Passage of the

Charities and Trustee Investment (Scotland) Bill 2004

SPPB 83
Passage of the

Charities and Trustee Investment (Scotland) Bill 2004

SP Bill 32 (Session 2), subsequently 2005 asp 10

SPPB 83
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Foreword

Purpose of the series

The aim of this series is to bring together in a single place all the official Parliamentary documents relating to the passage of the Bill that becomes an Act of the Scottish Parliament (ASP). The list of documents included in any particular volume will depend on the nature of the Bill and the circumstances of its passage, but a typical volume will include:

- every print of the Bill (usually three – “As Introduced”, “As Amended at Stage 2” and “As Passed”);
- the accompanying documents published with the “AsIntroduced” print of the Bill (and any revised versions published at later Stages);
- every Marshalled List of amendments from Stages 2 and 3;
- every Groupings list from Stages 2 and 3;
- the lead Committee’s “Stage 1 report” (which itself includes reports of other committees involved in the Stage 1 process, relevant committee Minutes and extracts from the Official Report of Stage 1 proceedings);
- the Official Report of the Stage 1 and Stage 3 debates in the Parliament;
- the Official Report of Stage 2 committee consideration;
- the Minutes (or relevant extracts) of relevant Committee meetings and of the Parliament for Stages 1 and 3.

All documents included are re-printed in the original layout and format, but with minor typographical and layout errors corrected. Extracts from the Official Report are re-printed as corrected for the archive version of the Official Report.

Documents in each volume are arranged in the order in which they relate to the passage of the Bill through its various stages, from introduction to passing. The Act itself is not included on the grounds that it is already generally available and is, in any case, not a Parliamentary publication.

Outline of the legislative process

Bills in the Scottish Parliament follow a three-stage process. The fundamentals of the process are laid down by section 36(1) of the Scotland Act 1998, and amplified by Chapter 9 of the Parliament’s Standing Orders. In outline, the process is as follows:

- Introduction, followed by publication of the Bill and its accompanying documents;
- Stage 1: the Bill is first referred to a relevant committee, which produces a report informed by evidence from interested parties, then the Parliament debates the Bill and decides whether to agree to its general principles;
- Stage 2: the Bill returns to a committee for detailed consideration of amendments;
- Stage 3: the Bill is considered by the Parliament, with consideration of further amendments followed by a debate and a decision on whether to pass the Bill.
After a Bill is passed, three law officers and the Secretary of State have a period of four weeks within which they may challenge the Bill under sections 33 and 35 of the Scotland Act respectively. The Bill may then be submitted for Royal Assent, at which point it becomes an Act.

Standing Orders allow for some variations from the above pattern in some cases. For example, Bills may be referred back to a committee during Stage 3 for further Stage 2 consideration. In addition, the procedures vary for certain categories of Bills, such as Committee Bills or Emergency Bills. For some volumes in the series, relevant proceedings prior to introduction (such as pre-legislative scrutiny of a draft Bill) may be included.

The reader who is unfamiliar with Bill procedures, or with the terminology of legislation more generally, is advised to consult in the first instance the Guidance on Public Bills published by the Parliament. That Guidance, and the Standing Orders, are available for sale from Stationery Office bookshops or free of charge on the Parliament’s website (www.scottish.parliament.uk).

The series is produced by the Legislation Team within the Parliament’s Clerking and Reporting Directorate. Comments on this volume or on the series as a whole may be sent to the Legislation Team at the Scottish Parliament, Edinburgh EH99 1SP.

Notes on this volume

The Bill to which this volume relates followed the standard 3 stage process described above.

The Finance Committee reported to the Communities Committee on the Bill at Stage 1. Its report is included in Annex A of the Stage 1 Report. However, the oral evidence and minutes for the Finance Committee meetings of 21 December 2004 and 18 January 2005 were not included in that report, and they are therefore included in this volume after the Stage 1 Report.

Forthcoming titles

The next titles in this series will be:

- SPPB 84: Transport (Scotland) Bill 2004
- SPPB 85: Smoking, Health and Social Care (Scotland) Bill 2004
- SPPB 86: Management of Offenders etc. (Scotland) Bill 2005
- SPPB 87: Environmental Assessment (Scotland) Bill 2005
Charities and Trustee Investment (Scotland) Bill
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**PART 1**

**CHARITIES**

**CHAPTER 1**

**OFFICE OF THE SCOTTISH CHARITY REGULATOR**

1 Office of the Scottish Charity Regulator

(1) There is established a body corporate to be known as the Office of the Scottish Charity Regulator ("OSCR"), with the functions conferred on it by or under this Act and any other enactment.

(2) OSCR’s general functions are—

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act, and

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.

(3) OSCR may do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.

(4) Subsection (3) does not enable OSCR to do anything in contravention of any express prohibition, restriction or limitation on its powers which is contained in any enactment (including this Act).

(5) OSCR must perform its functions in a manner that encourages equal opportunities and in particular the observance of the equal opportunity requirements.

(6) Schedule 1 makes further provision about OSCR.
2 Annual reports

(1) As soon as practicable after the end of each financial year, OSCR must—
   (a) prepare and publish a general report on the exercise of its functions during that year,
   (b) send a copy of the report to the Scottish Ministers, and
   (c) lay a copy of the report before the Scottish Parliament.

(2) A general report may include, in particular, any general recommendations which OSCR may have arising from the exercise of its functions during that year and any previous financial year.

(3) It is for OSCR to determine the form and content of a general report and by what means it is to be published.

(4) But OSCR must comply with any direction by the Scottish Ministers about any of the matters set out in subsection (3).

CHAPTER 2

SCOTTISH CHARITY REGISTER

The Register

3 Scottish Charity Register

(1) OSCR must keep a register of charities to be known as the “Scottish Charity Register” (and referred to in this Act as “the Register”).

(2) The Register is to be kept in such manner as OSCR thinks fit.

(3) The Register must contain a separate entry for each charity entered in it setting out—
   (a) the name of the charity,
   (b) the principal office of the charity or, where it does not have such an office, the name and address of one of its charity trustees,
   (c) the purposes of the charity,
   (d) where the charity is a designated religious charity or a designated national collector, that fact,
   (e) where—
      (i) a direction is given under section 11(3), 12(2) or (3), 16(6), 28(2), 30(1) or 31(5) to (9), or
      (ii) a notice is given under section 31(4), in relation to the charity, the fact that the direction or notice has been given and the date on which it was given,
   (f) any other information in relation to the charity which the Scottish Ministers by regulations require to be set out in the Register, and
   (g) any other information in relation to the charity which OSCR considers appropriate.
(4) OSCR must, despite subsection (3)(b), exclude the information specified in that provision from a charity’s entry in the Register if, on the application of the charity (whether together with its application for entry in the Register or separately), OSCR is satisfied that including that information is likely to jeopardise the safety or security of any person or premises.

(5) OSCR must, if it is satisfied that a direction or notice of a type described in subsection (3)(e) has been complied with or no longer has effect, remove reference to the direction or notice from the charity’s entry.

(6) OSCR must—
   
   (a) from time to time, review each entry in the Register, and
   
   (b) if it considers any information set out in a charity’s entry to be inaccurate—
      
      (i) amend the entry accordingly, and
      
      (ii) notify the charity of the amendment made.

Applications

4 Application for entry in Register

An application for entry in the Register must—

   (a) state the name of the body making the application (the “applicant”),

   (b) state the principal office of the applicant or, where it does not have such an office, the name and address of one of the persons who, if the applicant is entered in the Register, will be its charity trustees,

   (c) be accompanied by—

      (i) a statement of the applicant’s purposes,

      (ii) a copy of the applicant’s constitution, and

      (iii) the applicant’s most recent statement of account (if any), and

   (d) contain such other information, and be accompanied by such other documents, as may be—

      (i) required by regulations under section 6(1), or

      (ii) otherwise requested by OSCR.

5 Determination of applications

(1) OSCR may enter an applicant in the Register only if it considers that the applicant meets the charity test.

(2) OSCR must refuse to enter an applicant if—

   (a) it considers that the applicant’s name falls within section 10, or

   (b) the application must, by virtue of regulations under section 6(1), be refused,

   but must not otherwise refuse to enter an applicant which it considers meets the charity test.
6 Applications: further procedure

(1) The Scottish Ministers may by regulations make such further provision in relation to the procedure for applying and determining applications for entry in the Register (including applications under section 54(1)) as they think fit.

(2) Such regulations may in particular make provision about—

(a) information and documents which must (in addition to the information and documents mentioned in section 4 or, as the case may be, 54(2)) be specified in or accompany an application,

(b) the form and manner in which applications must be made,

(c) the period within which OSCR must make a decision on an application, and

(d) circumstances in which OSCR must refuse to enter a body in the Register.

7 The charity test

(1) A body meets the charity test if—

(a) its purposes consist only of one or more of the charitable purposes, and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

(a) the prevention or relief of poverty,

(b) the advancement of education,

(c) the advancement of religion,

(d) the advancement of health,

(e) the advancement of civic responsibility or community development,

(f) the advancement of the arts, heritage, culture or science,

(g) the advancement of amateur sport,

(h) the advancement of human rights, conflict resolution or reconciliation,

(i) the advancement of environmental protection or improvement,

(j) the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage,

(k) the provision of care to the aged, people with a disability, young people or children,

(l) the advancement of animal welfare,

(m) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(3) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if—
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Part 1—Charities
Chapter 2—Scottish Charity Register

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,

(b) its constitution expressly permits a third party to direct or otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

(4) In subsection (3)(b), a “third party” means any person who is not—

(a) a member of the body in question, or

(b) a person who would, if that body was a charity, be one of its charity trustees.

Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public, in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive.

Guidance on charity test

OSCR must, after consulting such persons as it thinks fit, issue guidance on how it determines whether a body meets the charity test.

Charity names

Objectionable names

(1) A body’s name falls within this section if it is—

(a) the same as, or too like, the name of a charity,

(b) likely to mislead the public as to the true nature of the purposes of the body or of the activities which it carries on, or intends to carry on, in pursuit of those purposes,

(c) likely to give the impression that the body is connected in some way to the Scottish Administration, Her Majesty’s Government in the United Kingdom or any local authority, or with any other person, when it is not so connected, or

(d) offensive.

(2) The reference in subsection (1)(b) to a body’s purposes are—
(a) in the case of an applicant, the purposes set out in the statement accompanying its application, and
(b) in the case of a charity, the purposes set out in its entry in the Register.

11 Change of name

(1) A charity may change its name only with OSCR’s consent.
(2) A charity which proposes to change its name must, not less than 42 days before doing so, give notice to OSCR specifying its proposed new name.
(3) Unless OSCR, within 28 days of the date on which a notice is given under subsection (2), directs the charity not to change its name, OSCR is to be taken as having given its consent.
(4) OSCR may refuse to consent to a charity changing its name only where it considers that the proposed new name falls within section 10.

12 Power of OSCR to require charity to change name

(1) A charity may, if it considers that the name of another charity is too like its name, request OSCR to review the names.
(2) OSCR must, if satisfied following such a review that the names of two charities are too alike, direct either one or both of the charities to change its name.
(3) OSCR must, where at any other time it considers that a charity’s name falls within section 10, direct the charity to change its name.
(4) Section 11 applies in relation to a change of name in compliance with a direction under this section (and the charity directed must give notice of its proposed new name under subsection (2) of that section within such period as may be specified in the direction).
(5) OSCR must remove from the Register any charity which fails to comply with a direction under this section.

References to charitable status

13 References to charitable status

(1) A body entered in the Register may refer to itself as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”.
(2) If such a body is established under the law of Scotland, or is managed or controlled wholly or mainly in or from Scotland, it may also refer to itself as a “Scottish charity” or a “registered Scottish charity”.
(3) A body which refers to itself in any of the ways described in subsection (1) is to be treated as representing itself as a body entered in the Register.
(4) A body which refers to itself in any of the ways described in subsection (2) is to be treated as representing itself—
(a) as a body entered in the Register, and
(b) as being managed or controlled wholly or mainly in or from Scotland.
14 Exception for certain bodies not in Register

A body which is not entered in the Register may, despite section 13, refer to itself as a “charity” without being treated as representing itself as a charity if, and only if—

(a) it is—

(i) established under the law of a country or territory other than Scotland,

(ii) entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(iii) managed or controlled wholly or mainly outwith Scotland,

(b) it does not—

(i) occupy any land or premises in Scotland, or

(ii) carry out activities in any office, shop or similar premises in Scotland, and

(c) in making that reference, it also refers to being established under the law of a country or territory other than Scotland.

15 References in documents

(1) The Scottish Ministers may by regulations require each body entered in the Register to state, in legible characters—

(a) that it is a charity,

(b) such other information as may be specified in the regulations,

on such documents issued or signed on behalf of the charity as may be so specified.

(2) Such regulations may provide that any statement required by them may, in the case of documents which are otherwise wholly or mainly in a language other than English, be made in that other language.

Changes

16 Changes which require OSCR’s consent

(1) A charity may take any action set out in subsection (2) only with OSCR’s consent and in accordance with any conditions attached to any such consent.

(2) Those actions are—

(a) amending its constitution so far as it relates to its purposes,

(b) amalgamating with another body,

(c) winding itself up or dissolving itself,

(d) applying to the court in relation to any action set out in paragraphs (a) to (c).

(3) Subsection (1) does not apply in relation to any action—

(a) in pursuance of an approved reorganisation scheme, or

(b) for which OSCR’s consent is required by virtue of any other enactment.

(4) Where a charity proposes to take any action set out in subsection (2) it must, not less than 42 days before the date on which the action is to be taken, give notice to OSCR of the proposal specifying that date.
(5) In the case of an action set out in subsection (2)(a), the charity must not proceed unless and until OSCR has given its consent.

(6) In any other case, unless OSCR, within 28 days of the date on which notice is given under subsection (4)—

(a) refuses its consent, or

(b) directs the charity not to take the action for a period of not more than 6 months specified in the direction,

OSCR is to be taken as having consented to it.

(7) A direction under subsection (6)(b)—

(a) may be revoked at any time,

(b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(8) Where OSCR gives such a direction it must, after making such inquiries as it thinks fit—

(a) give its consent, whether or not subject to conditions, or

(b) refuse its consent.

17 Notification of other changes

(1) A charity must give OSCR notice of—

(a) any change in—

(i) the principal office of the charity, or

(ii) where it does not have such an office, the name or address of the charity trustee specified in the Register (or which would, but for section 3(4), be so specified),

(b) any change in any other details set out in its entry in the Register,

(c) any change to its constitution,

(d) any action set out in section 16(2)(b) to (d) which the charity has taken,

(e) any administration order or an order for winding up made by the court in respect of the charity,

(f) the appointment of a receiver in respect of any of the charity’s property,

setting out the date on which the change, action, order or appointment took effect.

(2) Subsection (1) does not apply in relation to any action which requires OSCR’s consent under section 16.

(3) A notice under any of paragraphs (a) to (d) of subsection (1) must be given within 3 months of the date of the change or action to which it relates.

(4) A notice under paragraph (e) or (f) of subsection (1) must be given within 1 month of the date of the order or appointment to which it relates.
18 Removal from Register

OSCR must, within 28 days of the date on which it receives an application from a charity for removal from the Register—

(a) remove the charity from the Register, and

(b) give it notice of the date on which it is removed.

