in OSCR guidance.

- **Penalties for not complying with legal requirements:** The Group has acknowledged that there is often a misconception that there is no penalty for SCIO trustees' failure to comply with legal requirements and a lack of penalties under the Dissolution Regulations reinforces this belief. Clarification of existing enforcement powers and criminal penalties under the 2005 Act can be highlighted, with OSCR producing clear procedures, reflected in external guidance, that set out a process for dealing with non-compliance under the Dissolution Regulations and the general requirements of the 2005 Act.

- **Brand reputation of the SCIO:** The intention is that addressing the issues of the current regime with improved Regulations, guidance and understanding, as identified by the Working Group will help to strengthen the SCIO brand and

reputation, enabling OSCR to continue to be an effective and proportionate regulator of SCIOs.

Option C: A new bespoke regime for insolvent SCIOs

This option would require designing an entirely new process for SCIOs from scratch. Such a process would need to interact with existing UK Insolvency law and the established insolvency procedures in Scotland.

This would require significant development time and effort from OSCR, Scottish Government and the charity sector. Early on in its discussions the Group questioned whether this would be proportionate to any potential benefit that may result, as it was considered that suitable solutions were equally if not more likely to result from building on or adapting one of the existing insolvency regimes.

Option D: Adopting an existing regime of corporate insolvency in its entirety

This option looked at other corporate insolvency regimes that can apply to charities, and whether these might be applied in their entirety to SCIOs.

The two regimes the Group considered were the process for insolvent companies (as set out in Part IV of the Insolvency Act 1986) and the process for insolvent community benefit societies (following the provisions of Part IV of the Insolvency Act 1986 as modified by the Co-operative and Community Benefit Societies Act 2014).

The liquidation of a company is brought about in one of the following ways:

- Members' voluntary liquidation (MVL) where the company's directors have made a declaration of solvency.
- Creditors' voluntary liquidation (CVL) where no declaration of solvency has been made.
- Compulsory liquidation where the company is ordered to be wound up by the Court.

If a community benefit society is insolvent it can be wound up following one of the two routes available to insolvent companies (see above):

- Creditors' voluntary liquidation (CVL), initiated by a members' resolution with creditor involvement.
- Winding up by the Court at the petition of a society itself, a creditor or a member.

The supervision of company insolvency proceedings must be by a qualified Insolvency Practitioner (IP), and in the case of community benefit societies the liquidator must also be a qualified IP.

Most of the advantages and disadvantages identified in respect of the Option A would apply to this option.

Group discussion

It was agreed that the insolvency regime should be looked at in the context of all the proposals for improving the Dissolution Regulations, including the proposed the power to remove and restore SCIOs to the Register.

The Group acknowledged that the original vision for SCIOs and the regulatory regime did not anticipate the income size of larger SCIOs or the increased uptake of the SCIO legal form for community asset transfer[6].

However, the Group were cautious to avoid basing their decisions on more exceptional cases rather than on the vast majority of SCIOs on the Register.

Option A: The merits of the policy argument for having the same insolvency regime for all incorporated charities was discussed. From the public's perspective having two different dissolution regimes for different types of incorporated charity (SCIO and company) may be difficult to justify. However, the drive from the original SCIO Working Group and the responses to the 2010 consultation on the Dissolution Regulations, clearly indicated a desire for a 'lighter touch' regime overall for SCIOs. This policy

[6] Asset transfers under the Community Empowerment Act 2015

argument was clearly articulated at that time and the current Group agreed other than putting everyone on an equal footing, the original policy intentions remain valid.

Option B: The Group were persuaded by many of the arguments in favour of Option A but on balance concluded that Option B is the most feasible (in development as well as application) and therefore most desirable. The Group's view was that Option B would, on the whole, be able to provide ways for adequately addressing the problems identified with the current SCIO insolvency regime without creating a disproportionate regulatory burden. The matter of creating offences akin to 'wrongful trading' or 'fraudulent trading' to strengthen the current SCIO insolvency regime should be considered further by Scottish Government.

Option C: The Group discussed the idea of creating a new bespoke regime for insolvent SCIOs. The Original SCIO Working Group in 2010 concluded that further time and resource were required to develop this. The Group were clear that the small number of insolvent SCIO dissolutions and the size of the majority of SCIOs meant that the arguments for creating a new regime from scratch were weakened.

The Group were unclear what the benefits of creating tailored Scottish legislation to support the dissolution of an insolvent SCIO were. It was noted that this had the potential to overcomplicate the range of corporate insolvency routes and the requirements on SCIOs.

Option D: The complexity and cost of a full corporate regime was thought to be inappropriate for the majority of SCIOs. The Group were keen to ensure that the simplicity and proportionality of the original SCIO policy intentions were maintained. The Group dismissed Option D early in the process in favour of considering options thought to place less regulatory burdens on SCIOs.

Group recommendations

The Group recommends that Option B is pursued, whereby the current insolvent SCIO dissolution procedure is maintained with a mixture of legislative and non-legislative

enhancements. The Group noted that many of the issues that were identified with the current procedure can be (or have already been) addressed through non-legislative measures.

The Working Group therefore recommends the following:

- Non-legislative enhancements:
    - OSCR and the AiB establish an information sharing agreement. This should ensure that where the AiB has information that suggests trustee misconduct or mismanagement there is a clear pathway for the AiB to share the information with OSCR.
    - OSCR is clearer in guidance about the duties of SCIO trustees, and any penalties for misconduct and enforcement action that can be taken.

- Legislative enhancements:
    - Lengthen the publication times for insolvent dissolution applications and the places where applications should be published (as covered in proposal 2).
    - The Trustee in Bankruptcy handling the SCIO dissolution be required to report to OSCR any behaviours similar to those listed in s.156 of the Bankruptcy (Scotland) Act 2016. Alternatively, a general reporting duty should be created for the Trustee in Bankruptcy that could be specified in OSCR guidance.
    - The removal and restoration recommendations in proposal 4 should add to OSCR's range of tools to address the different circumstances of insolvent SCIOs.
    - Scottish Government consider creating an offence akin to wrongful trading for SCIOs, as is in place for other corporate bodies – **see section 4**.

