



Scottish Law Commission's Discussion Paper – Unincorporated Associations

Briefing Paper for Governing Bodies of Sport

Introduction

On the 3 December 2008, the Scottish Law Commission¹ (SLC) published a Press Release and Discussion Paper (DP) on Unincorporated Associations². It identifies legal issues which may affect non-profit making associations (e.g. sports clubs, district associations or unincorporated governing bodies of sport) and suggests possible ways forward.

This briefing summarises the content of the Discussion Paper. Its aim is to inform governing bodies and their clubs about the key principles, arguments and options in a simple way that allows them to make an informed response to this discussion.

It would be very helpful if someone within each governing body takes a lead on this issue and considers the impact on sports clubs. It is important to seek their views and experiences and then feedback to the SSA for consideration in our response to the SLC.

Unincorporated Associations

In Scotland unincorporated associations are not recognised as legal entities separate to their members. The consequence of this is that such organisations do not have the capacity to enter into legal relationships, such as in contract or delict³, or hold title to land in their own name.

This can give rise to unfortunate, and perhaps unforeseen, repercussions for members. For example, it is possible under current law that a member of an unincorporated association may, by virtue of that membership alone, find themselves personally liable in delict to a third party injured at an event organised by the association.

It is perhaps not readily apparent to members that, by joining a voluntary group or club, they may be exposing themselves to serious personal financial risk.

¹ The Commission's function is to recommend ways of simplifying, updating and improving Scots law. The outcome of any law reform project and consultation is the submission to Scottish Ministers of a report setting out in detail their recommendations for reform.

² Discussion Paper (Number 140) is available for download at www.scotlawcom.gov.uk

³ In Scottish civil law, delict is a wrong or injury done to somebody

Consultation on current issues and proposals

The Discussion Paper proposes that the negative consequences which may impact upon unincorporated associations and their members could be remedied by granting some form of legal status.

SLC seeks views on whether it would be preferable to attribute legal personality:

- to all organisations meeting certain specified minimum criteria;
- to allow organisations to opt-in to such an arrangement either by registration or by statement of intent;
- to grant certain legal capacities to unincorporated associations without according them the status of legal persons; or
- to introduce a new corporate vehicle specifically designed for non-profit organisations which are not registered as charities.

The current law does not recognise the existence of unincorporated organisations as separate legal entities. In the case of associations of sufficient size to wish to enter into contracts, own property or engage employees and so forth, this absence of legal personality has given rise to a variety of problems, highlighted in a substantial body of case law over many years, only some of which have been pragmatically resolved.

SCVO figures in 2006 revealed that small organisations (those with an annual income of £25,000 or less) accounted for just 2% of the sector's income although in number they comprised 64% of the sector as a whole. Small organisations tend not to incorporate and thus remain, by default, unincorporated associations. This includes the majority of sports clubs, district associations and some governing bodies of sport.

There are a large number of unincorporated associations which may be described as “member-interest” associations. These are mainly local clubs and societies created with a view to bringing benefits to their members other than the making of business profits. Obvious examples are sports clubs. Although such clubs are unlikely to be able to register as charities, they share the common characteristics of having defined, non-profit making objects but no separate legal personality.

The desirability of reform

The principal purpose of the Discussion Paper is to seek comment on the desirability of legislative reform. This reform would provide separate legal personality to unincorporated associations which do not wish to incorporate as companies (or other form of incorporated body), but which meet specified minimum criteria. The most obvious practical consequences of attributing legal personality to an association would be in the application to it of the law of obligations⁴. The association would have the capacity to enter into

⁴ Further reading on this can be found at: http://en.wikipedia.org/wiki/Law_of_obligations

contracts in its own right rather than through its office bearers or committee members as individuals. It could, in particular, be the employer of the association's staff. As regards claims for damages for negligence or breach of contract, being a member of the association, or of its management committee, would not of itself create liability. The liability would rest instead upon the association. The possibility remains for a claim being made against an individual member who was personally responsible for the negligence or other circumstances giving rise to the claim.

Property, whether heritable or moveable, could be owned by the association rather than by named individuals as trustees. Court actions could be raised and defended by the association rather than by named individuals representing it.

Problems from an absence of legal personality.

Part 3 of the Discussion Paper describes what SLC see as the problems arising from the absence of legal personality of unincorporated associations. (Refer to paras. 3.1 to 3.9 in the Discussion Paper).

The preliminary view of the SLC is that the current legal regime is unsatisfactory and creates serious financial risk (of which they may be unaware) for the office bearers and members of non-profit making associations.

Attribution of legal personality to unincorporated Associations

In Part 4, SLC make proposals for the treatment of unincorporated associations as separate entities with legal personality. They discuss the relative advantages and disadvantages of a number of schemes. These include:

- a statutory scheme in which legal personality is acquired voluntarily by registration in a new public register;
- a scheme which attributes legal personality to associations which fulfil certain minimum criteria, this can be either:
 - optionally, or
 - automatically.

(Refer to paras. 4.5 to 4.17 in the Discussion Paper).