19 Removal from Register: protection of assets

(1) A body removed from the Register (under section 18 or otherwise) continues to be under a duty to apply—

(a) any property previously acquired, or any property representing property previously acquired,

(b) any property representing income which has previously accrued, and

(c) the income from any such property,

in accordance with its purposes as set out in its entry in the Register immediately before its removal.

(2) Despite the removal of a body from the Register, the provisions of this Part set out in subsection (3) continue to apply to the body, but only so far as they relate to property and income referred to in subsection (1).

(3) Those provisions are—

(a) in Chapter 4—

   sections 28 and 29,
   section 31(1) to (3) and (5) to (9),
   section 32,
   section 33(2) to (4),
   section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b), and

(b) in Chapter 6, sections 45 and 46.

(4) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any property or income which a body removed from the Register is required to apply in accordance with subsection (1).

(5) The court may approve such a scheme only if it is satisfied—

(a) that it is necessary or desirable to act for the purpose of protecting the property or income to which the scheme relates or securing a proper application of such property or income for the purposes which were set out in the body’s entry in the Register immediately before its removal, and

(b) that those purposes would be better achieved by transferring the property and income to a charity.
(6) The court may approve a scheme under subsection (5) subject to modifications.

(7) A charity receiving property or income in pursuance of a scheme approved under subsection (5) may apply that property or income for its purposes as it thinks fit.

(8) The Scottish Ministers may by order disapply subsections (1) to (7) in relation to any property which they consider to be of national importance.

(9) An order under subsection (8) may make provision in relation to particular items or types of property or in relation to property owned by particular persons.

(10) It is not competent for such order to make provision in relation to property which is not owned by a charity on the day the order takes effect.

CHAPTER 3
Co-operation and information

Co-operation

(1) OSCR must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators.

(2) A “relevant regulator” is a public body or office-holder with functions (whether exercisable in the United Kingdom or elsewhere) which are—

(a) similar to those of OSCR, or

(b) conferred by any enactment and designed to allow the body or office-holder to regulate persons for other purposes.

(3) OSCR and any person authorised by virtue of section 38(1) or (2) to exercise functions under this Act must, so far as consistent with the proper exercise of their respective functions, co-operate with each other for the purpose of enabling or assisting the person to exercise those functions under this Act.

(4) Co-operation does not include the sharing of information which OSCR or any person with whom it is co-operating is prevented by law from disclosing.

Information about charities

Public access to Register

(1) OSCR must make the Register available for public inspection—

(a) at all reasonable times at its principal office,

(b) at such other places as it thinks fit, and

(c) otherwise as it thinks fit.

(2) It is for OSCR to determine the form and manner in which the Register is made available; but in doing so OSCR must ensure that the information in the Register is made reasonably obtainable.

(3) OSCR must publicise the arrangements which it makes in pursuance of subsection (1).

(4) OSCR may charge such fee (not exceeding the cost of supply) as it thinks fit for providing information under any arrangements it makes under subsection (1)(b) and (c).
22  **Power of OSCR to obtain information from charities**

(1) OSCR may by notice require any charity to provide to it—

(a) any document, or a copy of or extract from any document,

(b) documents of any type, or copies of or extracts from such documents,

(c) other information or explanation,

which OSCR requires in relation to the charity’s entry in the Register.

(2) The notice must specify—

(a) the documents, type of documents, copies, extracts, information or explanation which the charity is to provide to OSCR, and

(b) the date (which must be at least 14 days after the date on which the notice is given) by which the charity must do so.

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a charity would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

23  **Entitlement to information about charities**

(1) A person who requests a charity to provide a copy of its—

(a) constitution,

(b) latest statement of account prepared under section 45,

is, if the request is reasonable, entitled to be given that copy constitution or copy statement of account (if any) by the charity in such form as the person may reasonably request.

(2) A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe.

(3) The Scottish Ministers may by order exempt from the duty set out in subsection (1) any charities which meet such criteria as may be specified in the order.

*Sharing information*

24  **Disclosure of information by and to OSCR**

(1) OSCR may disclose any information to any public body or office-holder (in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom)—

(a) for any purpose connected with the exercise of OSCR’s functions, or

(b) for the purpose of enabling or assisting the public body or office-holder to exercise any functions.

(2) Any person to whom this subsection applies may disclose any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions.

(3) Subsection (2) applies to—
(a) any office-holder in the Scottish Administration,
(b) the Scottish Parliamentary Corporate Body,
(c) any local authority,
(d) any constable, and
(e) any other Scottish public authority with mixed functions or no reserved functions.

25 **Removal of restrictions on disclosure of certain information**

(1) The power to make a disclosure under section 24 is, unless subsection (2) otherwise provides, subject to any obligation as to secrecy or other restriction on disclosure of information however imposed.

(2) No such obligation or restriction prevents—

(a) OSCR from disclosing any information to a designated body for—

(i) any purpose connected with the exercise of OSCR’s functions,
(ii) the purpose of enabling or assisting that body to exercise any functions,

(b) a designated body from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(c) a charity trustee of a charity from disclosing any information about that charity to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(d) any person appointed to carry out an independent examination or audit of a charity’s statement of account from disclosing any information about that charity which the person appointed becomes aware of in carrying out that examination or audit to OSCR for the purpose of enabling or assisting OSCR to exercise any functions, or

(e) a relevant financial institution from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions under section 47.

(3) The Scottish Ministers may, by order, designate—

(a) for the purposes of paragraph (a) of subsection (2), any public body or office-holder in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom,

(b) for the purposes of paragraph (b) of that subsection, any Scottish public authority with mixed functions or no reserved functions,

and references in that subsection to a “designated body” are to be construed accordingly.

**Supplemental**

26 **False or misleading information etc.**

(1) It is an offence for a person to provide any information or explanation to OSCR or any other person if—

(a) the person providing the information or explanation knows it to be, or is reckless as to whether it is, false or misleading in a material respect, and

(b) the information or explanation is provided—
(i) in purported compliance with a requirement by or under this Act, or
(ii) in other circumstances in which the person providing it knows, or could reasonably be expected to know, that it would be used by OSCR, or provided to OSCR for use, in connection with the exercise of its functions.

(2) It is an offence for a person deliberately to alter, suppress, conceal or destroy any document (or any part of a document) which the person is, or which that person knows any other person is, required by or under this Act to provide to OSCR.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

27 Disclosure of information: entitlement under other enactments etc.

Sections 21 to 25 are without prejudice to any entitlement to receive or disclose information under any enactment or otherwise.

CHAPTER 4

SUPERVISION OF CHARITIES ETC.

Inquiries

28 Inquiries about charities etc.

(1) OSCR may at any time make inquiries, either generally or for particular purposes, with regard to—

   (a) a charity,
   (b) a body controlled by a charity (or by two or more charities, when taken together),
   (c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),
   (d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of—

   (i) a charity, or
   (ii) a body falling within paragraph (b) or (c),
   (e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,

   (f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).

(2) OSCR may direct any charity, body or person with regard to which it is making inquiries under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.

(3) A direction under subsection (2) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body to which the inquiries relate.

(4) A direction under subsection (2)—

   (a) may be revoked at any time,
(b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(5) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (2) is guilty of an offence.

(6) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.

29 **Power of OSCR to obtain information for inquiries**

(1) OSCR may by notice require any person to provide to it—

(a) any document, or a copy of or extract from any document,

(b) documents of any type, or copies of or extracts from such documents,

(c) any information or explanation,

which OSCR considers necessary for the purposes of inquiries under section 28.

(2) The notice must specify—

(a) the documents, type of documents, copies, extracts, information or explanation which the person is to provide to OSCR,

(b) the date (which must be at least 14 days after the date on which the notice is given) by which the person must do so, and

(c) the effect of subsection (6).

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

(4) OSCR must not disclose any document, information or explanation provided in response to a requirement under subsection (1) except for the purposes of the inquiries in connection with which the requirement was made.

(5) OSCR may pay to any person a sum in respect of expenses reasonably incurred by the person in complying with a requirement under subsection (1).

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.

30 **Removal from Register of charity which no longer meets charity test**

(1) Where OSCR is satisfied, as a result of inquiries under section 28, that a charity no longer meets the charity test it must—

(a) direct the charity to take, within such period as may be specified in the direction, such steps as OSCR considers necessary for the purposes of meeting the charity test, or

(b) remove the charity from the Register.
(2) Steps specified in a direction under subsection (1)(a) may include applying to OSCR for approval under section 40 of a reorganisation scheme in relation to the charity’s constitution.

(3) OSCR must, if a charity fails to comply with a direction under subsection (1)(a), remove the charity from the Register.

31 Powers of OSCR following inquiries

(1) Subsections (4), (6) and (7) apply where OSCR is satisfied, as a result of inquiries under section 28—

(a) that there has been misconduct in the administration of—

(i) a charity, or

(ii) a body controlled by a charity, or

(b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes.

(2) Subsections (5) to (7) apply where OSCR is satisfied, as a result of inquiries under section 28, that a body which is not a charity is being or has been represented as a charity.

(3) Subsections (8) and (9) apply where OSCR is satisfied, as a result of inquiries under section 28, that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body who appears to it to—

(a) have been responsible for or privy to the misconduct,

(b) have contributed to, or facilitated, the misconduct, or

(c) be unable or unfit to perform that person’s functions in relation to the property of the charity or body.

(5) OSCR may direct—

(a) the body representing itself as a charity,

(b) the person representing the body as a charity,

to stop doing so.

(6) OSCR may give a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without OSCR’s consent.

(7) OSCR may direct any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without OSCR’s consent.

(8) OSCR may direct the person—

(a) to cease acting, or representing itself as acting, for or on behalf of the charity or body in any activity specified in the direction,
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(b) to pay to the charity or body, within such period as the direction may specify, any
sums which it has collected for the charity or body and which are held by it or by
any relevant financial institution or other person on its behalf, after deducting any
sums payable to the person or any other person under an agreement with the
charity or body.

(9) OSCR may direct any relevant financial institution or other person holding property
which OSCR considers to be, or to represent, sums collected for the charity or body not
to part with the property without OSCR’s consent.

32 Suspensions and directions: procedure

(1) A suspension under subsection (4) and a direction under any of subsections (5) to (9) of
section 31—

(a) has effect for such period of not more than 6 months as is specified in the
suspension or direction,

(b) may be revoked at any time,

(c) may be varied, but not so as to have effect for a period of more than 6 months
from the date on which the suspension or direction first has effect.

(2) Where such a suspension has been made or direction has been given, a further
suspension or direction may be made or given under section 31 but the further
suspension or direction ceases to have effect on the same date as the original suspension
or direction (unless stated to cease to have effect earlier).

(3) A copy of the notice given under section 71 in respect of a—

(a) suspension under subsection (4) of section 31, or

(b) direction under subsection (5)(b) or (8) of that section,

must be given to the charity or body in question.

(4) A copy of the notice given under section 71 in respect of a direction under subsection
(7) or (9) of that section must be given to the person directed.

(5) A person who, without reasonable excuse—

(a) contravenes a suspension under subsection (4) of section 31, or

(b) refuses or fails to comply with a direction under any of subsections (5) to (9) of
that section,

is guilty of an offence and liable on summary conviction to a fine not exceeding level 5
on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

33 Reports on inquiries

(1) OSCR must prepare a report of the subject matter of inquiries made under section 28
if—

(a) as a result of the inquiries it—

(i) gives a direction, or removes a charity from the Register, under section 30,

(ii) suspends a person under subsection (4) of section 31, or

(iii) gives a direction under any of subsections (5) to (9) of that section, or
(b) in any other case, it is requested to do so by the person in respect of whom the inquiries were made.

(2) OSCR may prepare a report of the subject matter of any other inquiries under section 28.

(3) Apart from identifying the person in respect of whom inquiries were made, a report under this section must not—

(a) mention the name of any person, or

(b) contain any particulars which, in OSCR’s opinion—

(i) are likely to identify any person, and

(ii) can be omitted without impairing the effectiveness of the report,

unless OSCR considers it is necessary to do so.

(4) OSCR must—

(a) send a copy of the report to the person in respect of whom the inquiries were made, and

(b) publish the report or such other statement of the result of the inquiries as OSCR thinks fit in such manner as OSCR thinks fit.

Powers of Court of Session

34 Powers of Court of Session

(1) Where, on an application by OSCR, the Court of Session is satisfied—

(a) that there is or has been misconduct in the administration of—

(i) a charity, or

(ii) a body controlled by a charity (or by two or more charities, when taken together), or

(b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes,

the court may exercise any of the powers set out in subsection (4)(a) and (c) to (g).

(2) Where, on an application by OSCR, the Court of Session is satisfied that a body which is not a charity is or has been representing itself as a charity, the court may exercise any of the powers set out in subsection (4)(b) to (g).

(3) Where, on an application by OSCR, the Court of Session is satisfied that a person is or has been representing a body which is not a charity as a charity, the court may exercise any of the powers set out in subsection (4)(f) to (h).

(4) Those powers are power to—

(a) interdict (whether temporarily or permanently) the charity or body from such action as the court thinks fit,

(b) interdict (whether temporarily or permanently) the body from representing itself as a charity or from such other action as the court thinks fit,

(c) appoint a judicial factor (whether temporarily or permanently) to manage the affairs of the charity or body,
(d) where the charity or body is a trust, appoint a trustee,
(e) suspend or remove any person concerned in the management or control of the charity or body,
(f) order any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without the court’s consent,
(g) make an order restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without the court’s consent,
(h) interdict (whether temporarily or permanently) the person from representing the body as a charity or from such other action as the court thinks fit.

(5) Where the court appoints a trustee in pursuance of subsection (4)(d), section 22 of the Trusts (Scotland) Act 1921 (c.58) applies as if the trustee had been appointed under that section.

(6) The power in subsection (4)(g) applies despite anything in the constitution of the charity or body.

(7) Subsection (8) applies where, on an application by OSCR, the Court of Session is satisfied that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(8) The court may—
(a) interdict (whether temporarily or permanently) the person from acting, or representing itself as acting, on behalf of the charity or body,
(b) order the person to pay to the charity or body any sums which it has collected for the charity or body and which are held by it, any relevant financial institution or other person holding money on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body,
(c) order any relevant financial institution or other person holding property which the court considers to be, or to represent, sums collected for the charity or body not to part with the property without the court’s consent.

(9) The court may—
(a) recall the suspension of a person in pursuance of subsection (4)(e),
(b) vary or recall an order in pursuance of subsection (4)(f) or (g) or under subsection (8)(b) or (c).

35 Transfer schemes

(1) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any assets of—
(a) another charity,
(b) a body which is controlled by a charity (or by two or more charities, when taken together),
(c) a body which is not a charity but which is or has been representing itself as a charity.

(2) The court may approve a scheme in relation to a charity only if it is satisfied—
(a) that there is or has been misconduct in the administration of the charity,
(b) that 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) that the charity’s purposes would be better achieved by transferring its assets to another charity.

(3) The court may approve a scheme in relation to a body falling with paragraph (b) of subsection (1) only if it is satisfied—
(a) that there is or has been misconduct in the administration of the body or any of the charities which control it,
(b) that it is necessary or desirable to act for the purpose of protecting the property of the body or any such charity, and
(c) that the transfer provided for by the scheme is reasonable.

(4) The court may approve a scheme in relation to a body falling within paragraph (c) of subsection (1) only if it is satisfied—
(a) that the body falls within that paragraph, and
(b) that the transfer provided for by the scheme is reasonable.

(5) The court may approve a scheme under this section subject to modifications.

(6) A charity receiving property in pursuance of a scheme approved under this section may apply that property for its purposes as it thinks fit.