Proposal 4(a): allow OSCR to remove inactive and unresponsive SCIOs from the Register

Current Situation

As the registrar and regulator of charities in Scotland, OSCR has a duty to keep an accurate public Register of charities. As well as granting charitable status by entering new charities in the Register, OSCR must also remove charities that have dissolved, that have requested voluntary removal (not an option open to SCIOs) or that no longer meet the charity test[7].

Where a charity appears to be inactive and/or does not respond to OSCR's communications, its ability to meet the charity test and satisfy the requirements of charitable status are in doubt. One of the main ways in which OSCR identifies whether a charity appears to be inactive or unresponsive is where it fails to comply with the legal duty to submit annual reports and accounts. A charity that fails to provide the information is referred to as 'defaulting'. Approximately 6% of charities registered in Scotland are shown on the Register as defaulting. Failure to comply with annual monitoring requirements and unresponsive charities are not confined to SCIOs.

Unlike for other legal forms of charity, OSCR cannot use its powers under section 30 of the 2005 Act to remove a SCIO from the Register if it no longer meets the charity test. The effect of removal would be to dissolve the SCIO without OSCR having the ability to carry out due diligence or a power to restore it to the Register in the event that there was cause to do so.

At present, when it appears to OSCR following inquiries that a SCIO no longer meets the charity test, in terms of **Regulation 8 of the Dissolution Regulations** OSCR must either direct the SCIO to take steps to meet the charity test or direct it to apply to be removed from the Register and dissolved ('a Regulation 8 direction'). In the event that a

[7] To be a charity registered in Scotland a body must meet the charity test.

SCIO fails to comply with either type of direction, OSCR must apply to the Court of Session (the Court) for an order in respect of the SCIO.

The Court may 'deal with the SCIO and its trustees in any way it thinks fit'[8], but it is not clear, and has not been tested, whether the Court's power extends to directing OSCR to remove a SCIO from the Register, thereby dissolving it. It is notable that the Court does not have such a power in respect of any other type of charity. It is also notable that in many instances, where the SCIO had limited assets, an application to the Court will be an expensive and disproportionate course of action to take.

This leaves the situation where OSCR has made inquiries into an unresponsive and likely inactive SCIO to the full extent of its powers, but is still unable to remove it from the Register.

There is a further matter that hinders OSCR's ability to fulfil its function to maintain an accurate Register. Where OSCR serves a Regulation 8 direction on a SCIO's principal office and it is returned undelivered, if after inquiry OSCR cannot find a new address for the charity nor (in the absence of a database of charity trustees) does it have contact details for any of the other trustees, this removal process is thwarted from the outset. This is because this process requires OSCR to have served a direction in the manner set out in the legislation before it can make an application to the Court of Session for an order in terms of Regulation 8(4) of the Dissolution Regulations.

If OSCR is unable to serve notice on a SCIO, OSCR is unable to apply to the Court, the unresponsive SCIO remains on the Register and OSCR is unable to take any further action.

Original OSCR proposal

OSCR proposed that the Dissolution Regulations are amended to give OSCR the power to strike off a SCIO without the requirement to apply to the Court for an order in circumstances where, as a result of inquiries, OSCR considers that:

- the SCIO no longer meets the charity test; and
- has failed to comply with a direction (where given) to take steps to meet the charity test; and/or
- has failed to comply with a direction to apply to be dissolved and removed from the Register.

OSCR further proposed that:

- before using such a power OSCR must take all appropriate steps to ascertain the assets and liabilities of the SCIO; and
- such a power should be subject to a requirement for OSCR to publish a notice of the proposed removal on its website and to take into consideration any representations received; and
- OSCR's decision to remove a SCIO be subject to review and appeal in terms of the 2005 Act; and
- such a power be tied in with a power to restore a removed SCIO to the Register where good reason is found for doing so.

Further developed OSCR proposal

The Dissolution Regulations should be amended to give OSCR the power to remove a SCIO from the Register **without** the requirement to apply to the Court for an order. The circumstances under which OSCR may exercise such a power should be set out in new Dissolution Regulations allowing dissolution by OSCR where, as a result of inquiries, OSCR considers that:

- The SCIO no longer meets the charity test; and

- has failed to comply with a direction (where given) to take steps to meet the charity test; and/or
- has failed to comply with a direction to apply to be dissolved and removed from the Register.

In addition it was proposed that:

- before using such a power OSCR should take steps[9] to ascertain the assets of the SCIO and where necessary take action to protect the assets; and
- OSCR be required to publish a notice of the proposed removal on the OSCR website, SCIO Register entry and in the Edinburgh Gazette, and any other place it considers likely to be able to come to the attention of creditors, (former) charity trustees and beneficiaries, for a minimum period of three months
- OSCR must take into consideration any representations received; and
- OSCR's decision to remove a SCIO be subject to review and appeal in terms of the 2005 Act; and
- such a power to remove be tied in with the power to restore, in specified circumstances, a removed SCIO to the Register.

Additional proposal for unresponsive SCIOs: Where OSCR is unable to establish contact with a SCIO, for example where OSCR has not been notified of a SCIOs change of address or attempts to contact the charity are simply ignored, alternative means of serving a Regulation 8 direction need to be provided in the Dissolution Regulations.

Regulation 19 of the CIO Dissolution Regulations makes provision for alternative means of serving a notice on trustees or members of a CIO in such circumstances.

SCIO Regulations could bring in comparable provisions, plus a provision which creates further means of notification for a Regulation 8 direction where previous methods (i.e.

[9] Steps taken would be proportionate to the nature of the SCIO

s100 of the 2005 Act, and any further methods comparable to CIO Regs) have failed. In such cases new provisions should set out that publication:

- on the OSCR website
- in the SCIO register entry
- in Edinburgh Gazette, and
- in any other place it considers likely to be able to come to the attention of creditors, (former) charity trustees and beneficiaries,

for a minimum period of three months shall be considered to effect the service of a Regulation 8 direction. The Regulations could also make clear that a failure to respond to a direction as served (within a specified time) is treated as a failure to comply.

Group discussion

The Group recognised that unlike all other UK registrars of corporate bodies, OSCR does not have a power to strike off or cancel the registration of bodies it regulates where conditions for doing so have been met.

The Group discussed the comparisons in England and Wales: when CCEW has reasonable cause to believe that a CIO is not in operation it must set in train a process that will, if not stopped by confirmation from the CIO that contradicts that belief, result in the CIOs dissolution by removal from the register of charities. For companies, the Registrar of companies may strike off a company (s)he believes not to be carrying on a business and must do so in cases of a company winding up where no liquidator appears to be acting.