SLC invite comment on various criteria which could be applied in determining whether an association is to be treated as a legal entity. They tentatively suggest that the adoption of a written constitutive document (a basic constitution) would meet the minimum criteria. The document would contain the name, objects, criteria for membership and for the election of office-bearers, and rules for distribution of assets on dissolution.

(Refer to paras 4.18 to 4.26 in the Discussion Paper)

They also address the situation of associations which, though meeting the minimum criteria, prefer not to be treated as legal entities.

(Refer to paras. 4.27 to 4.28 in the Discussion Paper)

The Commission consider in detail the legal consequences of attribution of legal personality. They ask whether, as an alternative, it would be preferable to confer certain specific capacities on associations, such as capacity to contract, without according them separate personality.

(Refer to paras. 4.29 to 4.49 in the Discussion Paper)

SLC discuss the circumstances in which legal personality might be lost by an association (other than its dissolution) and they also invite comment on whether special provision is needed for large associations which might properly be expected to incorporate rather than continue to carry on their activities with unincorporated status.

(Refer to paras. 4.50 to 4.61 in the Discussion Paper)

SLC invite comment on whether there is need for statutory default provisions for internal governance of associations with legal personality.

(Refer to paras. 4.62 to 4.63 in the Discussion Paper)

Finally, the Commission ask whether special legislative provision is needed for multi-tiered organisations such as churches and national associations with local branches.

(Refer to paras. 4.64 to 4.66 in the Discussion Paper)

Comment on the need for a new vehicle

In Part 5, SLC invite comment on whether there is a need in Scotland for a new corporate vehicle for non-profit making associations which wish to incorporate. The document describes those vehicles that currently exist (the company limited by guarantee, community interest companies, charities and the proposed Scottish Charitable Incorporated Organisation).

(Refer to paras. 5.2 to 5.13 in the Discussion Paper)

No special corporate vehicle is presently available for member-interest associations, such as sports clubs. The Commission's preliminary view is that there is no need for a new form of corporate vehicle.

Impact

The Discussion Paper covers some miscellaneous issues in Part 6. There appears to be no effect on the tax treatment of associations.

With respect to law, it would no longer be permissible to prosecute individual members except those who were personally culpable.

The issues of cross border determination are also covered in Part 6.

Part 7 deals with an impact assessment and assesses the risks associated with current difficulties. The aim is to provide a means by which an association or club, which does not wish to establish itself as a company (or some other form of incorporated body), may avoid the difficulties outlined in paragraphs 7.1 and 7.2 of the Discussion Paper.

It then provides a series of 8 Options, with associated benefits and costs.

Questions

There are a total of 25 questions posed within the Discussion Paper. Some of these appear complicated and may require some knowledge of Scots Law. SSA is not in a position to answer these at present and all may not be relevant to our area of business.

Nevertheless there are a number that can be answered by member sports and their clubs. Some of these request a view on a specific principle.

Conclusions

The Scottish Law Commission's preliminary conclusion is that the status quo is undesirable.

They consider the attribution of legal personality to unincorporated associations would bring significant benefits and few, if any, adverse consequences. They recognise, however, that the information presently available about the potential impact of their proposals on the huge number of current associations is incomplete. The consultation will enable them to learn more about this from consultees throughout the range of activities of the third sector in Scotland. This will allow the impact assessment to be concluded in their report to Ministers to be as fully supported by evidence as possible.

It is important that our sector contributes to this body of knowledge. SCVO consider that the sports and arts sector will constitute about 75% of the associations to which this discussion applies.

Find out more

There are three public meetings planned:

- 19 January in Edinburgh - Mansfield Traquair Centre, 2 to 5pm
- 30 January in Glasgow - Centrum House, Queen Street, 1 to 4pm
- 3 February in Inverness - Fairway House, 2 to 5pm.

Governing bodies have been asked to provide a small number of representatives at these meetings (e-mail sent at 14:22 on 12 Jan 09). If others wish to attend please advise Chris Robison at the SSA office 0131 339 8785 or chris@info-ssa.org.uk

What next?

The Scottish Sports Association strongly encourages all governing bodies to visit the Discussion Paper in detail, before providing responses to this consultation. There are two ways in which to respond:

- By submitting a response direct to Gillian Swanson, Project Manager at SLC by 6 March 2009 Gillian.swanson@scotlawcom.gov.uk
- Via the SSA for inclusion in their collated response by sending to Chris Robison, Policy Director by 27 February 2009 chris@info-ssa.org.uk

This does not need to be complicated or difficult.

Please construct your response in a way that suits your organisation. This may be through direct answers to the specific questions (or those relevant to you) within the Discussion Paper, or you may wish to provide general comments.

A short response with a few key points is just as helpful.

Specific examples or experience are always most welcome and often help illustrate a point.

The SSA is working with colleagues at SCVO and **sportscotland** to ensure our views are represented and the needs of our sector are met. We are also seeking legal advice.

If you have any questions please do not hesitate to contact Chris Robison in the SSA office on 0131 339 8785.

Chris Robison
Policy Director

13 January 2009

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