36 Powers in relation to English and Welsh charities

(1) Subsection (2) applies where the Charity Commissioners for England and Wales inform OSCR that a relevant financial institution or other person in Scotland holds moveable property on behalf of a body—
(a) which is registered as a charity in England and Wales under section 3 of the Charities Act 1993 (c.10), or
(b) which, by virtue of section 3(5) of that Act, is not required to register as a charity under that section.

(2) The Court of Session may, on an application by OSCR, make an order requiring the relevant financial institution or other person not to part with the property without the court’s consent.

(3) An order under subsection (2) may be made subject to conditions and may be varied or recalled.

(4) Where the court has made an order under subsection (2) and, on an application by OSCR, it is satisfied as to the matters set out in subsection (5) it may transfer the property to a charity specified in the application—
(a) which has purposes which are the same as or which resemble closely the purposes of the body whose property is transferred, and
(b) which has intimated that it is prepared to receive the property.

(5) Those matters are—

(a) that there has been misconduct in the administration of the body, and

(b) that it is necessary or desirable to transfer the property for the purpose of
protecting it or securing a proper application of it for the purposes of the body
from which it is to be transferred.

37 Expenses

In proceedings before it under sections 34 to 36 in relation to a charity, the Court of
Session may, instead of awarding expenses against the charity, award expenses against a
charity trustee of the charity or against any two or more of its charity trustees jointly and
severally.

Supplemental

38 Delegation of functions

(1) It is for the Scottish Ministers to exercise OSCR’s functions under sections 28 to 35
(other than section 30), and any of its general functions relating to those provisions, in
so far as they are exercisable in relation to—

(a) charities which are registered social landlords,

(b) bodies controlled by any such charity (or by two or more such charities, when
taken together), and

(c) persons acting for or on behalf of any such charity or body.

(2) OSCR may authorise any Scottish public authority with mixed functions or no reserved
functions to exercise any of the functions referred to in subsection (1) in so far as they
are exercisable in relation to—

(a) such charities or bodies, or types of charity or body, as OSCR may specify in the
authorisation, and

(b) persons acting for or on behalf of those charities or bodies.

(3) Such an authorisation may be made only if the authorised person has other regulatory
functions conferred on it by an enactment in relation to the charities or types of charity
in respect of which the authorisation is made.

(4) OSCR must send a copy of such an authorisation to each charity to which it relates.

(5) OSCR must, before making such an authorisation, consult such persons (including the
person it proposes to authorise) as it thinks fit.

(6) OSCR may, at any time, withdraw an authorisation under subsection (2) (and
subsections (4) and (5) apply in relation to such a withdrawal as they apply in relation to
an authorisation).

(7) Subsection (1) does not prevent OSCR from authorising, under subsection (2), the
Scottish Ministers to exercise functions in relation to a person other than a registered
social landlord.
(8) It is not competent for OSCR to exercise any of its functions which are, by virtue of subsection (1) or (2), delegated to another public body or office-holder (unless it considers it necessary or expedient to do so in relation to its functions under section 30).

(9) In this section “registered social landlord” means a body registered in the register maintained under section 57(1) of the Housing (Scotland) Act 2001 (asp 10).

39 Bodies controlled by a charity

A charity which is able (whether directly or through one or more nominees) to secure that the affairs of a body are conducted in accordance with the charity’s wishes is, for the purposes of sections 28 to 35, to be treated as being in control of that body.

CHAPTER 5

REORGANISATION OF CHARITIES

40 Reorganisation of charities: applications by charity

(1) OSCR may, on the application of a charity, approve a reorganisation scheme proposed by the charity if it considers—

(a) that any of the reorganisation conditions is satisfied in relation to the charity, and

(b) that the proposed reorganisation scheme will—

(i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or

(ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.

(2) The Scottish Ministers may by regulations make such provision as they think fit in relation to the procedure for applying for and determining applications under this section.

(3) Such regulations may in particular make provision about—

(a) the form and manner in which applications must be made,

(b) the period within which OSCR must make a decision on an application,

(c) publication of proposed reorganisation schemes,

and may make different provision in relation to different types of charity.

41 Reorganisation of charities: applications by OSCR

(1) Where OSCR considers—

(a) that any of the reorganisation conditions is satisfied in relation to a charity, and

(b) that a reorganisation scheme proposed by it or by the charity trustees of the charity will—
(i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or

(ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.

OSCR may, of its own accord or on the application of the charity trustees of the charity, apply to the Court of Session for approval of the scheme.

(2) The Court of Session may, on an application under subsection (1), approve the proposed reorganisation scheme if it considers that the matters set out in paragraphs (a) and (b) of that subsection are satisfied in relation to the charity to which the application relates.

(3) The charity trustees of a charity may enter appearance as a party in proceedings on an application under subsection (1) in relation to the charity.

(4) OSCR must, not less than 28 days before making an application under subsection (1), notify the charity in question of its intention to do so.

42 Approved schemes

A charity may, despite any provision of its constitution having contrary effect, proceed with any variation, transfer or amalgamation for which an approved reorganisation scheme makes provision.

43 Reorganisation: supplementary

(1) This section applies for the interpretation of Chapter 5.

(2) The “reorganisation conditions” are—

(a) that some or all of the purposes of the charity—

(i) have been fulfilled as far as possible or adequately provided for by other means,

(ii) can no longer be given effect to (whether or not in accordance with the directions or spirit of its constitution),

(iii) have ceased to be charitable purposes, or

(iv) have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution,

(b) that the purposes of the charity provide a use for only part of its property, and

(c) that a provision of the charity’s constitution (other than a provision setting out the charity’s purposes) can no longer be given effect to or is otherwise no longer desirable.

(3) A “reorganisation scheme” is a scheme for—

(a) variation of the constitution of the charity (whether or not in relation to its purposes),
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(b) transfer of the property of the charity (after satisfaction of any liabilities) to another charity (whether or not involving a change to the purposes of the other charity), or

(c) amalgamation of the charity with another charity.

(4) Nothing in section 41 affects the power of the Court of Session to approve a cy près scheme in relation to a charity.

(5) Sections 40 and 41 do not apply to any charity—

(a) constituted under a Royal charter or warrant or under any enactment,

(b) which is a trust to which section 16 (property held on trust by local authorities) of the Local Government etc. (Scotland) Act 1994 (c.39) applies.

(6) But, despite subsection (5), those sections do apply to an endowment if its governing body is a charity.

(7) In subsection (6), “endowment” and “governing body” have the same meaning as in Part 6 (reorganisation of endowments) of the Education (Scotland) Act 1980 (c.44).

Endowments

In section 122 (interpretation of Part 6) of the Education (Scotland) Act 1980 (c.44), after subsection (3) insert—

“(4) This Part, apart from section 104, does not apply in relation to any endowment the governing body of which is a charity within the meaning of section 103 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

CHAPTER 6
Charity accounts

Duty to keep accounts etc.

Accounts

(1) A charity must—

(a) keep proper accounting records,

(b) prepare for each financial year of the charity a statement of account, including a report on its activities in the financial year,

(c) have the statement of account independently examined or audited, and

(d) after such examination or audit, send a copy of the statement of account to OSCR, in accordance with regulations under subsection (4).

(2) Accounting records kept in pursuance of subsection (1)(a) must be preserved by the charity for 6 years from the end of the financial year in which they are made.

(3) Subsection (2) is without prejudice to any other enactment or rule of law.

(4) The Scottish Ministers may by regulations make provision about the matters referred to in subsection (1) including—

(a) the meaning of “financial year”,
(b) the information to be contained in the accounting records and statement of account,
(c) the manner in which that information is to be presented,
(d) the keeping and preservation of the accounting records,
(e) the methods and principles according to which, and the time by which, the statement of account is to be prepared,
(f) the time by which the copy statement of account is to be sent to OSCR,
(g) examination or audit of the statement of account,
(h) such other matters in relation to the accounts of a charity as the Scottish Ministers think necessary or expedient.

(5) Regulations under subsection (4) may make different provision in relation to different types of charity, including provision exempting charities of a particular type from some or all of the requirements of this section.

### 46 Failure to provide statement of account

(1) This section applies where a charity fails, within such period as is specified in regulations under section 45(4), to send a copy of a statement of account to OSCR in pursuance of subsection (1)(d) of that section.

(2) OSCR may, after notifying the charity of its intention to do so, appoint a suitably qualified person (an “appointed person”) to prepare such a statement of account.

(3) An appointed person is entitled—
   (a) on giving reasonable notice, to enter premises occupied by the charity at all reasonable times,
   (b) to have access to, and take possession of, any document appearing to the appointed person to relate to the financial affairs of the charity, and
   (c) to require any charity trustee, or agent or employee, of the charity to give the person such assistance, information or explanation as the appointed person may reasonably require.

(4) The charity trustees of the charity are personally liable jointly and severally for—
   (a) any costs incurred by OSCR in relation to the appointment of the appointed person, and
   (b) the expenses of the appointed person in performing that person’s functions under this section.

(5) The appointed person must—
   (a) send to OSCR the statement of account prepared in pursuance of subsection (2),
   (b) submit to OSCR a report on the affairs and accounting records of the charity, and
   (c) send a copy of the statement of account and report to each person appearing to the appointed person to be a charity trustee of the charity.

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement of an appointed person under subsection (3) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.
Charities and Trustee Investment (Scotland) Bill 25

Part 1—Charities

Chapter 6—Charity accounts

Dormant charity accounts

47 Dormant accounts of charities

(1) Subsection (3) applies where—

(a) a relevant financial institution (whether or not in response to a request from OSCR) informs OSCR that every account held by the institution in the name of or on behalf of a body appearing to the institution to be a relevant body is dormant,

(b) OSCR is satisfied that the body is a relevant body, and

(c) OSCR is unable, after making reasonable inquiries, to locate any person concerned in the management or control of the body.

(2) A relevant body is one which is, has at any time been or, in the case of a body which has ceased to exist, was prior to such cessation—

(a) a charity, or

(b) entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

(3) OSCR must transfer the amount standing to the credit of the relevant body in the dormant accounts (less any amount which it is authorised by regulations under section 48(1) to retain) to—

(a) such charity as OSCR may determine, having regard to the purposes of the relevant body and the purposes of the charity, or

(b) where OSCR is unable to ascertain the purposes of the relevant body, to such charity as OSCR considers appropriate.

(4) For the purposes of subsection (3), OSCR may effect any transaction in relation to the dormant accounts (including a transaction closing any such account).

(5) Where under subsection (3) OSCR transfers an amount to 2 or more charities, it may divide the amount among those charities as it thinks fit.

(6) A charity to which an amount is transferred under this section may apply the amount for its purposes as it thinks fit.

(7) The receipt by—

(a) OSCR of an amount withdrawn or transferred from an account by virtue of this section is a complete discharge of the relevant financial institution, or

(b) a charity of an amount received from OSCR by virtue of this section is a complete discharge of OSCR, in respect of the amount.

(8) OSCR’s power under subsection (3) ceases—

(a) if the relevant financial institution by which the accounts are held informs OSCR that the accounts (or any of them) are no longer dormant, or

(b) if OSCR becomes aware of the identity of a person concerned in the management or control of the relevant body and informs the relevant financial institution of that fact.
48 Dormant accounts of charities: procedure and interpretation

(1) The Scottish Ministers may, by regulations, make provision as to—
   (a) the procedure to be followed by OSCR under section 47,
   (b) the extent to which OSCR, in transferring an amount under subsection (3) of that
       section, may retain a sum in respect of its expenses in exercising its functions
       under that section.

(2) An account is dormant for the purposes of section 47 if no transaction other than—
   (a) a payment into the account, or
   (b) a transaction effected by the relevant financial institution holding the account,
       has been effected in relation to the account within the period of 5 years immediately
       preceding the dormancy date.

(3) An account is no longer dormant for the purposes of that section if a transaction other
     than—
     (a) a payment into the account,
     (b) a transaction effected by the relevant financial institution holding the account, or
     (c) a transaction effected by OSCR in pursuance of subsection (3) of that section,
         is effected after the dormancy date.

(4) The dormancy date is the date on which the institution informs OSCR as mentioned in
     section 47(1)(a).

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CHAPTER 7

SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS

Nature and constitution

49 Scottish charitable incorporated organisations

(1) A charity may be constituted as a Scottish charitable incorporated organisation (a
     “SCIO”).

(2) A SCIO is a body corporate having—
   (a) a constitution,
   (b) a principal office in Scotland,
   (c) 2 or more members.

(3) Its membership may, but need not, consist of or include some or all of its charity
    trustees.

(4) The members are not liable to contribute to the assets of the SCIO if it is wound up.

50 Constitution and powers

(1) A SCIO’s constitution must state its name and its purposes.

(2) A SCIO’s constitution must make provision—
   (a) about who is eligible for membership, and how a person becomes a member, and
(b) for the appointment of 3 or more persons (“charity trustees”) who are to be charged with the general control of the SCIO’s administration, and about any conditions of eligibility for becoming a charity trustee.

(3) A SCIO’s constitution must also provide for such other matters, and comply with such requirements, as are specified in regulations made by the Scottish Ministers.

(4) A SCIO must use and apply its property in furtherance of its purposes and in accordance with its constitution.

(5) Subject to anything in its constitution, a SCIO has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so.

(6) For the purposes of managing the affairs of a SCIO, its charity trustees may exercise all the SCIO’s powers.

**51 General duty of members of SCIO**

Subsections (1)(a), (3) and (4) of section 65 apply to the members of a SCIO who are not charity trustees as they apply to its charity trustees.

**52 Name and status**

(1) The name of a SCIO must appear in legible characters on—

(a) such documents issued by or on behalf of the SCIO,

(b) such documents signed by or on behalf of the SCIO,

as may be specified in regulations made by the Scottish Ministers.

(2) Subsection (3) applies where the name of a SCIO does not include—

(a) “Scottish charitable incorporated organisation”, or

(b) “SCIO” (with or without a full stop after each letter), whether or not capital letters are used.

(3) Where this subsection applies, the fact that a SCIO is a SCIO must be stated in legible characters in all the documents referred to in subsection (1).

(4) Section 15 does not apply in relation to a SCIO.

**53 Offences etc.**

(1) A charity trustee of a SCIO or a person on the SCIO’s behalf who—

(a) issues, or authorises the issue of, any document referred to in subsection (1)(a) of section 52, or

(b) signs, or authorises the signature on behalf of the SCIO of, any document referred to in subsection (1)(b) of that section,

which does not comply with subsections (1) and (3) of that section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(2) OSCR may direct—

(a) any body which is not a SCIO and which is representing itself as being a SCIO,
(b) any person who is representing that any such body is a SCIO, to stop doing so by such date as OSCR may direct.

(3) The Court of Session may, on an application by OSCR, interdict—
(a) any body which is not a SCIO from representing itself as a SCIO,
(b) a person who is representing that such a body is a SCIO from doing so.

(4) OSCR may not apply for such an interdict against a body or person unless the body or person has failed to comply with a direction under subsection (2).

Creation of SCIO and entry in Register

54 Application for creation of SCIO

(1) Any 2 or more individuals may apply to OSCR for a SCIO to be constituted and for its entry in the Register.

(2) The application must—
(a) state the name of the SCIO,
(b) state the proposed principal office of the SCIO,
(c) be accompanied by a copy of the SCIO’s proposed constitution,
(d) contain such other information, and be accompanied by such other documents, as may be—
   (i) required by regulations under section 6(1), or
   (ii) otherwise required by OSCR.