The lack of comprehensive data held by OSCR for charity trustees was discussed by the Group and the hindering effect this has on the due diligence work that OSCR is able to perform prior to removing a SCIO from the Register. The Group recognised that this was not a problem exclusive to SCIOs and a change to primary legislation would be required to resolve this. This issue has already been considered by the Scottish

Government's 2019 consultation on possible changes to charity law, and received a high degree of support.

The Group acknowledged that as the number of SCIOs increases, and thereby inevitably the number of inactive SCIOs, OSCR's inability to remove inactive SCIOs risks the Register becoming inaccurate with SCIOs continuing to be registered long after they have ceased to be active and provide public benefit. This in turn risks undermining public confidence in SCIOs, OSCR and the Register.

It was discussed what safeguards could be put in place for creditors, employees and other third parties who may have claims against the SCIO on the removal of a SCIO from the Register. The Group agreed that any power granted to OSCR to strike off inactive SCIOs would need to be balanced by provision to restore a SCIO in established circumstances.

Removal: The Group discussed OSCR's current policy for dealing with defaulting charities[10] and the steps it takes to ascertain whether charities are still active and the level of assets held. The Group acknowledged that the cost of OSCR petitioning the Court of Session for the removal of small SCIOs with minimal assets is a disproportionate use of OSCR and the Court's resources – assuming the Court could in fact order the removal of a SCIO.

The Group explored whether the SCIO 'brand' would be weakened by replacing a judicial process of removal with an administrative process. The Group acknowledged that the inquiries required on OSCR's part are the same whether the process is via the Court or is administrative. It was agreed that the option to petition the Court should remain open where deemed appropriate by OSCR.

The Group agreed that the Dissolution Regulations should provide for an alternative means of serving a notice on SCIO trustees where attempts to serve directions

[10] https://www.oscr.org.uk/managing-a-charity/annual-monitoring/

addressed to the SCIO's principal office or members had failed. Comparisons with the provisions of **Regulation 19 of the Charitable Incorporated Organisations (Insolvency and Dissolution) Regulations 2012** were discussed. The Group agreed that alternative means of serving a notice on a SCIO could be via publication on the OSCR website, the Edinburgh Gazette and any other place thought to be relevant in the circumstances.

Assets: The question of what to do with any remaining SCIO assets an inactive SCIO may have prior to and following removal was discussed by the Group. Equivalent UK regimes were assessed:

- In England and Wales, CCEW has a role to remove inactive CIOs without recourse to the Court. Assets, if any, of a removed CIO are held by the Official Custodian, a function of CCEW for which OSCR has no equivalent. Remaining assets, which have not been transferred by the Official Custodian to another charity, are returned to the CIO in the event of its restoration.

- In the case of companies, the Registrar has power to strike-off unresponsive companies. Company property upon strike-off becomes 'bona vacantia' (ownerless property) and belongs to the Crown. The representative of the Crown in Scotland is the Queen's and Lord Treasurer's Remembrancer (QLTR). Bona vacantia property will be returned to a company restored to the register. The property of a removed SCIO will equally become bona vacantia and fall to the Crown.

The actions available to OSCR for dealing with SCIO assets prior to removal were examined:

OSCR currently can apply to the Court under section 34 of the 2005 Act to appoint a Judicial Factor (JF) to manage the affairs of a charity. Appointment of an interim JF can be done swiftly, but can be a costly option for OSCR and would only be considered where there was alleged serious misconduct or in cases where the charitable assets were likely to be substantial.

Where a permanent JF is appointed and it is deemed that the charity should wind up, the JF could apply for a solvent or insolvent dissolution, as appropriate.

In future, if and when the 'Transfer Regulations' are brought into force, OSCR could also utilise the proposed Charities (Scheme for the Transfer of Assets) (Scotland) Regulations[11]. Section 35 of the 2005 Act provides for Regulations to be made that would allow OSCR to apply to the Court for a scheme to transfer the assets of a charity to another charity. The Court may approve a scheme where it is satisfied that:

> (a) there is or has been misconduct in the administration of the charity,
> (b) it is necessary or desirable to act for the purpose of protecting the property of the charity or securing a proper application of such property for its purposes, and
> (c) the charity's purposes would be better achieved by transferring its assets to another charity.

OSCR envisage preparing such transfer schemes in straightforward cases where a SCIO has failed to supply annual reports and accounts (misconduct), is unresponsive to OSCR's communications and does not have heritable assets. OSCR could apply to the Court for a scheme and, if approved, remove a SCIO from the Register once assets were successfully transferred.

Both the above options require OSCR to apply to the Court of Session to take action.

The Group also examined the options available for any assets remaining after removal. It is assumed that any remaining assets of removed SCIOs fall to the Crown (QLTR). It was agreed that OSCR should seek to exhaust all other options first in order to minimise the possibility and extent of any charitable assets falling to the Crown and

[11] The 2005 Act provides for the transfer of assets from a range of bodies to a recipient charity as a means of ensuring that those assets are protected and secured for proper application in furtherance of charitable purposes. This is potentially a valuable way of 'unlocking' charitable assets in circumstances where they are not providing public benefit or where there is a risk of them being lost to the charity sector.

thereby being lost to the charity sector. Therefore it is anticipated that the number of cases where assets fall to QLTR should be small. For those situations the Group discussed the possibility of developing an MoU between OSCR and QLTR regarding SCIO assets, including an agreement that QLTR will notify OSCR if charitable assets come to their attention within 6 years of the SCIO having been removed from the Register.

In this context the Group agreed it would be desirable if any charitable assets that were identified as having fallen to the Crown could (if they were not able to be returned to a SCIO restored on the Register) be preserved for the charitable sector and applied for charitable purposes.

The Group acknowledged that new provisions would need to ensure that OSCR is able to act proportionately when assessing what action to take prior to the removal of an unresponsive SCIO. In this process a focus on pre-dissolution transfer of assets will be necessary. To assist in this process it was noted by the Group that it would be of benefit to OSCR if the Transfer of Assets Regulations (see above) and the Dormant Charity Account Regulations[12] were enacted. The Dormant Charity Account Regulations would enable OSCR to transfer funds from the bank account of a dormant charity to an active charity with similar purposes.

It was noted that a scheme under **s.12 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990** had been in force (prior to 2005) for dormant charity bank accounts, via the Scottish Charities Nominee. This scheme had a threshold of £5k (below which no action was taken) and the Group were advised that there had been challenges in getting information from banks. The scheme was repealed by section 47 of the 2005 Act.

The Group agreed that a *de minimis* level would be required for OSCR to determine the appropriate route to deal with a SCIO's assets prior to removal (i.e. a level of assets below which the JF or Court route would not be initiated). The Group agreed that a

[12] Section 48 of the Charities and Trustee Investment (Scotland) Act 2005

provision for a *de minimis* level should be included in Regulations but no actual monetary figure should be set out in order to futureproof the Regulations. OSCR could be given discretion to set such a figure in guidance.

Group recommendations

The Group recommends that:

- The Dissolution Regulations are amended to provide OSCR with the power to remove (and thereby dissolve) inactive and unresponsive SCIOs from the Register without the requirement to apply to the Court.

- This power should only be exercised following inquiries by OSCR to establish whether the SCIO is active, what assets (if any) the SCIO holds and whether the removal of the SCIO is the most appropriate course of action.

- The power for OSCR to remove may only be exercised if following such inquiries, OSCR considers the SCIO no longer meets the charity test and the SCIO has failed to comply with directions to take steps to meet the charity test and to apply to be dissolved and removed from the register.

- The mechanism for serving notice on the SCIO of a direction under Regulation 8 of the Dissolution Regulations be expanded to include service on the trustees or members by publication on:
    - OSCR website
    - SCIO register entry
    - Edinburgh Gazette, and
    - any other place it considers likely to be able to come to the attention of creditors, (former) charity trustees and beneficiaries,

  where attempts to serve a notice on the SCIO, Trustees and/or members has failed. These publication requirements are to be consistent with those **under proposal 2.**

- Publication is for a minimum period of three months and shall be considered to effect the service of a direction.

- The Regulations make clear that a failure to respond to a direction as served (within a specified time) is treated as a failure to comply.

- OSCR produce guidance setting out the criteria under which it would commence inquiries that could lead to a direction to apply for dissolution.

- OSCR establish an MoU with QLTR regarding charitable assets, including an agreement that QLTR notify OSCR if charitable assets come to their attention within 6 year of the relevant SCIO having been removed from the Register.

- That Scottish Government consider changes to primary legislation to allow OSCR to hold contact information for all charity trustees[13] in order that all efforts to contact a SCIOs trustees can be pursued.

- The Dissolution Regulations should specify that a *de minimis* level is to be set to determine the appropriate mechanism for dealing with remaining assets (prior to or after removal). The actual monetary figure should be set out in guidance by OSCR in order that it may be altered as appropriate over time.

The Group considers that the provisions of **Regulation 16 to 19 of the CIO Dissolution Regulations** could be used as a possible basis for new provisions.

The Group further recommends that:

- Scottish Government considers enacting the proposed Charities (Scheme for the Transfer of Assets) (Scotland) Regulations and developing Dormant Charity Account Regulations[14].

[13] Proposal 2: https://www.gov.scot/publications/consultation-scottish-charity-law/pages/4/
[14] Sections 35 and 48 of the 2005 Act

- Scottish Government explore the possibility that any charitable assets having fallen to the Crown are ring-fenced (by the QLTR), to be applied for charitable projects.

SCIOs with debts of less than £1,500

Current situation

Under the current Regulations, a SCIO with debts of less than £1,500 cannot use the insolvent dissolution route (Regulation 4 of the Dissolution Regulations), nor can its trustees make a declaration of solvency in order to dissolve as a solvent SCIO. Potentially this may lead to a SCIO accruing further debt before it can apply for insolvent dissolution and be considered by the AiB. Alternatively, it may lead to inaction on the part of trustees who cannot see how to wind up the SCIO in an orderly fashion, and so to more inactive SCIOs on the Register. There is currently no mechanism for removing an insolvent SCIO with debts of less than £1500 under the Dissolution Regulations.

Group discussion

The Group discussed that an insolvent dissolution application route to OSCR should be created for SCIOs with debts of less than £1500 (possibly by the removal of the financial limit from the Dissolution Regulations).

The Group discussed that the level of debt at which an insolvent SCIO's application is referred to the AiB (currently effectively set at debts greater than £1500) should be linked to the level in the Bankruptcy Act for personal insolvency to ensure future changes are updated automatically in the Regulations.

If an application were received and it was established that the SCIO had assets, the SCIO should be advised that these should be realised, and if they are sufficient to pay the debt an application for solvent dissolution be submitted instead. Referral to the AiB (as for SCIOs with debts of over £1500) for sequestration of the estate of such a SCIO was considered disproportionate and an inefficient use of public funds. Therefore, the

Group concluded that OSCR must have the power to remove insolvent SCIOs with debts under £1500 and no assets from the Register, on application by the SCIO. The Group also consider that its recommended timescales and publication requirements as set out in proposal 2 for solvent SCIO dissolution applications should be applied to these insolvent applications.

A new ability for OSCR to remove insolvent SCIOs with debts under £1500 and no assets leaves open the question as to what happens to that debt. In cases over £1500 the SCIO is discharged of all debts and obligations contracted by it, or for which it was liable (in essence, the debt is written off by the AiB); however, OSCR does not have such a power. The Group were unclear whether the effect of removing the SCIO would be to 'write off' the debts and whether this would be within the competency of the Regulations. The Group agreed that further work was needed to establish the wider implications of removal in these cases, especially where employees may be owed money, but were clear that there needs to be a mechanism for removing these insolvent SCIOs with debts of less than £1500.

Group recommendations

- The Dissolution Regulations should be amended to remove the financial lower limit for applications for insolvent dissolution to be made to OSCR.

- The level of outstanding debts at which point OSCR must transmit an insolvent SCIO's application to the AiB, should be linked to the provisions of the Bankruptcy Act in order to ensure that the Regulations mirror future changes in bankruptcy law.

- The Dissolution Regulations should be amended to give OSCR the power to remove a SCIO from the Register where:
    - an application for dissolution is made to OSCR
    - OSCR considers that the SCIO is insolvent
    - the SCIO has debts of less than the level (currently £1500, see recommendation above) where applications must be made to the AiB, and no

assets.