(3) OSCR may grant the application only if it considers that the SCIO, if constituted, would meet the charity test.

(4) OSCR must refuse the application if—
(a) it considers that the SCIO’s proposed name falls within section 10,
(b) the SCIO’s proposed constitution does not comply with one or more of the requirements of section 50 and any regulations made under that section, or
(c) the application must, by virtue of regulations under section 6(1), be refused, but must not otherwise refuse an application if it considers that the SCIO, if constituted, would meet the charity test.

(5) Sections 4 and 5 do not apply in relation to an application under subsection (1).

55 Entry in Register

(1) If OSCR grants an application under section 54(1) it must enter the SCIO to which the application relates in the Register.

(2) On the entry in the Register being made in accordance with subsection (5), subsections (3) and (4) apply.

(3) The SCIO becomes by virtue of this subsection a body corporate—
(a) whose constitution is that proposed in the application,
(b) whose name is that specified in the constitution, and
(c) whose first members are the individuals who made the application.

(4) All property for the time being vested in those individuals (or any of them) on trust for the charitable purposes of the SCIO (when constituted) vests by virtue of this subsection in the SCIO.

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(5) The entry for the SCIO in the Register must (in addition to the matters required by section 3(3)) include—
(a) the date when the entry was made, and
(b) a note stating that the charity is constituted as a SCIO.

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(6) OSCR must send a copy of the entry in the Register to the SCIO at its principal office.

(7) If a SCIO ceases to be a charity, it ceases to be a SCIO.

Conversion, amalgamation and transfer

56 Conversion of charity which is a company or registered friendly society

(1) The following may apply to OSCR to be converted into a SCIO, and for the SCIO’s entry in the Register—
(a) a charity which is a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,
(b) a charity which is a registered society within the meaning of the Industrial and Provident Societies Act 1965 (c.12).

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(2) But such an application may not be made—
(a) by a company or registered society having a share capital if any of the shares are not fully paid up,
(b) by a company having only a single member.

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(3) Such an application is referred to in this section and section 57 as an “application for conversion”.

(4) Subsections (2) to (4) of section 54 apply in relation to an application for conversion as they apply to an application for a SCIO to be constituted.

(5) In addition to the documents referred to in section 54(2), the application for conversion must be accompanied by—
(a) a copy of the resolution of the company or registered society that it be converted into a SCIO, and
(b) a copy of the resolution of the company or registered society adopting the proposed constitution of the SCIO.

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(6) The resolution referred to in subsection (5)(a) must be—
(a) a special resolution of the company or registered society, or
(b) a unanimous written resolution signed by or on behalf of all the members of the company or registered society who would be entitled to vote on a special resolution.
(7) In the case of a registered society, “special resolution” has the meaning given in section 52(3) of the Industrial and Provident Societies Act 1965 (c.12).

57 Conversion: supplementary

(1) If OSCR grants an application for conversion, it must—

(a) enter the SCIO in the Register,

(b) send to the appropriate registrar a copy of the resolution of the converting company or registered society referred to in section 56(5)(a) and a copy of the entry in the Register relating to the SCIO, and

(c) once the SCIO’s constitution as a SCIO has taken effect, remove from the Register the entry for the converting company or registered society.

(2) The entry for the SCIO in the Register must, for so long as its constitution as a SCIO has not yet taken effect, include a note stating that fact.

(3) If the appropriate registrar—

(a) registers the documents sent under subsection (1)(b), and

(b) cancels the registration of the company under the Companies Act 1985 (c.6), or of the society under the Industrial and Provident Societies Act 1965 (c.12), subsections (4) and (5) apply.

(4) The company or registered society is by virtue of this subsection converted into a SCIO, being a body corporate—

(a) whose constitution is that proposed in the application for conversion,

(b) whose name is that specified in the constitution, and

(c) whose first members are the members of the converting company or society immediately before the moment of conversion.

(5) All property, rights and liabilities of the converting company or registered society become by virtue of this subsection the property, rights and liabilities of the SCIO.

(6) The entry for the SCIO in the Register must include—

(a) a note stating that the charity is constituted as a SCIO,

(b) the date on which it became so constituted, and

(c) a note of the name of the company or society which was converted into the SCIO.

(7) In this section, the “appropriate registrar” means—

(a) in the case of an application for conversion by a company, the registrar of companies (within the meaning of the Companies Act 1985 (c.6)),

(b) in the case of an application for conversion by a registered society, the Financial Services Authority.

58 Amalgamation of SCIOs

(1) Any 2 or more SCIOs (“the old SCIOs”) may, in accordance with this section, apply to OSCR to be amalgamated, and for a new SCIO (“the new SCIO”) to be constituted and entered in the Register as their successor.
Part 1—Charities
Chapter 7—Scottish charitable incorporated organisations

(2) Such an application is referred to in this section and section 59 as an “application for amalgamation”.

(3) Subsections (2) to (4) of section 54 apply in relation to an application for amalgamation as they apply to an application for a SCIO to be constituted, but with—

(a) the reference to the individuals making the application being read as a reference to the old SCIOs, and

(b) references to the SCIO being read as references to the new SCIO.

(4) In addition to the documents and information referred to in section 54(2), the application for amalgamation must be accompanied by—

(a) a copy of a resolution of each of the old SCIOs approving the proposed amalgamation, and

(b) a copy of a resolution of each of the old SCIOs adopting the proposed constitution of the new SCIO.

(5) The resolutions must be passed—

(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or

(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

59 Amalgamation: supplementary

(1) If OSCR grants an application for amalgamation, it must—

(a) enter the new SCIO in the Register, and

(b) remove from the Register the entries for the old SCIOs.

(2) On the new SCIO being entered in the Register it becomes by virtue of this section a body corporate—

(a) whose constitution is that proposed in the application for amalgamation,

(b) whose name is that specified in the constitution, and

(c) whose first members are the members of the old SCIOs immediately before the new SCIO was entered in the Register.

(3) On the removal of the old SCIOs from the Register—

(a) all the property, rights and liabilities of each of the old SCIOs become by virtue of this subsection the property, rights and liabilities of the new SCIO, and

(b) each of the old SCIOs is dissolved.

(4) The entry for the new SCIO in the Register must include—

(a) a note stating that it is constituted as a SCIO,

(b) the date on which it became so constituted, and

(c) a note that it was constituted following amalgamation, and of the name of each of the old SCIOs.

(5) OSCR must send a copy of the entry in the Register to the new SCIO at its principal office.
60 Transfer of SCIO’s undertaking

(1) A SCIO may resolve that all its property, rights and liabilities should be transferred to another SCIO specified in the resolution.

(2) Where a SCIO has passed such a resolution, it must send to OSCR—

(a) a copy of the resolution, and

(b) a copy of a resolution of the transferee SCIO agreeing to the transfer to it.

(3) A resolution referred to in subsection (1) and (2)(b) must be passed—

(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or

(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

(4) The resolution referred to in subsection (1) does not take effect until confirmed by OSCR.

(5) If OSCR confirms the resolution—

(a) all the property, rights and liabilities of the transferor SCIO become by virtue of this subsection the property, rights and liabilities of the transferee SCIO in accordance with the resolution,

(b) the transferor SCIO is dissolved, and

(c) OSCR must remove from the Register the entry for the transferor SCIO.

General

61 Third parties

(1) A person dealing with a SCIO in good faith and for value is not concerned to inquire whether—

(a) anything in the SCIO’s constitution prevents it acting in the way that it is, or

(b) any constitutional limitations on the powers of the SCIO’s charity trustees prevent them from binding the SCIO or authorising others to do so.

(2) Nothing in subsection (1) prevents a person from bringing proceedings for interdict in respect of the doing of an act which—

(a) the SCIO, because of anything in its constitution, does not have power to do, or

(b) the SCIO’s charity trustees, because of any constitutional limitations on their powers, do not have power to do.

(3) But no such proceedings may be brought in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the SCIO.

(4) Subsection (3) does not prevent OSCR from exercising any of its powers.

(5) Nothing in subsection (1)(b) affects any liability incurred by the SCIO’s charity trustees (or any of them) for doing anything which, because of any constitutional limitations on their powers, the trustees (or that trustee) do not have power to do.
(6) Nothing in subsection (1) absolves the SCIO’s charity trustees from their duty to act within the SCIO’s constitution and in accordance with any constitutional limitations on their powers.

(7) In this section “constitutional limitations” on the powers of a SCIO’s charity trustees are limitations on their powers under its constitution, including limitations deriving from a resolution of the SCIO in general meeting, or from an agreement between the SCIO’s members.

62 Amendment of constitution

(1) A SCIO may by resolution of its members amend its constitution (and a single resolution may provide for more than one amendment).

(2) Such a resolution must be passed—
   (a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or
   (b) unanimously by the SCIO’s members, otherwise than at a general meeting.

(3) The date of passing of such a resolution is—
   (a) the date of the general meeting at which it was passed, or
   (b) if it was passed otherwise than at a general meeting, the date on which the last member agreed to it.

63 Regulations relating to SCIOs

The Scottish Ministers may by regulations make further provision in relation to SCIOs including, in particular, provision about—
   (a) applications for constitution as, or conversion into, a SCIO, the determination of applications, entry in the Register and the effect of such entry,
   (b) the administration of a SCIO,
   (c) amalgamation of SCIOs and transfer of a SCIO’s property, rights and liabilities to another SCIO,
   (d) the winding up, insolvency or dissolution of a SCIO,
   (e) such other matters in connection with the provision made by this Chapter as they think fit.

CHAPTER 8

RELIGIOUS CHARITIES

64 Designated religious charities

(1) OSCR may designate as a designated religious charity a charity which appears to it to have—
   (a) the advancement of religion as its principal purpose,
   (b) the regular holding of public worship as its principal activity,
   (c) been established in Scotland for at least 10 years,
(d) a membership of at least 3,000 persons who are—
   (i) resident in Scotland, and
   (ii) at least 16 years of age, and

(e) an internal organisation such that—
   (i) one or more authorities in Scotland exercise supervisory and disciplinary
       functions in respect of the component elements of the charity, and
   (ii) those elements are subject to requirements as to keeping accounting records
       and audit of accounts which appear to OSCR to correspond to those
       required by section 45.

(2) OSCR may determine that subsection (1)(c) need not be satisfied in the case of a
charity—
   (a) created by the amalgamation of 2 or more charities each of which, immediately
       before the amalgamation—
       (i) was a designated religious charity, or
       (ii) was, in OSCR’s opinion, eligible for designation as such, or
   (b) constituted by persons who have removed themselves from membership of a
       charity which, immediately before the removal—
       (i) was a designated religious charity, or
       (ii) was, in OSCR’s opinion, eligible for designation as such.

(3) The provisions set out in subsection (4) do not apply to—
   (a) a designated religious charity,
   (b) any component element of a designated religious charity which is itself a charity
       (whether or not having as its principal purpose the advancement of religion).

(4) Those provisions are—

   subsections (1) and (6) of 16 (in so far as those subsections relate to any action set
   out in subsection (2)(b) to (d) of that section),
   section 28(2),
   section 31(4) and (6),
   section 34(4)(c) to (e),
   section 68.

(5) OSCR may, by notice served on a designated religious charity, withdraw the designation
of the charity as such where—
   (a) it appears to OSCR that one or more of paragraphs (a) to (e) of subsection (1) is
       no longer satisfied in relation to the charity, or
   (b) in consequence of an investigation of any component element of the charity under
       section 28, OSCR has given a direction under section 31(5) in relation to the
       component element and considers that it is no longer appropriate for the charity to
       be a designated religious charity.
CHAPTER 9

CHARITY TRUSTEES

General duties

65 Charity trustees: general duties

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.

(5) A breach of the duty under subsection (2) in relation to a charity’s duties under section 11 or 16, or under regulations under section 15, is an offence.

(6) A charity trustee guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Remuneration

66 Remuneration for services

(1) Where a charity trustee of a charity—

(a) provides services to or on behalf of the charity, or

(b) might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected,

the person providing the services (the “service provider”) is entitled to be remunerated from the charity’s funds for doing so only if the conditions set out in subsection (2) are met.

(2) Those conditions are—

(a) that the maximum amount of the remuneration—

(i) is set out in a written agreement between the service provider and the charity (or, as the case may be, its charity trustees) under which the service provider is to provide the services in question, and

(ii) is reasonable in the circumstances,

(b) that, before entering into the agreement, the charity trustees were satisfied that it would be in the interests of the charity for those services to be provided by the service provider for that maximum amount,
(c) that, immediately after entering into the agreement, less than half of the total number of charity trustees of the charity fall within subsection (4), and

(d) that the charity’s constitution does not contain any provision which expressly prohibits the service provider from receiving the remuneration.

(3) The condition set out in subsection (2)(c) does not apply in the case of a charity which has less than three charity trustees.

(4) A charity trustee falls within this subsection if the trustee is—

(a) party (in the capacity of a service provider) to a written agreement of the type described in subsection (2)(a)(i) under which any obligation is still to be fully discharged,

(b) entitled to receive remuneration from the charity’s funds otherwise than by virtue of such an agreement, or

(c) connected with any other charity trustee who falls within sub-paragraph (a) or (b).

(5) Subsection (1) does not prevent a charity trustee or other service provider from receiving any remuneration from a charity’s funds which that service provider is entitled to receive by virtue of—

(a) any provision of the charity’s constitution which was in force on the day on which the Bill for this Act was introduced in the Scottish Parliament,

(b) an order made by the Court of Session, or

(c) any enactment.

(6) Where a charity trustee or other service provider is remunerated in contravention of this section, the charity may recover the amount of remuneration; and proceedings for its recovery must be taken if OSCR so directs.

67 Remuneration: supplementary

(1) In section 66—

“benefit” means any direct or indirect benefit,

“maximum amount”, in relation to remuneration, means the maximum amount of the remuneration whether specified in or ascertainable under the terms of the agreement in question,

“remuneration” includes any benefit in kind (and “remunerated” is to be construed accordingly),

“services” includes goods that are supplied in connection with the provision of services.

(2) For the purposes of that section, the following persons are “connected” with a charity trustee—

(a) any person—

(i) to whom the trustee is married, or

(ii) with whom the trustee is living as husband and wife or, where the trustee and the other person are of the same sex, in an equivalent relationship,
(b) any child, parent, grandchild, grandparent, brother or sister of the trustee (and any spouse of any such person),

(c) any institution which is controlled (whether directly or through one or more nominees) by—

(i) the charity trustee,

(ii) any person with whom the charity trustee is connected by virtue of paragraph (a), (b), (d) or (e), or

(iii) two or more persons falling within sub-paragraph (i) or (ii), when taken together,

(d) a body corporate in which—

(i) the charity trustee has a substantial interest,

(ii) any person with whom the charity trustee is connected by virtue of paragraph (a), (b), (c) or (e) has a substantial interest, or

(iii) two or more persons falling within sub-paragraph (i) or (ii), when taken together, have a substantial interest,

(e) a Scottish partnership in which one or more of the partners is—

(i) the charity trustee, or

(ii) a person with whom the charity trustee is, by virtue of paragraph (a) or (b), connected.

(3) For the purposes of subsection (2)—

(a) a person who is—

(i) another person’s stepchild, or

(ii) brought up or treated by another person as if the person were a child of the other person,

is to be treated as that other person’s child,

(b) a person who is able to secure that the affairs of an institution are conducted in accordance with the person’s wishes is to be treated as being in control of the institution,

(c) a person who—

(i) is interested in shares comprised in the equity share capital of a body corporate of a nominal value of more than one-fifth of that share capital, or

(ii) is entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, more than one-fifth of the voting power at any general meeting of a body corporate,

is to be treated as having a substantial interest in the body corporate.

(4) The rules set out in Part 1 of Schedule 13 to the Companies Act 1985 (c.6) apply for the purposes of this section as they apply for the purposes of section 346(4) (connected persons etc.) of that Act (and “equity share capital” and “share” have the same meanings in this section as they have in that Act).
Disqualification

68 Disqualification from being charity trustee

(1) The persons specified in subsection (2) are disqualified from being charity trustees.

(2) Those persons are any person who—

(a) has been convicted of—

(i) an offence involving dishonesty,

(ii) an offence under this Act,

(b) is an undischarged bankrupt,

(c) has been removed, under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) or section 34 of this Act, from being concerned in the management or control of any body,

(d) has been removed from the office of charity trustee or trustee for a charity by an order made—

(i) by the Charity Commissioners for England and Wales under section 18(2)(i) of the Charities Act 1993 (c.10), section 20(1A)(i) of the Charities Act 1960 (c.58) or section 20(1) of that Act (as in force before the commencement of section 8 of the Charities Act 1992 (c.41)), or

(ii) by Her Majesty’s High Court of Justice in England, on the grounds of any misconduct in the administration of the charity for which the person was responsible or to which the person was privy, or which the person’s conduct contributed to or facilitated,

(e) is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

(3) A person referred to in subsection (2)(a) is not disqualified under subsection (1) if the conviction is spent by virtue of the Rehabilitation of Offenders Act 1974 (c.53).

(4) OSCR may, on the application of a person disqualified under subsection (1), waive the disqualification either generally or in relation to a particular charity or type of charity.

(5) OSCR must notify a waiver under subsection (4) to the person concerned.

(6) OSCR must not grant a waiver under subsection (4) if to do so would prejudice the operation of the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

69 Disqualification: supplementary

(1) A person who acts as a charity trustee while disqualified by virtue of section 68 is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a period not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 2 years or a fine or both.
(2) Any acts done as a charity trustee by a person disqualified by virtue of section 68 from being a charity trustee are not invalid by reason only of the disqualification.

(3) In section 68(2)(b), “undischarged bankrupt” means a person—
   (a) whose estate has been sequestrated, who has been adjudged bankrupt or who has granted a trust deed for or entered into an arrangement with creditors, and
   (b) who has not been discharged under or by virtue of—
      (i) section 54 or 75(4) of the Bankruptcy (Scotland) Act 1985 (c.66),
      (ii) an order under paragraph 11 of Schedule 4 to that Act,
      (iii) section 279 or 280 of the Insolvency Act 1986 (c.45), or
      (iv) any other enactment or rule of law subsisting at the time of the person’s discharge.

CHAPTER 10

DECISIONS: NOTICES, REVIEWS AND APPEALS

Preliminary

15 70 Decisions

This Chapter applies to any decision by OSCR (or by a person to whom OSCR’s functions are delegated by virtue of section 38) to—
   (a) refuse an application for entry in the Register, including entry as a SCIO under section 55, 57 or 59,
   (b) refuse to disapply section 3(3)(b) in relation to a charity,
   (c) give a direction under section 11(3),
   (d) give a direction under section 12(2) or (3),
   (e) refuse to give a direction under section 12(2),
   (f) refuse to consent to a charity taking any action set out in section 16(2),
   (g) give a direction under section 28(2),
   (h) make a requirement under section 29(1),
   (i) remove a charity from the Register under section 30(1) or (3),
   (j) suspend a person under section 31(4),
   (k) give a direction under section 31(5) or (8),
   (l) give a direction under section 31(6), (7) or (9),
   (m) refuse an application made for the purposes of section 40(1),
   (n) give a direction under section 53(2),
   (o) give a direction under section 66(6),
   (p) refuse to grant a waiver under section 68(4),
   (q) refuse to designate a charity as a designated religious charity or designated national collector, or
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(r) withdraw the designation of a charity as a designated religious charity or designated national collector.

Notice and effect of decisions

71 Notice of decisions

(1) Any person who makes a decision to which this Chapter applies must, as soon as reasonably practicable after doing so, give notice of it to the person specified in subsection (2).

(2) That person is—

(a) in the case of a decision referred to in paragraph (a), (g), (j), (k), (n) or (p) of section 70, the person in respect of whom the decision was made,

(b) in the case of a decision referred to in paragraph (e) of that section, the charity which requested OSCR to conduct a review under section 12, and

(c) in the case of any other decision referred to in that section, the charity in respect of which the decision was made.

(3) A notice given under this section must—

(a) set out the decision,

(b) give the reasons for the decision, and

(c) advise the recipient of—

(i) the right to request OSCR to review the decision, and

(ii) the period within which such a request must be made.

72 Effect of decisions

(1) Unless subsection (2) or (3) provides otherwise, a decision to which this Chapter applies (and any direction, requirement, suspension or other act in pursuance of such a decision) has effect from the day on which the notice required by section 71 is given.

(2) A decision referred to in section 70(d), (i), (o) or (r) (and any direction, requirement, suspension or other act in pursuance of such a decision) is of no effect unless and until the notice required by section 71 is given and—

(a) the period within which OSCR must, on request, review the decision expires without a request being made, or

(b) where OSCR, on a request made within that period, confirms the decision (with or without variations)—

(i) the period within which that decision by OSCR may be appealed under section 75 to the Panel expires without an appeal being made, or

(ii) where such an appeal is made, it is abandoned or finally determined (by the Panel or, as the case may be, the Court of Session).

(3) A decision referred to in section 70(h) (and any corresponding requirement) is of no effect unless and until the notice required by section 71 is given and—
(a) the period within which OSCR must, on request, review the decision expires without a request being made, or
(b) where such a request is made, the date on which OSCR confirms the decision (with or without variations).

Reviews

73 Review of decisions
(1) OSCR must, within 21 days of being requested to do so by a person given notice under section 71 of a decision to which this Chapter applies—
   (a) review the decision,
   (b) confirm, vary, reverse or revoke it, and
   (c) give notice of its decision under paragraph (b) to the person who requested the review.
(2) A notice under paragraph (c) of subsection (1) must set out OSCR’s reasons for its decision under paragraph (b) of that section.
(3) The duty in subsection (1) applies only if the request is made within 21 days of the notice under section 71 being given to the person making the request.
(4) OSCR must publish any further procedures in accordance with which reviews are to be conducted.

Appeals

74 Scottish Charity Appeals Panel
(1) The Scottish Ministers must, from time to time, constitute a panel to be known as the Scottish Charity Appeals Panel (in this Act referred to as “the Panel”) to exercise functions conferred on it by section 75.
(2) Schedule 2 makes further provision about the Panel.

75 Appeals to Scottish Charity Appeals Panel
(1) Where OSCR—
   (a) confirms a decision under section 73(1), or
   (b) reconfirms a decision under section 76(1),

   the decision (or, where OSCR varies the decision on confirming or reconfirming it, the decision as varied) may be appealed to the Panel.
(2) A decision referred to in paragraph (g) or (h) of section 70 (whether or not confirmed with variations) may not, despite subsection (1)(a), be appealed to the Panel.
(3) It is for the person whose request or, as the case may be, earlier appeal under this section caused OSCR to confirm or reconfirm the decision to make an appeal under subsection (1).
(4) Such an appeal must be made within 28 days of the person entitled to appeal it being given notice of the confirmation or reconfirmation.
(5) The Panel may—
(a) confirm a decision appealed to it,
(b) quash such a decision and direct OSCR to take such other action, if any, as the Panel thinks fit by such time as may be specified in the direction, or
(c) remit such a decision back to OSCR, together with the Panel’s reasons for doing so, for reconsideration.

(6) The Panel may not award expenses to OSCR or to any person who appeals a decision.

76 Reconsideration of decision remitted to OSCR

(1) OSCR must, within 14 days of a decision being remitted to it under section 75(5)(c)—
(a) reconsider the decision,
(b) confirm, vary, reverse or revoke it, and
(c) give notice of its decision under paragraph (b) to the person who appealed its earlier decision to the Panel.

(2) That notice must set out OSCR’s reasons for its decision under subsection (1)(b).

77 Appeals to Court of Session

(1) Any decision of the Panel under section 75(5) may be appealed by—
(a) the person who appealed to the Panel, or
(b) OSCR,
to the Court of Session.

(2) Any decision of OSCR to suspend a person by notice under section 31(4) may be appealed by the person suspended to the Court of Session.

(3) The Court of Session may—
(a) confirm the decision appealed to it, or
(b) quash the decision and direct OSCR to take such action, if any, as the Court thinks fit by such time as may be specified in the direction.

PART 2
FUNDRAISING FOR BENEVOLENT BODIES

78 Interpretation of Part 2

(1) In this Part—

“benevolent body” means a body (including a charity) which is established for charitable, benevolent or philanthropic purposes,
“benevolent contributions”, in relation to a representation made by a commercial participator or other person, means—
(a) the whole or part of—
(i) the consideration given for goods or services sold or supplied by that person,

(ii) any proceeds (other than such consideration) of a promotional venture undertaken by that person,

(b) sums given by that person by way of donation in connection with the sale or supply of such goods or services,

“commercial participator” means a person who—

(a) carries on for profit a business other than a fundraising business, but

(b) in the course of that business, engages in a promotional venture in the course of which it is represented that benevolent contributions are to be—

(i) given to or applied for the benefit of one or more particular benevolent bodies, or

(ii) applied for charitable, benevolent or philanthropic purposes,

“company” means a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,

“fundraising business” means a business carried on for profit and wholly or primarily engaged in soliciting or otherwise procuring money or promises of money for one or more particular benevolent bodies or for charitable, benevolent or philanthropic purposes,

“goods” includes all corporeal moveables except money,

“professional fundraiser” means—

(a) a person (other than a benevolent body or a company connected with it) who carries on a fundraising business,

(b) any other person who for reward solicits money or other property for the benefit of a benevolent body or for charitable, benevolent or philanthropic purposes otherwise than in the course of a fundraising venture undertaken by a person falling within paragraph (a),

“promises of money” includes standing orders, direct debits and similar instructions and authorisations for the payment of money,

“promotional venture” means an advertising or sales campaign or any other venture undertaken for promotional purposes,

“radio or television programme” includes any item included in a programme service within the meaning of the Broadcasting Act 1990 (c.42),

“services” includes facilities, and in particular—

(a) access to any premises or event,

(b) membership of any organisation,

(c) a ticket or other entitlement to participate in a lottery or game of chance,

(d) the provision of advertising space, and

(e) the provision of any financial facilities,

and references to the supply of services are to be construed accordingly.
(2) In subsection (1), the definition of “commercial participator”, in relation to a benevolent body, does not include a company connected with the body.

(3) The following persons are excluded from paragraph (b) of the definition of “professional fundraiser” in subsection (1)—

(a) a benevolent body or a company connected with it,

(b) a person concerned in the management or control, or an employee, of any such body or company,

(c) a person who in the course of a radio or television programme during which a fundraising venture is undertaken by a benevolent body, or by a company connected with it, makes any solicitation at the instance of the body or company,

(d) a commercial participator,

(e) a person who receives no more than—

(i) such sum as may be specified by regulations under section 82 by way of remuneration in connection with soliciting money or other property for the benefit of the benevolent body, or

(ii) such sum as may be so specified by way of remuneration in connection with any fundraising venture in the course of which the person solicits money or other property for the benefit of that body.

(4) For the purposes of this Part a company is connected with a benevolent body if—

(a) the body, or

(b) the body and one or more other benevolent bodies, when taken together, is or are entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, the whole of the voting power at a general meeting of the company.

Representation and solicitation

(1) In this Part, references to representing and soliciting are to representing and soliciting in any manner, whether expressly or impliedly and however the representation or solicitation is communicated, and include representations and solicitations made—

(a) orally (whether or not in the presence of the person being spoken to),

(b) in writing (whether or not by means of electronic communication), or

(c) by means of a statement published in any newspaper, film or radio or television programme.

(2) In construing references to soliciting or otherwise procuring money or promises of money, it is immaterial whether any consideration by way of goods or services is, or is to be, given in return for the money or promises of money.

(3) Where—

(a) a solicitation of money or a promise of money for the benefit of a benevolent body is made in accordance with arrangements between a person and the body, and

(b) under those arrangements the person will be responsible for receiving on behalf of the body money or a promise of money given in response to the solicitation,
then (if the person would not be so regarded apart from this subsection) that person is to be regarded for the purposes of this Part as soliciting money or promises of money for the benefit of the body.

(4) Where a fundraising venture is undertaken by a professional fundraiser in the course of a radio or television programme, a solicitation which is made by a person in the course of the programme at the instance of the fundraiser is to be treated for the purposes of this Part as made by the fundraiser and not by the person (whether or not the solicitation is made by the person for any reward).

Control of fundraising

80 Prohibition on professional fundraising without formal agreement

(1) It is unlawful—

(a) for a professional fundraiser to solicit money or promises of money for the benefit of a benevolent body, or

(b) for a commercial participator to represent that benevolent contributions are to be given to, or applied for the benefit of, a benevolent body,

except in accordance with an agreement between the professional fundraiser or commercial participator and the body which satisfies the prescribed requirements.

(2) Where on the application of a benevolent body (whether or not a charity), or of OSCR in relation to a benevolent body which is a charity, the sheriff is satisfied—

(a) that a person has contravened or is contravening subsection (1) in relation to the body, and

(b) that the contravention is likely to continue or be repeated,

the sheriff may grant an interdict.

(3) Compliance with subsection (1) is enforceable only under subsection (2).

(4) Subsections (5) and (6) apply where a benevolent body makes an agreement with a professional fundraiser or a commercial participator authorising—

(a) the professional fundraiser to solicit money or promises of money, or

(b) the commercial participator to represent that benevolent contributions are to be given to or applied,

for the benefit of the body.

(5) If the agreement does not satisfy the prescribed requirements, it is not enforceable against the benevolent body except to such extent (if any) as may be provided by an order of the sheriff.

(6) The professional fundraiser or commercial participator is not entitled to receive remuneration or expenses in respect of anything done in pursuance of the agreement unless the agreement provides for such remuneration or expenses and—

(a) the agreement satisfies the prescribed requirements, or

(b) any such provision has effect by virtue of an order under subsection (5).

(7) In this section “the prescribed requirements” means such requirements as are prescribed by regulations made under section 82.
81 Prevention of unauthorised fundraising

(1) Where on the application of a benevolent body, the sheriff is satisfied—
   (a) that the body has complied with subsection (3),
   (b) that any person is or has been—
      (i) soliciting money or promises of money for the benefit of the body, or
      (ii) representing that benevolent contributions are to be given to or applied for
           the benefit of the body,
   (c) that the person is likely to continue to do so or do so again, and
   (d) as to one or more of the matters specified in subsection (2),

   the sheriff may grant an interdict.

(2) Those matters are—
   (a) that the person in question is using methods of fundraising to which the body
       objects,
   (b) that that person is not a fit and proper person to raise funds for the body,
   (c) where the conduct complained of is the making of such representations as are
       mentioned in subsection (1)(b)(ii), that the body does not wish to be associated
       with the particular promotional or other fundraising venture in which that person
       is engaged.