- Further work needs to be done to clarify the wider implications of removal in these cases, in particular what happens to the debt that was outstanding at point of removal.
- The timescales, publication requirements and information gathering provisions as recommended under proposal 2 for solvent dissolutions should apply before removals of SCIOs with debts of less than £1500 (or another determined level) can be given effect.

Proposal 4(b): allow a removed SCIO to be restored to the Register

Current Situation

With a SCIO (unlike other legal forms of charity), removal from the Register has the effect of dissolving the organisation, and it ceases to exist. At present there is no provision for a SCIO that has been removed from the Register to be restored (and so brought back into being) in the event that good reason is found for doing so, for example where it is established that the SCIO has creditors who wish to enforce recovery of debts they are owed. This is in contrast to CIOs and companies who can be restored by their relevant regulator or the Courts.

Original OSCR proposal

OSCR proposed that any power granted to OSCR to strike off inactive SCIOs would need to be balanced by a provision to restore a SCIO in agreed circumstances.

Further developed OSCR proposal for the Group

There are two main ways in which corporate bodies (specifically a company or a CIO) can be restored:

- administrative restoration:
- a company may be restored by the Registrar of Companies on the application of a former member or director (subject to certain conditions being met).
- a CIO may be restored by CCEW when it was removed as a result of inactivity or where liquidation was commenced but left unfinished.
- court ordered restoration:
- a company may be restored by the Court if it has been dissolved through insolvency proceedings, upon application by any person deemed by the Court to have an interest in the matter, for example creditors.
- a CIO removed through liquidation under insolvency legislation may only be restored by the Court. It can also be restored on application by any person deemed by the Court to have an interest in the matter

Restoring a SCIO to the Register should follow such established restoration models (in so far as possible in the Scottish context) to ensure consistency. The CIO Regulations are based on comparable provisions in the Companies Act 2006.

The Court should be able to restore a SCIO on application by a creditor or interested party, as above. A SCIO should also be able to be restored via administrative restoration by OSCR where the charity trustees come forward or where assets come to light after removal.

Where a SCIO is restored following new information about remaining assets the trustees in office at the time of dissolution would normally resume their duties, but, where necessary, OSCR could apply to the Court to appoint a Judicial Factor (JF) to assess the assets and any liabilities with a view to transferring the remaining assets to another charity.

QLTR would have to consent to any administrative restoration of a SCIO with provisions in Regulations that mirror conditions for administrative restoration set out in **s.1025 of the Companies Act 2006**.

It is proposed, on the assumption that the property of a dissolved SCIO is bona vacantia, that the Dissolution Regulations are amended to allow for a SCIO to be restored to the Register, either by OSCR or by the Court depending upon the circumstances of its removal, and for the property of the SCIO to be returned to it.

Group discussion

The Group discussed possible restoration options and agreed that a model similar to that set out in the CIO Regulations was the preferred option.

The Group expressed the need for new Regulations to set out what information (for example, outstanding statements of account) a former SCIO would need to supply for OSCR to progress an application for administrative restoration and the timescales for provision of the information.

The Group felt that OSCR should have the ability to apply to the Court in cases where administrative restoration would be an option but OSCR believes that, in the circumstances, it would be more appropriate for the Court to determine.

The possibility of setting up an official custodian for SCIOs was discussed. However, rather than pursue this it was agreed that OSCR should seek an MoU with the QLTR, whereby the QLTR would notify OSCR of (heritable) charitable assets when it became aware of them. OSCR could then restore the SCIO and 'deal' with the assets should this be necessary and proportionate (for example through the appointment of a Judicial Factor).

Group recommendations

The Group recommends that:

- Provision is made in the Dissolution Regulations for the power to restore a SCIO to the Register.

- The power should allow a SCIO to be restored to the Register during a period of six years following its removal.
- OSCR should have the power of administrative restoration, with the criteria for exercising such a power set out in Dissolution Regulations.
- The Courts should have the power to restore, with the criteria for exercising such a power set out in Dissolution Regulations.
- New provisions to set out the information required for a SCIO to be restored, and timescales for providing the information.
- QLTR would have to consent to any administrative restoration of a SCIO (with provisions in Regulations that mirror conditions for administrative restoration set out in **s.1025 of the Companies Act 2006**).
- The Group considers that the provisions of **Part 5 of the CIO Dissolution Regulations** could be used as a basis for new provisions.

4. Additional proposed amendments to SCIO Dissolution Regulations

Disposal of surplus assets

With regard to disposal of surplus assets upon dissolution, there is inconsistency between the wording in the Dissolution Regulations and the Scottish Charitable Incorporated Organisations Regulations 2011 (the General Regulations).

Regulation 3(b) of the Dissolution Regulations requires a members' resolution to name the body (or bodies) which has purposes which are the same as or which resemble closely the purposes of the SCIO, to which surplus assets will be transferred. In short, the assets must be passed to an organisation that has the same or very similar purposes to the SCIO.

Regulation 2(g) of the General Regulations requires a SCIO's constitution to make provision in the event of dissolution for any remaining assets to be used for those purposes which are the same as or which resemble closely the purposes of the SCIO.

In short, the SCIOs constitution only needs to state that assets *will be used for the same or similar charitable purposes*, regardless of the purposes of the organisation to which assets will be passed.

This inconsistency prevents a dissolving SCIO from passing a resolution to transfer surplus assets to a body that does not have purposes similar to its own even though the preferred transferee intends and commits to using those assets for purposes resembling the SCIO's own and the transfer would be consistent with the SCIO's constitution.

- The Group recommends that the Dissolution Regulations are amended to allow a SCIO to transfer any remaining assets in a manner as set out in Regulations 2(g) of the General Regulations

Resolution for Dissolution

The current Dissolution Regulations require SCIO members to pass a resolution for dissolution (Regulation 3(2) and (3) and Regulation 4(1) and (2)), which then accompanies the application to OSCR. The practicality of achieving this, in case of SCIOs that are perhaps no longer very active may pose a hurdle to passing such a resolution. It was suggested that it may also be appropriate to allow a resolution passed by the Charity Trustees only in these cases.

- The Group recommends that options to relax the requirement for a members' resolution be considered when amending the Dissolution Regulations.