(3) Not less than 28 days before making an application under subsection (1) the benevolent
    body must serve on the person in question a notice—
    (a) requesting the person immediately to cease—
        (i) soliciting money or promises of money for the benefit of the body, or
        (ii) representing that benevolent contributions are to be given to or applied for
             the benefit of the body,
      as the case may be, and
    (b) stating that, if the person does not comply with the notice, the body will apply for
        an interdict under this section.

(4) Where a person to whom a benevolent body gives such a notice—
    (a) complies with the notice, but
    (b) subsequently begins to carry on activities which are the same, or substantially the
        same, as those in respect of which the notice was given,

    the body need not, for the purposes of an application under subsection (1) made by it,
    serve a further notice on the person in respect of any such activities carried on within 12
    months of giving the notice.

(5) No application may be made under subsection (1) by a benevolent body in respect of
    anything done by a professional fundraiser or commercial participator in relation to the body.

82 Regulations about fundraising

(1) The Scottish Ministers may, after consulting such persons as they think fit, make
    regulations—

(a) about the solicitation by professional fundraisers of money or promises of money for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes,

(b) about representations made by commercial participators in relation to benevolent contributions,

(c) generally for or in connection with regulating benevolent fundraising by benevolent fundraisers.

(2) Such regulations may, in particular, make provision—

(a) specifying sums for the purposes of section 78(3)(e),

(b) about the form and content of—

(i) agreements for the purposes of section 80,

(ii) notices under section 81(3),

(c) about the information to be provided by professional fundraisers or commercial participators in soliciting money or promises of money or making representations in relation to benevolent contributions,

(d) about the information and identification to be provided by benevolent fundraisers in carrying on benevolent fundraising,

(e) about circumstances in which payments or agreements made in response to—

(i) solicitations or representations of the type described in paragraph (c), or

(ii) benevolent fundraising,

may be refunded or, as the case may be, cancelled,

(f) requiring professional fundraisers or commercial participators to make available to benevolent bodies with whom they have agreements for the purposes of section 80 books, documents or other records (however kept) which relate to the bodies,

(g) about the manner in which money or promises of money acquired by professional fundraisers or commercial participators for the benefit of, or otherwise falling to be given to or applied by them for the benefit of, benevolent bodies is or are to be transmitted to the bodies,

(h) requiring benevolent fundraisers, in carrying on benevolent fundraising, to take all reasonable steps to ensure that it is carried on in such a way that it does not—

(i) unreasonably intrude on the privacy of those from whom funds are being solicited or procured,

(ii) involve the making of unreasonably persistent approaches to persons to donate funds,

(iii) result in undue pressure being placed on persons to donate funds,

(iv) involve the making of any false or misleading representation about any of the matters mentioned in subsection (3).

(3) Those matters are—

(a) the extent or urgency of any need for funds on the part of any benevolent body or company connected with such a body,

(b) any use to which funds donated in response to the fundraising are to be put by such a body or company, and
(c) the activities, achievements or finances of such a body or company.

(4) In subsection (2)(g) the reference to money or promises of money includes a reference to money or promises of money which, in the case of a professional fundraiser or commercial participator—

(a) has or have been acquired by the fundraiser or commercial participator otherwise than in accordance with an agreement with a benevolent body, but

(b) by reason of any solicitation or representation in consequence of which it has or they have been acquired, is or are held by the fundraiser or commercial participator on trust for such a body.

(5) Regulations under this section may provide that a person who, without reasonable excuse, fails to comply with a specified requirement of the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6) In this section—

“benevolent fundraising” means soliciting or otherwise procuring money or promises of money for—

(a) the benefit of benevolent bodies or companies connected with them, or

(b) charitable, benevolent or philanthropic purposes,

“benevolent fundraisers” are—

(a) benevolent bodies and companies connected with them,

(b) persons concerned in the management or control of such bodies or companies,

(c) employees or agents of—

(i) such bodies or companies,

(ii) persons concerned in the management or control of such bodies or companies, and

(d) volunteers acting for or on behalf of such bodies or companies.

Public benevolent collections

83 Meaning of “public benevolent collection”

(1) This section applies for the interpretation of sections 84 to 91.

(2) “Public benevolent collection” means a collection from the public of money or promises of money (whether or not given by them for a consideration by way of goods or services) for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes taken—

(a) in a public place, or

(b) by means of visits to two or more houses or business premises.

(3) “Public place”, in relation to a public benevolent collection, means—

(a) any road (within the meaning of the Roads (Scotland) Act 1984 (c.54)), and
(b) any other place to which, at any time when the collection is taken, members of the public have access as of right or by virtue of express or implied permission and which—

(i) is not within a building, or

(ii) if within a building, is a public area within any station, airport or shopping precinct or is any other similar public area.

(4) But subsection (3)(b) does not apply to any place to which members of the public have access—

(a) only on payment or by ticket,

(b) only by virtue of permission given for the purpose of the collection in question.

(5) In relation to a public benevolent collection—

“business premises” means any premises used for business or other commercial purposes,

“house” includes any part of a building constituting a separate dwelling.

84 Regulation of public benevolent collections

(1) Where a public benevolent collection is held in the area of a local authority without the consent of the authority under section 85, the organiser of the collection is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

(2) Subsection (1) does not apply to a collection—

(a) by a designated national collector,

(b) which takes place in the course of a public meeting,

(c) which—

(i) takes place on land to which members of the public have access only by virtue of the express or implied permission of the occupier of the land (or, in relation to unoccupied land, the person entitled to occupy it), and

(ii) is organised by that person, or

(d) which takes place by means of an unattended receptacle in a public place.

85 Local authority consents

(1) An application for the consent of a local authority to the holding of a public benevolent collection must be made to the authority, in such form as the authority may determine, by the organiser of the collection—

(a) no earlier than 18 months, and

(b) no later than 2 months (or such shorter period as the organiser and the authority may agree),

before the proposed date of the collection.

(2) Before determining such an application, the local authority must consult the chief constable of the police force for the area and may make other inquiries.

(3) On such an application the local authority may—
(a) grant its consent (whether or not subject to conditions), or
(b) refuse its consent on any of the grounds set out in subsection (6).

(4) Where the application has been made not later than 2 months before the proposed date of the collection, the local authority must give the organiser notice of its decision on the application not later than 14 days before that date.

(5) The conditions which may be imposed in pursuance of subsection (3)(a) are such conditions as the local authority thinks fit having regard to the local circumstances in which the collection is to be held, including conditions—
(a) specifying the date, time or frequency of the collection,
(b) specifying where it may take place,
(c) regulating its conduct,
(d) as to the use by collectors of badges and certificates of authority of such type as may be specified in regulations made by the Scottish Ministers,
(e) specifying the form of collection boxes, other containers and any other articles which may be used for the purposes of the collection,
(f) as to any other matter relating to the local circumstances of the collection.

(6) The grounds of refusal referred to in subsection (3)(b) are—
(a) that the date, time or frequency of the collection, or that holding it at the proposed place, would cause undue public inconvenience,
(b) that another collection in respect of which consent under this section has been given by the authority or which is organised by a designated national collector is due to take place in the area of the authority on the same day or the day before or after that day,
(c) that it appears to the local authority that the amount likely to be applied for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes in consequence of the collection is inadequate having regard to the likely amount of the proceeds of the collection,
(d) where the local authority has requested the organiser of the collection to provide it with any supplementary information which it considers necessary for the purposes of determining the application, that the organiser has failed to comply with the request, and
(e) that the organiser of the collection has been convicted of—
(i) an offence under section 84(1), 89(3) or 90(3) of this Act, or
(ii) any other offence which involves dishonesty or the commission of which would be likely to be facilitated by the grant of consent under this section.

(7) Where a local authority has reason to believe that, since its consent was granted under this section, there has been a change in circumstances such that one or more of the grounds of refusal set out in subsection (6) applies in relation to the public benevolent collection, the authority may, not later than the day before the date of the collection—
(a) withdraw the consent, or
(b) vary the consent by making it subject to conditions or further conditions or varying any condition to which it is subject.
(8) Where a local authority has reason to believe that there has been, or is likely to be, a breach of any condition imposed on a consent under this section, it may, not later than the day before the date of the collection, withdraw the consent.

(9) A local authority must give the organiser of a public benevolent collection notice of a decision under this section—

(a) to grant consent subject to conditions,

(b) to refuse consent,

(c) to withdraw or vary a consent,

including the reasons for the authority’s decision and information about the organiser’s right of appeal under section 87.

(10) The Scottish Ministers may, by regulations, disapply the duty to consult under subsection (2) in relation to applications of such type as they may describe in the regulations.

86 Designated national collectors

(1) OSCR may specify criteria to be satisfied for the purposes of—

(a) obtaining, and

(b) retaining,

designation as a designated national collector under this section.

(2) Before specifying such criteria, OSCR must consult—

(a) such associations representing local authorities,

(b) such persons representing the interests of charities, and

(c) such other persons,

as it thinks fit.

(3) OSCR must publish any criteria specified under subsection (1).

(4) OSCR may designate as a designated national collector a charity which appears to it to satisfy such criteria as are for the time being specified under subsection (1)(a).

(5) OSCR may withdraw a designation under subsection (4) from a charity which appears to it not to satisfy such criteria as are for the time being specified under subsection (1)(b).

(6) Regulations under section 89 may make provision about the effect of the withdrawal of a designation in relation to public benevolent collections notice of which was, prior to the withdrawal, given under subsection (7).

(7) A designated national collector which proposes to hold a public benevolent collection in the area of a local authority must—

(a) no earlier than 18 months, and

(b) no later than 3 months,

before the proposed date of the collection, notify the authority of the proposal.

(8) The local authority may prohibit the public benevolent collection if it considers that the public benevolent collection would be likely to cause undue public inconvenience (by reason of it being held on the same date and at the same time and place as any other public benevolent collection or for any other reason).
A decision under subsection (8) must be made not later than one month after the date of the notification under subsection (7).

A local authority must give the designated national collector notice of a decision under subsection (8) including the reasons for the authority’s decision and information about the designated national collector’s rights of appeal under section 87.

87 Appeals

(1) The organiser of a public benevolent collection may, by summary application, appeal to the sheriff against a decision of a local authority under section 85—

(a) granting consent subject to conditions,

(b) refusing consent, or

(c) withdrawing or varying a consent.

(2) But no appeal is competent under subsection (1) against the decision of the local authority so far as the decision, or the reasons for it, relate to the date of the proposed collection.

(3) A designated national collector may, by summary application, appeal to the sheriff against a decision of a local authority under section 86(8).

(4) An appeal under this section must be lodged within 14 days of the date of receipt of the notice under section 85(9) or, as the case may be, 86(10).

(5) In upholding an appeal under this section the sheriff may quash the decision of the local authority and remit the case, together with reasons for the sheriff’s decision, to the authority for further consideration.

88 Application of funds

(1) This section applies where the court, on an application by OSCR, is satisfied that sums collected in a public benevolent collection by or on behalf of any person other than a charity cannot for any reason be applied for the purposes for which they were collected.

(2) The court may—

(a) order any person holding such sums not to part with them without the court’s consent,

(b) approve a scheme prepared by OSCR for the transfer of those sums to a charity specified in the scheme.

(3) The court may approve a scheme under subsection (2)(b) subject to modifications.

(4) In this section, “the court” means the sheriff.

89 Regulations relating to public benevolent collections

(1) The Scottish Ministers may, by regulations, make further provision for the purpose of regulating public benevolent collections.

(2) Such regulations may, in particular, include provision—

(a) about keeping and publishing accounts,

(b) for preventing public inconvenience,
(c) specifying particular provisions of the regulations breach of which is an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

90 Collection of goods

(1) The Scottish Ministers may, by regulations, make provision about the collection from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

(2) Those regulations may, in particular, include provision—

(a) requiring the organiser of such a collection to notify the local authority for the area in which it is proposed that the collection be carried out,

(b) allowing or requiring the local authority, in such circumstances as may be specified in the regulations, to prohibit the carrying out of such a collection,

(c) about the dates, times and places at which, and the frequency with which, such collections may be carried out,

(d) about keeping and publishing reports on those collections,

(e) for preventing public inconvenience,

(f) specifying particular provisions of the regulations breach of which is to be an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

91 Guidance on collections

Local authorities must have regard to any guidance issued by OSCR about the exercise of their functions in relation to—

(a) public benevolent collections, or

(b) collections from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

PART 3

INVESTMENT POWERS OF TRUSTEES

92 Extension of general powers of trustees

(1) Section 4 (general powers of trustees) of the Trusts (Scotland) Act 1921 (c.58) is amended as follows.

(2) In subsection (1)—

(a) after paragraph (e) insert—

“(ea) To make any kind of investment of the trust estate (including an investment in heritable property).
(eb) To acquire heritable property for any other reason.”,

(b) paragraph (ee) is repealed.

(3) After subsection (1) insert—

“(1A) The power to act under subsection (1)(ea) or (eb) above is subject to any restriction or exclusion imposed by or under any enactment.

(1B) The power to act under subsection (1)(ea) or (eb) above is not conferred on any trustees who are—

(a) the trustees of a pension scheme,

(b) the trustees of an authorised unit trust, or

(c) trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate.

(1C) No term relating to the powers of a trustee contained in a trust deed executed before 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1D) No term restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 (c.62) contained in a trust deed executed on or after 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1E) The reference in subsection (1D) above to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and “trust deed” shall be construed accordingly.

(1F) In this section—

“authorised unit trust” means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 (c.8) is in force,

“enactment” has the same meaning as in the Scotland Act 1998 (c.46),

“pension scheme” means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust and subject to the law of Scotland.”

93 Exercise of power of investment

After section 4 of the Trusts (Scotland) Act 1921 (c.58) insert—

“4A Exercise of power of investment: duties of trustee

(1) Before exercising the power of investment under section 4(1)(ea) of this Act, a trustee shall have regard to—

(a) the suitability to the trust of the proposed investment, and

(b) the need for diversification of investments.

(2) Before exercising that power of investment, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about the way in which the power should be exercised.
(3) When reviewing the investments of the trust, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about whether the investments should be varied.

(4) If a trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to obtain such advice, the trustee need not obtain it.

(5) In this section, “proper advice” means the advice of a person who is reasonably believed by the trustee to be qualified by the person’s ability and practical experience of financial and other matters relating to the proposed investment.”

94 Power to amend enactments

(1) The Scottish Ministers may by order make such amendments of—

(a) any local, personal or private Act of Parliament,

(b) any other Act of Parliament or Act of the Scottish Parliament,

as appear to them appropriate in consequence of or in connection with sections 92 and 93.

(2) Before making an order under subsection (1)(a) the Scottish Ministers must consult any person who appears to them to be affected by any proposed amendment.

(3) Schedule 3 makes amendments consequential on those sections.

PART 4

GENERAL AND SUPPLEMENTARY

95 Financial assistance for benevolent bodies

(1) The Scottish Ministers may make such payments as they think fit to—

(a) any benevolent body, in connection with its activities,

(b) any person, in connection with anything done by that person with a view to enabling one or more benevolent bodies, benevolent bodies of a particular type or benevolent bodies generally to implement their purposes to better effect.

(2) Such payments may include payments in relation to the costs of establishing, dissolving or winding up a benevolent body.

(3) A payment under subsection (1) may be made by way of grant, loan or otherwise.

(4) A payment under subsection (1) may be made subject to conditions, including conditions requiring repayment in specified circumstances.

(5) No payment may be made under subsection (1) to a local authority or any other public body or office-holder.

(6) The power to make a payment under subsection (1) may be exercised whether or not there is power to make the payment under any other enactment.

96 Rate relief for registered community amateur sports clubs

(1) Section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9) is amended as follows.
In subsection (2)—

(a) for the word “or” which follows paragraph (a) substitute—

“(aa) are occupied by a registered community amateur sports club and are wholly or mainly used for the purposes of that club (or for the purposes of that and of other clubs which are, or are entitled to be registered as, such clubs);”,

(b) for “either paragraph (a) or paragraph (b)” substitute “any of paragraphs (a), (aa) and (b)”.

In subsection (5), for “paragraph (a), (b) or (c)” substitute “any of paragraphs (a) to (c)”.

In subsection (10), after paragraph (b) insert—

“(c) “registered community amateur sports club” means a registered club for the purposes of Schedule 18 to the Finance Act 2002 (c.23); and the period during which a club is a registered club for those purposes is to be taken to begin with the date on which its registration takes effect and end on the date with effect from which its registration is terminated (whether or not it is registered, or its registration is terminated, with retrospective effect).”

After subsection (12) insert—

“(13) The amendments to this section made by section 96 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00) (which extend mandatory relief to, and allow discretionary relief to be given to, registered community amateur sports clubs) have effect only as respects the year 2006-7 and subsequent years.”

97 Transitional arrangements

OSCR must enter in the Register each body which was, immediately prior to the commencement of paragraph 5(a)(ii) of Schedule 4 to this Act, entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

The Scottish Ministers may, by order, make such further transitional, transitory or savings provision as they consider necessary or expedient for the purposes or in consequence of this Act.

Such an order may in particular—

(a) provide that a body specified in the order, or a body of such type as may be so specified, may, despite not being entered in the Register, refer to itself as a “charity” for such period as may be so specified,

(b) require each body entered in the Register to provide OSCR, within such period as may be so specified, with such documents, information or explanations as may be so specified,

(c) disapply any provision of this Act in relation to any body entered in the Register by virtue of subsection (1) for such period as may be so specified.

98 Notices, applications etc.

In this section, “formal communication” means—
(a) any notice, notification, direction or consent given, or
(b) any request for review, proposal, application (other than an application to a court)
or decision made,
under or for the purposes of this Act.

(2) A formal communication must be made in writing.

(3) A formal communication which is sent by electronic means is to be treated as being in
writing if it is received in a form which is legible and capable of being used for
subsequent reference.

(4) A formal communication is given to or made to a person if it is—

(a) delivered to the person,
(b) sent by post in a prepaid registered letter, or by the recorded delivery service,
addressed—

(i) where the person is a charity, to the charity at the principal office set out in
its entry in the Register or to the charity trustee whose name is so set out at
the address so set out,
(ii) where the person is an incorporated company or body (other than a
charity), to the secretary, chief clerk or chief executive of the company or
body at its registered or principal office,
(iii) where the person is a public office-holder, to the office-holder at the office-
holder’s principal office,
(iv) in any other case, to the person at that person’s usual or last known place of
abode, or
(c) sent to the person in some other manner (including by electronic means) which the
sender considers likely to cause it to be delivered on the same or next day.

(5) Where a charity’s entry in the Register does not, because of subsection (4) of section 3,
include the information specified in subsection (3)(b) of that section, a formal
communication may also be given to or made to the charity if it is sent by post in a
prepaid registered letter, or by the recorded delivery service, addressed—

(a) to the charity care of OSCR, or
(b) where OSCR is the sender—

(i) to the charity at its principal office, or
(ii) to the charity trustee whose name is, because of section 3(4), excluded
from the Register at the address which is so excluded.

(6) A formal communication sent under subsection (4)(c) is, unless the contrary is proved,
to be deemed to be delivered on the next working day which follows the day on which it
is sent.

(7) In subsection (6), “working day” means any day other than a Saturday, a Sunday or a
day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday
in Scotland.

99 Offences by bodies corporate etc.

(1) Where an offence under this Act committed—
(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
   (i) is a director, manager or secretary of the body corporate, or
   (ii) purports to act in any such capacity,

(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
   (i) is a partner, or
   (ii) purports to act in that capacity,

(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—
   (i) is concerned in the management or control of the association, or
   (ii) purports to act in the capacity of a person so concerned,

the individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body corporate.

100 Ancillary provision

The Scottish Ministers may by order—

(a) modify any enactment for the purposes of preventing a body established by enactment from failing the charity test by reason of section 7(3)(b),

(b) make such other incidental, supplemental or consequential provision as they consider necessary or expedient for the purposes or in consequence of this Act.

101 Orders, regulations and rules

(1) Any power of the Scottish Ministers under this Act to make orders, regulations or rules is exercisable by statutory instrument.

(2) Any such power includes power to make—

   (a) such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

   (b) different provision for different purposes.

(3) An order under section 100 may modify any enactment, instrument or document.

(4) A statutory instrument containing an order, regulations or rules under this Act except—

   (a) regulations under section 63(d),

   (b) where subsection (5) applies, an order under section 94 or 100,

   (c) an order under section 104(2),

is subject to annulment in pursuance of a resolution of the Scottish Parliament.
(5) No—

(a) regulations made by virtue of section 63(d), or

(b) order under section 94 or 100 containing provisions which add to, replace or omit any part of the text of an Act,

may be made unless a draft of the statutory instrument containing the regulations or, as the case may be, order has been laid before, and approved by resolution of, the Parliament.

102 Minor and consequential amendments and repeals

Schedule 4 sets out minor amendments and amendments and repeals consequential on the provisions of this Act.

103 General interpretation

In this Act, unless the context otherwise requires—

“applicant” has the meaning given in section 4(a),

“benevolent body” has the meaning given in section 78,

“charitable purposes” means the purposes set out in section 7(2),

“charity” means a body entered in the Register,

“charity test” is to be construed in accordance with section 7,

“charity trustees”—

(a) in relation to a charity which is a body corporate (other than a SCIO) means—

(i) its directors,

(ii) where the charity is managed by its members, its members (or, where a committee or group manage the charity, the members of that committee or group),

(b) in relation to a charity which is a body of trustees, means its trustees,

(c) in relation to a charity which is an unincorporated association, means each of the persons in accordance with whose directions or instructions the managers of the charity’s affairs (whether or not the same persons) are accustomed to act,

(d) in relation to a SCIO, has the meaning given in section 50(2)(b),

“constitution”—

(a) in relation to a charity or other body established under the Companies Acts, means its memorandum and articles of association,

(b) in relation to a charity or other body which is a body of trustees, means the trust deed,

(c) in relation to a SCIO, has the meaning given in section 50,

(d) in relation to a charity or other body established by enactment, means the enactment which establishes it and states its purposes,
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(e) in relation to charity or other body established by a Royal charter or warrant, means the Royal charter or warrant, and

(f) in the case of any other charity or body, means the instrument which establishes it and states its purposes,

“designated national collector” means a charity designated as such under section 86(4),

“designated religious charity” means a charity designated as such under section 64(1),

“equal opportunities” and “equal opportunity requirements” have the meaning given in Section L2 of Part 2 of Schedule 5 to the Scotland Act 1998 (c.46),

“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),

“misconduct” includes mismanagement,

“OSCR” means the Office of the Scottish Charity Regulator,

“the Panel” mean a Scottish Charity Appeals Panel constituted in accordance with section 74(1) of this Act,

“the Register” means the Scottish Charity Register,

“relevant financial institution” means—

(a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 (c.8) to accept deposits,

(b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits,

and this definition must be read with section 22 of and Schedule 2 to that Act and any relevant order under that section,

“reorganisation scheme” has the meaning given in section 43(3) and references to “approved reorganisation schemes” are references to schemes approved under section 40 or 41,

“SCIO” has the meaning given in section 49.

104 Short title and commencement

(1) This Act may be cited as the Charities and Trustee Investment (Scotland) Act 2005.

(2) This Act (except sections 97, 100 and 101 and this section) comes into force on such day as the Scottish Ministers may by order appoint.
SCHEDULE 1
(introduced by section 1)

OFFICE OF THE SCOTTISH CHARITY REGULATOR

Membership

1 (1) OSCR is to consist of such number of members (but not fewer than 4) as the Scottish Ministers think fit.

(2) It is for the Scottish Ministers to appoint those members from amongst those persons appearing to them to have knowledge and skills relevant to the functions of OSCR.

(3) An individual is disqualified from appointment as, and from being, a member of OSCR if the individual is—
   (a) a member of the Scottish Parliament,
   (b) a member of the House of Commons,
   (c) a member of the European Parliament,
   (d) an office-holder in the Scottish Administration,
   (e) an individual of such other description as may be prescribed by order by the Scottish Ministers.

Tenure and removal from office

2 (1) Each member of OSCR—
   (a) is to be appointed for such period as is specified in the appointment,
   (b) may, by notice to the Scottish Ministers, resign as a member,
   (c) in other respects, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
   (d) after ceasing to hold office, may be reappointed as a member.

(2) The Scottish Ministers may remove a member from office if satisfied—
   (a) that the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract,
   (b) that the member—
      (i) has been absent from meetings of OSCR for a period longer than 6 consecutive months without the permission of OSCR, or
      (ii) is unable to discharge the member’s functions as a member or is unsuitable to continue as a member, or
   (c) that it is necessary or expedient to do so in connection with the management of the affairs of OSCR.

Chairing

3 (1) The Scottish Ministers must appoint—
   (a) one of the members of OSCR to chair OSCR, and
(b) another of those members to act as deputy to that member.

(2) A member appointed to chair OSCR or to act as deputy to that member holds and vacates office as such in accordance with the terms of the appointment to that office.

(3) A member so appointed may, by notice to the Scottish Ministers, resign from office as such.

(4) A member so appointed vacates office as such on ceasing to be a member of OSCR.

(5) Where a member—
(a) is appointed to chair OSCR or to act as deputy to that member, or
(b) ceases to hold office as such,
the Scottish Ministers may vary the terms of the member’s appointment as a member of OSCR so as to alter the date on which office as a member is to be vacated.

Chief executive and other staff

4 (1) OSCR—
(a) must appoint a chief executive, and
(b) may appoint such other employees as it considers appropriate.

(2) The terms and conditions of the chief executive and any other employees, and the number of any other employees, require the approval of the Scottish Ministers.

Proceedings

5 The quorum of OSCR and the arrangements for its meetings are for OSCR to determine.

Delegation of powers

6 (1) Anything authorised or required under any enactment to be done by OSCR may be done by any member or employee of OSCR who is authorised (whether generally or specifically) for the purpose by it.

(2) Nothing in sub-paragraph (1) prevents OSCR from doing anything that any of its members or employees has been authorised or required to do.

Validity of proceedings and acts

7 The validity of any proceedings or acts of OSCR is not affected by any—
(a) vacancy in its membership, or
(b) defect in the appointment of a member.
SCHEDULE 2
(introduced by section 74)

SCOTTISH CHARITY APPEALS PANEL

Panel members

1 (1) The Scottish Ministers must appoint such number of persons as they think fit to be eligible (for such period, not exceeding 5 years, as the Scottish Ministers may specify) to serve as members of a Panel constituted under section 74(1).

(2) At least one of the persons so appointed must be, and have been for at least 5 years—
   (a) a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46), or
   (b) an advocate.

(3) An individual is disqualified from being so appointed, and from being appointed as or being a Panel member, if the individual is—
   (a) a Lord of Appeal in Ordinary or holds any of the judicial offices specified in Part 1 of schedule 1 to the House of Commons Disqualification Act 1975 (c.24),
   (b) a member of the Scottish Parliament,
   (c) an office-holder in the Scottish Administration,
   (d) an individual of such other description as may be prescribed by order by the Scottish Ministers.

4 Each Panel is to consist of 3 of the persons appointed under paragraph 1(1) (one of whom is to be appointed by the Scottish Ministers to chair the Panel).

5 A person appointed to chair a Panel must fall within paragraph 1(2).

Tenure and removal from office

2 (1) Each person appointed under paragraph 1(1)—
   (a) is to be appointed for such period as is specified in the appointment,
   (b) if appointed to serve as a Panel member, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
   (c) may, by notice to the Scottish Ministers, resign from being eligible to be, or from being, a Panel member,
   (d) after ceasing to be eligible to serve as a Panel member, may be reappointed as a person eligible to serve as a Panel member.

(2) A person appointed under paragraph 1(1) ceases to be eligible to serve as, and may not be, a Panel member if the Scottish Ministers are satisfied that the person is unable to discharge the functions of a Panel member or is unsuitable to serve, or to continue to serve, as a Panel member.
Staff, property and services

3 The Scottish Ministers may provide the Panel, or ensure that it is provided, with such property, staff and services as they consider necessary or expedient in connection with the exercise of its functions.

Rules of procedure

4 (1) The Scottish Ministers may make rules as to the practice and procedure of the Panel.

(2) Such rules may, in particular, include provision for or in connection with—

(a) the form and manner in which appeals to the Panel are to be made,

(b) the time within which such appeals are to be made,

(c) the lodging of documents before the Panel,

(d) the notification of matters specified in the rules to OSCR and any appellant,

(e) the periods within which proceedings must be held and decided on,

(f) the notification of the Panel’s decisions to OSCR and appellants,

(g) the time within which a decision of the Panel may be appealed to the Court of Session.

SCHEDULE 3
(introduced by section 94)

POWERS OF TRUSTEES: CONSEQUENTIAL AMENDMENTS

Judicial Factors Act 1849 (c.51)

1 In section 5 (judicial factor’s duty to lodge in bank money held by factor etc.) of the Judicial Factors Act 1849, subsection (4) is repealed.

Trusts (Scotland) Act 1921 (c.58)

2 In the Trusts (Scotland) Act 1921, sections 12 and 14 are repealed.

Trusts (Scotland) Act 1961 (c.57)

3 In section 2(1) (validity of certain transactions by trustees etc.) of the Trusts (Scotland) Act 1961—

(a) for “(ee)” substitute “(eb)”,

(b) in the proviso, after “transaction” where it first occurs insert “(other than a transaction such as is specified in paragraph (ea) of that subsection)’’.

Trustee Investments Act 1961 (c.62)

4 (1) The Trustee Investments Act 1961 is amended as follows.

(2) Sections 1, 2, 5, 6, 12, 13 and 15 are repealed except in so far as they are applied by or under any other enactment.
(3) Section 3 and Schedules 2 and 3 are repealed, except in so far as they relate to a trustee having a power of investment conferred under an enactment—
   (a) which was passed before the passing of the Trustee Investments Act 1961, and
   (b) which is not amended by this schedule.

(4) Section 8 and paragraph 1(2) of Schedule 4 are repealed.

National Health Service (Scotland) Act 1978 (c.29)

5 In Schedule 7 (the Research Trust) to the National Health Service (Scotland) Act 1978, paragraph 4 is repealed.

Education (Scotland) Act 1980 (c.44)

6 In section 105 (schemes for reorganisation of educational endowments) of the Education (Scotland) Act 1980, subsection (4D) is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73)

7 Section 54 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

8 In Schedule 8 (amendments of enactments) to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in paragraph 21, sub-paragraph (1)(b) and the preceding “and” are repealed.

Charities Act 1993 (c.10)

9 In the Charities Act 1993, the following provisions are repealed—
   sections 70 and 71,
   in section 86(2), the word “70” in paragraph (a), and paragraph (b),
   section 100(5).

SCHEDULE 4
(introduced by section 102)

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

PART 1

ACTS

Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9)

1 In section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962, for paragraph (a) of subsection (10) substitute—
“(a) “charity” means a body entered in the Scottish Charity Register,”.