Trustee in Bankruptcy

The Dissolution Regulations, specifically Regulation 6(6)(a), stipulate that in the case of an insolvent SCIO applying to OSCR to be dissolved, the SCIO does not have the ability to nominate the trustee who will act in its bankruptcy. Instead the AiB will act as the trustee in bankruptcy by default. This differs from the position for hostile, creditor-led petitions for sequestration. It is also a position distinct from that of all other entities who are subject to the bankruptcy provisions (trusts, partnerships, limited partnerships etc.)

as well as the position in all corporate insolvency regimes. The Group discussed the merits of the AiB being the only option as the trustee in bankruptcy in these cases.

A large number of the cases where the AiB is appointed as trustee are outsourced to firms with whom contractual arrangements are in place (appointed in accordance with public sector procurement rules). Regardless of those contractual arrangements, fees and outlays in all cases where the AiB acts as trustee are set in accordance with the **Bankruptcy Fees (Scotland) Regulations 2018**. These fees and outlays would be recovered from the assets of the dissolved SCIO. When The Accountant in Bankruptcy is the trustee, costs that cannot be met by selling assets are met from the public purse. When an insolvency practitioner is the trustee, costs that cannot be met by selling assets or from contributions will be met by the trustee themselves. The IP will consider this before agreeing to act as a trustee in bankruptcy.

The Group acknowledges that the current process does not allow a SCIO that has obtained advice from an IP prior to deciding to dissolve to appoint that IP as their trustee in bankruptcy and keep that same IP throughout the process. That could result in a different IP (instructed by the AiB) taking on the case, with a possible loss of knowledge of the specific circumstances of the SCIO, and resultant duplication of effort.

As discussed earlier in the Report, the scale and profile of a significant number of SCIOs has changed markedly since their inception, with the result that there may be a significant degree of complexity were certain SCIOs to enter into insolvency. Some members of the Group expressed concern that the restriction on appointment of a trustee is without justification and could potentially be harmful in the event of a large-scale SCIO insolvency, which would risk denting public confidence in the SCIO model. Some views were consequently expressed that this restriction should be removed and the nomination of trustees by the SCIO be permitted in cases where a SCIO applies for its own bankruptcy. The AiB expressed no objection to this restriction being removed.

Remuneration in cases where a trustee is appointed in this manner is subject to audit by the AiB (under the provisions of the Bankruptcy (Scotland) Act 2016) and is recovered from the assets of the dissolved SCIO. It was also noted however that in many cases the assets of an insolvent SCIO might not be sufficient to cover IP fees and outlays and

would not necessarily be attractive to many IPs (not under contractual arrangement with the AiB) to act.

In terms of future proofing the Dissolution Regulations and in light of the increase in larger SCIOs the Group thinks Scottish Government should consider further the appointment of the Trustee in Bankruptcy. The Group can see advantages for larger SCIOs appointing their own IP to act; however, there is also merit in keeping the regime straightforward and consistent for all.

- The Group seeks to highlight this matter to Scottish Ministers to take a view on, as it did not agree on any recommendations in this respect.

Offences and deterrents

The matter of effective deterrents and sanctions to prevent or address instances of willful wrongdoing by charity trustees of SCIOs came up in most areas of the Group's discussions. The Group's recommendations for improving the Dissolution Regulations will help to address many of the practical problems OSCR and SCIOs encounter around dissolution. However, tackling the few cases of willful wrongdoing and providing effective deterrents against such behaviour will require more than the improvements suggested and the sanctions currently available to OSCR under the 2005 Act.

Much of the Group's discussions focused on comparisons with other corporate regimes, namely those for companies and CIOs. Concerns about SCIOs engaging in wrongful trading were voiced throughout the discussions. The current Dissolution Regulations do not prevent the trustees of an insolvent SCIO from continuing to trade while insolvent where they knew or ought to have concluded that there was no reasonable prospect of the SCIO avoiding an insolvent dissolution.

A SCIO may, inadvertently or intentionally, continue to trade while insolvent. In other corporate regimes this can constitute a civil offence. For SCIO trustees this may amount to a finding of misconduct on their part and, in serious cases, an order can be sought for the permanent disqualification of the trustees. However, there is no equivalent to the wrongful trading provisions of the Insolvency Act 1986, which penalises wrongful trading

in a company. In case of wrongful trading, directors of a company can lose the protections of limited liability and, depending on the circumstances, be required to contribute to the assets of a company in order to meet creditors' claims, or be disqualified as directors. Fraudulent trading may further result in a fine or custodial sentence.

The Group also consider that **section 212 of the Insolvency Act 1986** 'Summary remedy against delinquent directors' (i.e. misfeasance) may provide a useful model for the creation of a new offence for SCIOs. Such an offence would enable a civil claim against charity trustees of SCIOs who had misapplied money or breached their fiduciary duties to repay, restore or account for money or other property to the charity.

The Group recognise that since the Dissolution Regulations were passed in 2011, changes to bankruptcy legislation have introduced sanctions for certain behaviours and actions in personal insolvency cases.

Section 156 Bankruptcy (Scotland) Act 2016 sets out the behaviours to be taken into consideration by the AiB or the sheriff in deciding if there are grounds to make a Bankruptcy Restriction Order in personal insolvency cases. The behaviours include:

> (h) trading at a time before the date of sequestration when the debtor knew, or ought to have known, that the debtor was unable to meet the debtor's debts,
>
> (i) incurring, before the date of sequestration, a debt which the debtor had no reasonable expectation of being able to pay.

The Group considers there is now a mismatch between the legal requirements and their consequences for company directors and individuals compared to those of SCIO trustees. In the case of personal insolvency, an individual may be subject to a Bankruptcy Restriction Order that imposes restrictions on the debtor for up to 15 years. Where there is wrongful trading, directors of a company can lose the protections of limited liability, be required to contribute to the assets of a company in order to meet creditors' claims, or be disqualified as directors. Fraudulent trading may further result in a fine or custodial sentence. The Group acknowledge that cases of wrongful trading are

rare; however, deterrents against reckless behaviour and the need for consistency between regimes is required to protect the SCIO brand.

- The Group are keen to ensure provisions akin to wrongful trading be put in place for SCIOs, as with other corporate bodies. The Group recommend that a new provision is created on these lines (in primary legislation if it cannot be achieved through regulations) to address this and to align OSCR's powers with those of other regulators of corporate bodies. The Group also recommend that consideration is given to **section 212 of the Insolvency Act 1986** 'Summary remedy against delinquent directors' (i.e. misfeasance) as a useful model for the creation of a new offence for SCIOs.

5. Conclusions

Maintaining confidence in the SCIO legal form and providing for robust and proportionate regulation from OSCR are key elements to maintaining public trust in the whole charity sector.

This Group's remit focused on a narrow area of charity law, but in the course of its discussions has touched on many areas of charity law and highlighted the interdependencies between the recommendations and additional Regulations still to be enacted.

On reflection, many of the identified issues with the current Dissolution Regulations may be resolved by measures that require less wide-ranging changes than might have been expected – but which are all the more desirable, as well as important, for that. Group have focused their attention on feasible solutions to accommodate the issues encountered thus far and on the majority of cases that can be anticipated, and were conscious not to make recommendations based on very hypothetical, rare or exceptional cases.

Not all the recommendations require legislative changes and OSCR should be in a position to implement some of the changes in readiness for new Dissolution Regulations.

Annex 1: Group Membership

Group Membership	
Marieke Dwarshuis	Independent Chair
Caroline Monk	Secretariat (OSCR)
Eileen Blackburn	French Duncan
Moira Cathcart	OSCR Senior Legal Advisor
Stuart Cross	OSCR Board member
Richard Dennis	Accountant in Bankruptcy
Robin Fallas	Law Society of Scotland
Tim Hencher	Scottish Council for Voluntary Organisations (SCVO)
Steve Kent	OSCR Casework Policy Manager
Anne Knox	TSI Representative: Stirlingshire Voluntary Enterprise
Claire McHarrie	Scottish Government: Charity Law and Volunteering team
Gareth Morgan	The Kubernesis Partnership LLP
Jenny Simpson	Wylie & Bisset LLP
Steven Wood	Institute of Chartered Accountants of Scotland (ICAS)

Annex 2: Summary of all recommendations

Proposal 1(a): Require a solvent SCIO to have ceased operation before making an application to be dissolved and removed from the Register

The Group recommends that:

- A SCIO should be 'inactive' for three months prior to making a solvent dissolution application to OSCR. This should ensure the statement in respect of its solvency (see proposal 1(b) below) that the SCIO provides at the time of applying to OSCR remains accurate, and that the SCIO is unlikely to enter into credit agreements or take on further assets and liabilities. This in turn allows OSCR to make its decision to grant consent for a SCIO to dissolve based on accurate and up to date information.

- Restrictions on SCIO activities following application for dissolution should broadly follow the provisions as set out in **Regulation 10 of the CIO Regulations** – with the insertion 'proceeding with the wind up' rather than 'proceeding with the application' at regulation 10(a)(i).

- Requirements on a SCIO following application for dissolution to notify OSCR of any property received after making the application should broadly follow the provisions as set out in **Regulation 11 of the CIO Regulations**, with OSCR setting out in guidance the nature of notification.

- Broad criteria for what 'inactive' means should be set out in the Dissolution Regulations (as stated above) and OSCR should set out in guidance what 'inactive' may mean in practice. The Regulations need to be broadly worded to accommodate the wide range of operations charities undertake.

- Having made an application, a SCIO may not engage in any activity, except for residual activity that may be necessary to conclude its affairs.

- OSCR should be able to reject an application for dissolution from a SCIO which is still active on the grounds that the application is premature.

Proposal 1(b): Require a declaration of solvency to be validated by a supporting statement from a suitably qualified or experienced person

- The current requirement for a 'declaration of solvency' in the Dissolution Regulations Regulation 3(4)(c) be removed.

- Regulation 3(4)(e) be amended to encompass the existing statement of all assets and liabilities, a statement by or on behalf of the charity trustees that any debts and liabilities of the SCIO had been settled or otherwise provided for in full, together with the proposed disposal of residual assets in accordance with the SCIOs constitution– as per **Regulation 5(b)(2ii)and (iii)of the CIO Regulations**.

- The Dissolution Regulations (Regulation 3(4)) be amended to allow OSCR discretion to specify any additional information it requires for applications to be made for solvent SCIO dissolutions. OSCR should specify in guidance what additional information may be required and under what circumstances, including when additional information would be required to confirm solvency, taking into account the requirement for OSCR to act proportionately.

- The scope of OSCR's discretion to require more information once an application has been received (Regulation 3(7)) should be clarified (bearing in mind the need for OSCR to act transparently and proportionately), to enable this discretion to be used effectively to assist decision making.

Proposal 2: Allow OSCR greater discretion with regard to timescales and provision of information in respect of solvent SCIO applications to dissolve

The Group recommends that:

- OSCR should make greater use of the discretion it already has under the Dissolution Regulations (Regulation 3(7)) to request additional information once an application had been received, which may require clarification of the scope of this discretion (see also recommendation under proposal 1(b)).

- The timescales in the Dissolution Regulations for publishing notices and for making decisions on applications are relaxed and made explicitly to apply only in respect of complete/competent applications, so allowing OSCR the opportunity to request and receive information relevant and necessary to progress the application.

- The Dissolution Regulations be amended to give OSCR discretion over the format of notices, allowing these to be more informative for interested parties.

- The notices are published on the OSCR website (as is currently the case) and in the *Edinburgh Gazette*, as well as anywhere else OSCR considers appropriate in order to provide greater protection for creditors and inform beneficiaries and other stakeholders of the intended dissolution.

- The publication period for notices of applications for dissolution should be extended in the Dissolution Regulations from 28 days to three months.

- The provisions in the CIO Dissolution Regulations, giving the CCEW greater discretion over the format of published notices and flexibility in respect of publication and decision timescales are considered when amending the relevant provisions of the SCIO Dissolution Regulations.

Proposal 3: Develop a bespoke procedure for the dissolution of insolvent SCIOs that improves the protection afforded to creditors

The Group recommends that Option B is pursued, whereby the current insolvent SCIO dissolution procedure is maintained with a mixture of legislative and non-legislative enhancements. The Group noted that many of the issues that were identified with the current procedure can be (or have already been) addressed through non-legislative measures.

The Working Group therefore recommends the following:

- Non-legislative enhancements:
    - OSCR and the AiB establish an information sharing agreement. This should ensure that where the AiB has information that suggests trustee misconduct or mismanagement there is a clear pathway for the AiB to share the information with OSCR.
    - OSCR is clearer in guidance about the duties of SCIO trustees, and any penalties for misconduct and enforcement action that can be taken.

- Legislative enhancements:
    - Lengthen the publication times for insolvent dissolution applications and the places where applications should be published (as covered in proposal 2).
    - The Trustee in Bankruptcy handling the SCIO dissolution be required to report to OSCR any behaviours similar to those listed in s.156 of the Bankruptcy (Scotland) Act 2016. Alternatively, a general reporting duty should be created for the Trustee in Bankruptcy that could be specified in OSCR guidance.
    - The removal and restoration recommendations in proposal 4 should add to OSCR's range of tools to address the different circumstances of insolvent SCIOs.
    - Scottish Government consider creating an offence akin to wrongful trading for SCIOs, as is in place for other corporate bodies – **see section 4**.

Proposal 4(a): allow OSCR to remove inactive and unresponsive SCIOs from the Register

The Group recommends that:

- The Dissolution Regulations are amended to provide OSCR with the power to remove (and thereby dissolve) inactive and unresponsive SCIOs from the Register without the requirement to apply to the Court.

- This power should only be exercised following inquiries by OSCR to establish whether the SCIO is active, what assets (if any) the SCIO holds and whether the removal of the SCIO is the most appropriate course of action.

- The power for OSCR to remove may only be exercised if following such inquiries, OSCR considers the SCIO no longer meets the charity test and the SCIO has failed to comply with directions to take steps to meet the charity test and to apply to be dissolved and removed from the register.

- The mechanism for serving notice on the SCIO of a direction under Regulation 8 of the Dissolution Regulations be expanded to include service on the trustees or members by publication on:
    - OSCR website
    - SCIO register entry
    - Edinburgh Gazette, and
    - any other place it considers likely to be able to come to the attention of creditors, (former) charity trustees and beneficiaries,

  where attempts to serve a notice on the SCIO, Trustees and/or members has failed. These publication requirements are to be consistent with those **under proposal 2.**

- Publication is for a minimum period of three months and shall be considered to effect the service of a direction.

- The Regulations make clear that a failure to respond to a direction as served (within a specified time) is treated as a failure to comply.

- OSCR produce guidance setting out the criteria under which it would commence inquiries that could lead to a direction to apply for dissolution.

- OSCR establish an MoU with QLTR regarding charitable assets, including an agreement that QLTR notify OSCR if charitable assets come to their attention within 6 year of the relevant SCIO having been removed from the Register.

- That Scottish Government consider changes to primary legislation to allow OSCR to hold contact information for all charity trustees[15] in order that all efforts to contact a SCIOs trustees can be pursued.

- The Dissolution Regulations should specify that a *de minimis* level is to be set to determine the appropriate mechanism for dealing with remaining assets (prior to or after removal). The actual monetary figure should be set out in guidance by OSCR in order that it may be altered as appropriate over time.

The Group considers that the provisions of **Regulation 16 to 19 of the CIO Dissolution Regulations** could be used as a possible basis for new provisions.

The Group further recommends that:

- Scottish Government considers enacting the proposed Charities (Scheme for the Transfer of Assets) (Scotland) Regulations and developing Dormant Charity Account Regulations[16].

[15] Proposal 2: https://www.gov.scot/publications/consultation-scottish-charity-law/pages/4/
[16] Sections 35 and 48 of the 2005 Act

- Scottish Government explore the possibility that any charitable assets having fallen to the Crown are ring-fenced (by the QLTR), to be applied for charitable projects.

SCIOs with debts of less than £1,500

- The Dissolution Regulations should be amended to remove the financial lower limit for applications for insolvent dissolution to be made to OSCR.

- The level of outstanding debts at which point OSCR must transmit an insolvent SCIO's application to the AiB, should be linked to the provisions of the Bankruptcy Act in order to ensure that the Regulations mirror future changes in bankruptcy law.

- The Dissolution Regulations should be amended to give OSCR the power to remove a SCIO from the Register where:
    - an application for dissolution is made to OSCR
    - OSCR considers that the SCIO is insolvent
    - the SCIO has debts of less than the level (currently £1500, but note recommendation above) where applications must be transmitted to the AiB, and no assets.
- Further work needs to be done to clarify the wider implications of removal in these cases, in particular what happens to the debt that was outstanding at point of removal.

- The timescales, publication requirements and information gathering provisions as recommended under proposal 2 for solvent dissolutions should apply before removals of SCIOs with debts of less than £1500 (or another determined level) can be given effect.

Proposal 4(b): allow a removed SCIO to be restored to the Register

The Group recommends that:

- Provision is made in the Dissolution Regulations for the power to restore a SCIO to the Register.

- The power should allow a SCIO to be restored to the Register during a period of six years following its removal.

- OSCR should have the power of administrative restoration, with the criteria for exercising such a power set out in Dissolution Regulations.

- The Courts should have the power to restore, with the criteria for exercising such a power set out in Dissolution Regulations.

- New provisions to set out the information required for a SCIO to be restored, and timescales for providing the information.

- QLTR would have to consent to any administrative restoration of a SCIO (with provisions in Regulations that mirror conditions for administrative restoration set out in **s.1025 of the Companies Act 2006**).

- The Group considers that the provisions of **Part 5 of the CIO Dissolution Regulations** could be used as a basis for new provisions.

Additional proposed amendments to SCIO Dissolution

- Disposal of surplus assets

  The Group recommends that the Dissolution Regulations are amended to allow a SCIO to transfer any remaining assets in a manner as set out in Regulations 2(g) of the General Regulations.

- Resolution for Dissolution

  The Group recommends that options to relax the requirement for a members' resolution be considered when amending the Dissolution Regulations.

- Trustee in Bankruptcy

  The Group seeks to highlight this matter to Scottish Ministers to take a view on, as it did not agree on any recommendations in this respect.

- Offences and deterrents

  The Group are keen to ensure provisions akin to wrongful trading be put in place for SCIOs, as with other corporate bodies. The Group recommend that a new provision is created on these lines (in primary legislation if it cannot be achieved through regulations) to address this and to align OSCR's powers with those of other regulators of corporate bodies. The Group also recommend that consideration is given to **section 212 of the Insolvency Act 1986** 'Summary remedy against delinquent directors' (i.e. misfeasance) as a useful model for the creation of a new offence for SCIOs.

Annex 3 SCIO Dissolution process flowchart

THE END OF A SCIO