Sex Discrimination Act 1975 (c.65)

2 In section 79(1) of the Sex Discrimination Act 1975—
   (a) for “Part IV” substitute “section 104”;
   (b) after paragraph (a), insert—

   “(aa) in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00),”;
   (c) in paragraph (b), after “endowment”, where second occurring, insert “(or which would, but for the disapplication of that section by section 122(4) of that Act, be so dealt with)”.

Education (Scotland) Act 1980 (c.44)

3 In section 122(1) of the Education (Scotland) Act 1980, for the definition of “charitable purposes” substitute—

   ““charitable purposes” has the same meaning as in the Charities and Trustee Investment (Scotland) Act 2005 (asp 00);”

Civic Government (Scotland) Act 1982 (c.45)

4 In the Civic Government (Scotland) Act 1982—
   (a) in section 24(3), for paragraph (c) substitute—

   “(c) the business of a charity (that is to say, a body which is entered in the Scottish Charity Register);”,
   (b) in section 39(3)(f), for the words from “charitable” to the end of that paragraph substitute “benevolent collection (within the meaning of section 83 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)).”,
   (c) section 119 (regulation of charitable collections) is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

5 In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990—
   (a) in section 1—

   (i) subsections (4) to (6), and
   (ii) the words which follow paragraph (b) in subsection (7), are repealed,
   (b) sections 2 to 8, 12 to 14 and 15(1) to (8) are repealed,
   (c) in section 9(1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

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Schedule 4—Minor and consequential amendments and repeals

Part 1—Acts

(d) in section 10—

(i) in subsection (1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

(ii) subsections (6), (9)(b) and (11)(b) are repealed,

5 (e) in section 15(9)—

(i) after “affect” insert “—

(a)”,

(ii) at the end insert “; or

(b) any body entered in the Scottish Charity Register.”

10 Charities Act 1992 (c.41)

6 In Schedule 6 to the Charities Act 1992, paragraph 10 is repealed.

Further and Higher Education (Scotland) Act 1992 (c.37)

7 In section 19(3) of the Further and Higher Education (Scotland) Act 1992, for “within the meaning of the Income Tax Acts” substitute “(within the meaning of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

15 Tribunals and Inquiries Act 1992 (c.53)

8 In Part 2 of Schedule 1 to the Tribunals and Inquiries Act 1992, after paragraph 47 insert—

“Charities

47A Any Scottish Charity Appeals Panel constituted in accordance with section 74(1) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”

Local Government etc. (Scotland) Act 1994 (c.39)

9 In Schedule 13 to the Local Government etc. (Scotland) Act 1994, paragraph 129(16) is repealed.

25 Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

10 In schedule 3 to the Ethical Standards in Public Life etc. (Scotland) Act 2000, before the entry relating to “The Parole Board for Scotland” insert—

“The Office of the Scottish Charity Regulator”.

Land Reform (Scotland) Act 2003 (asp 2)

11 In the Land Reform (Scotland) Act 2003—

(a) in section 34(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”,
(b) in section 71(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

12 In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, before the entry relating to the “Parole Board for Scotland” insert—

“The Office of the Scottish Charity Regulator”.

Protection of Children (Scotland) Act 2003 (asp 5)

13 In paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003, for the definition of “charity” substitute—

“charity” means a body entered in the Scottish Charity Register;”.

PART 2

SUBORDINATE LEGISLATION

Arable Area Payments Regulations 1996 (S.I. 1996/3142)

14 In regulation 9(3)(h) of the Arable Area Payments Regulations 1996, for the words from “a”, where it second occurs, to the end of the paragraph substitute “, in relation to Scotland, a body entered in the Scottish Charity Register”.

Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002 (S.S.I 2002/167)

15 In regulation 2(1) of the Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002, in paragraph (i) of the definition of “net annual income”, for the words from “Scottish” to “1990” substitute “body entered in the Scottish Charity Register”.

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004 (S.S.I. 2004/115)

16 In the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 5(2)(k)(i), and

(b) paragraph 101(2)(m)(i) of schedule 5,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 (S.S.I. 2004/116)

17 In the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—
(a) regulation 3(2)(k)(i),

(b) paragraph 66(3)(l)(i) of schedule 1,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”. 


Charities and Trustee Investment (Scotland) Bill
[AS INTRODUCED]

An Act of the Scottish Parliament to make provision about charities and other benevolent bodies; to make provision about fundraising in connection with charities and other benevolent bodies; to amend the law in relation to the investment powers of trustees; and for connected purposes.

Introduced by: Malcolm Chisholm
On: 15 November 2004
Supported by: Johann Lamont, Hugh Henry
Bill type: Executive Bill
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

EXPLANATORY NOTES

(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, the following documents are published to accompany the Charities and Trustee Investment (Scotland) Bill introduced in the Scottish Parliament on 15 November 2004:

- Explanatory Notes;
- a Financial Memorandum;
- an Executive Statement on legislative competence; and
- the Presiding Officer’s Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 32–PM.
INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is in 4 Parts.

5. These are:
   - Part 1 – Charities
   - Part 2 – Fundraising for benevolent bodies
   - Part 3 – Investment powers of trustees
   - Part 4 – General and supplementary.

6. Commentary explaining the provisions introduced by each Part is provided below.

COMMENTARY ON PARTS

PART 1: CHARITIES

Chapter 1 – Office of the Scottish Charity Regulator

7. Section 1 establishes the Office of the Scottish Charity Regulator (OSCR) as a body corporate and sets out its general functions. These are to determine charitable status, keep a public register of charities, encourage and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary. Schedule 1 deals with the detailed membership arrangements for OSCR, with paragraphs 2 and 3 providing for OSCR’s members and the chair and deputy being appointed by the Scottish Ministers (after normal public appointment procedures). Certain categories of person are disqualified from being members (e.g. MSPs, MPs, MEPs, office holders of the Scottish Administration or others which may be prescribed by an Order made by the Scottish Ministers). The terms and conditions (including remuneration and allowances) of OSCR members may be determined by the Scottish Ministers. Paragraph 5 allows OSCR to appoint a chief executive and other employees, under terms and conditions which require the Scottish Ministers’ approval. Although not covered by the Bill, it is intended that OSCR will become a non-Ministerial office holder of the Scottish Administration (i.e. a non-Ministerial department) and that the employees will be civil servants.
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

The formal mechanism for this will be by a section 104 order made by Westminster under the Scotland Act 1998, following enactment of this Bill.

8. **Section 2** stipulates that OSCR must prepare and publish an annual report on the exercise of its functions, send a copy to the Scottish Ministers and lay a copy before the Scottish Parliament.

**Chapter 2 – Scottish Charity Register**

9. **Section 3** provides that OSCR must keep a public register of charities, reviewing it from time to time, and keeping it up to date. The section specifies certain information that the register must contain for each charity. This mandatory information is:
   - the name of the charity;
   - the principal office or the name and address of one of the charity trustees (unless, under subsection (4), OSCR is satisfied it is necessary to protect an individual or the charity’s premises);
   - the charity’s purposes; and
   - certain other information (including whether it is a designated religious charity or national collector).

10. In addition the register must include the dates of any directions or notices under the Bill that have been given to the charity by OSCR until the direction or notice has been complied with, when it is to be removed.

11. The Scottish Ministers may (under **section 3(3)(f)**) make regulations to add to the mandatory information to be held on the register and OSCR may also decide (subsection 3(g)) to include other information if it sees fit.

12. **Section 4** sets out the information that must be provided to OSCR by an applicant wishing to be entered on the register. This information includes the information required to be shown on the register and also a statement of the applicant’s purposes, constitution and the most recent statement of account (if there is one). As a result of section 5 the register will only hold details of organisations that OSCR considers meet the charity test (see below) and do not have inappropriate names. The Scottish Ministers may make regulations (section 6) to set out further details relating to the form of application for the register and the process by which OSCR will determine applications.

**The charity test**

13. **Section 7** sets out the charity test that must be satisfied by every body on the register. The test consists of two parts: the purposes of the body must be exclusively charitable and it must provide public benefit, either in Scotland or elsewhere. Unlike in the previous charity definition, none of the charitable purposes are assumed to provide public benefit. In addition, the body must be non-property-distributing, free from third party control, and non-political.

14. The charitable purposes listed in **section 7(2)** are:
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health;
- advancement of civic responsibility or community development;
- advancement of the arts, heritage, culture or science;
- advancement of amateur sport;
- advancement of human rights, conflict resolution or reconciliation;
- advancement of environmental protection or improvement;
- provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage;
- provision of care to the aged, people with a disability, young people or children;
- advancement of animal welfare; or
- any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Public benefit

15. **Section 8** sets out certain criteria to which OSCR and the courts must have regard when determining whether a body provides public benefit. The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body’s functions compared to the benefit to the public. The second criterion covers the extent to which any condition restricting persons from obtaining the benefits from a body’s functions may be unduly restrictive if only a section of the public can receive those benefits.

16. **Section 9** gives OSCR a statutory duty to issue guidance, following consultation, on how it determines whether a body meets the charity test.

Charity names and status

17. **Section 10** sets out the circumstances when a charity’s name may be considered to be objectionable. These are to ensure that a charity’s name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.

18. Under **section 11** a charity must inform OSCR at least 42 days before it wishes to change its name, and unless OSCR directs the charity not to do so within 28 days, permission is deemed to have been granted. OSCR may refuse to the change only if it considers the proposed name falls within the circumstances describes in section 10 as objectionable.

19. If a charity considers that another charity has a name too similar to its own, it can ask OSCR to review the names (**section 12**). If satisfied that there may be confusion, OSCR must
direct either or both of the charities to change its name and must remove from the register a charity which refuses.

References to charitable status

20. **Section 13** places restrictions on the way that bodies may use the term “charity” to describe themselves in order to protect the charity brand and attempt to avoid confusion for the public. Under **section 13(1)**, only bodies entered in the Scottish Charity Register (“the Register”) may refer to themselves as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”. Bodies registered elsewhere, such as with the Charity Commission in England and Wales often currently refer to themselves as “registered charities”, but under this Bill they will not be able to do this in Scotland unless they are also registered with OSCR or specifically note that they are “registered in England and Wales” or “with the Charity Commission”.

21. Under **section 13(2)**, bodies on the Register which are established under the law of Scotland, or are managed or controlled in Scotland may use the terms “Scottish Charity” or “registered Scottish charity” to describe themselves. This provision aims to distinguish those charities which are directly registered with OSCR and based in Scotland from those which may be based elsewhere but also operate here.

22. A large number of “foreign” charities (i.e. registered outside Scotland) may only have relatively minor operations in Scotland, such as sending a newsletter or information to Scottish members, awarding a grant to a body in Scotland or merely advertising in a newspaper which may also be seen in Scotland. Under **section 14**, as long as they are registered elsewhere, do not occupy premises or carry out activities in an office, shop etc. in Scotland, these bodies may operate in Scotland using the term “charity” without having to register with OSCR only if they also refer to the territory where they are registered as charities. Hence such a body might, for example, refer to itself factually as a “charity registered in England and Wales” a “French charity” or a “charity recognised by the Inland Revenue” in Northern Ireland.

23. It is intended that all charities will have to clearly label their main documents to show that they are a charity and are registered (with names as set out above). Section 15 confers powers on the Scottish Ministers to make regulations requiring this and setting the detailed provisions about which documents must state a charity’s name etc. This will allow the Scottish Ministers to vary the documents to be labelled over time as different forms of communication or finance are introduced. Initially it is expected that charities will have to label documents such as cheques, credit cards and annual reports, headed notepaper, raffle tickets and other advertising material etc.

Changes

24. Many changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity’s status on the Scottish Charity Register. **Section 16** lists those changes requiring OSCR’s consent as amending the charitable purposes in its constitution, amalgamating with another body, winding up or dissolving. If the change is to amend its purposes, the charity must give OSCR 42 days notice of the proposed change and may not carry out the change without OSCR’s consent. For the other
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changes, unless OSCR is willing to consent to the changes it must, within 28 days of being informed of the charity’s proposals, either refuse consent to the change or direct the charity not to make the change for a set period (up to 6 months) whilst it makes a determination. If neither of these actions is taken, OSCR is considered to have consented to the proposal.

25. Several other types of change which a charity may wish to make to its organisation may be made without OSCR’s consent (section 17), but the charity must inform OSCR within 3 months of the action being taken. These changes include: a change to the charity’s principal office or name of charity trustee specified on the register, other changes to details on the register, changes to its constitution (apart from its purposes), any amalgamations, winding up or dissolving actions taken by the charity (following OSCR’s agreement). Similarly OSCR must be informed of changes within 1 month following orders by the court to wind up or put the charity into administration or appoint a receiver.

Removal from the Register

26. Section 18 requires OSCR to remove a charity from the Scottish Charity Register within 28 days of receiving an application from the charity itself requesting this, and to confirm in a notice that this has been done.

27. Under section 30(1), one of the options available to OSCR upon completion of inquiries about a charity is that it may remove a charity from the register if it is satisfied that the charity no longer meets the charity test. If OSCR, following inquiries into a charity, gives a direction to the charity to take certain steps, but the charity fails to comply, OSCR must remove the charity from the register.

28. However, even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively “locked” for charitable uses. Section 19 protects such assets, ensuring that several provisions of the Bill continue to apply to them, despite the charity’s removal from the register. The following provisions continue to apply:

- Sections 28 and 29: power of OSCR to make inquiries about charities (i.e. the body holding the protected assets), and to obtain documents and information;
- Sections 31(1) to (3), and (5) to (9): powers of OSCR following inquiries;
- Section 32: notices and directions under section 31;
- Section 33(2) to (4): reports on inquiries;
- Section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b): Powers of Court of Session;
- Section 35(1), (2) and (4): transfer schemes to allow OSCR to transfer assets from the ex-charity to be used by another charity or body;
- Section 37: on charging expenses for a transfer scheme; and
- Chapter 6: sections 45 and 46 on charity accounts.
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29. These provisions allow OSCR to continue to oversee the use of the locked assets even though the body holding them is no longer a charity. It can investigate and take action if required. It can ensure that the body continues to prepare accounts showing how the assets are being used.

30. Under section 19(4), OSCR may apply to the Court of Session for a scheme to transfer the locked assets of a charity removed from the register to another charity. A transfer scheme may only be approved if the Court is satisfied that it is needed to protect the assets or secure their proper application for the original purposes, and that such a transfer is the better way for this to be achieved. Section 19(8) allows the Scottish Ministers to exclude certain assets which they consider to be of national importance from this section. The Scottish Ministers would have to have made an order specifying either items or types of property or property owned by particular persons which come under this description. This would, for instance, allow the Scottish Ministers to ensure that national assets owned by a charity removed from the Register could not be transferred to other bodies, potentially being lost to the nation.

Chapter 3 – Co-operation and information

Co-operation

31. Section 20 provides a statutory duty for OSCR to seek to secure co-operation with other relevant regulators, which are defined in subsection 2 as public bodies or office-holders with functions that are similar to those of OSCR, or conferred on them to allow them to regulate persons for other purposes. This provision is intended to ensure that where possible the burden of dual or multiple regulation on the same body by several regulators is minimised.

32. Subsection (3) requires OSCR and any other regulator which has been authorised (under section 38(2)) to carry out OSCR’s functions to co-operate with each other so far as is consistent with their proper functions.

33. Subsection (4) emphasises that there is no requirement for either party co-operating in relation to this section to share information with anyone that they are prevented from disclosing by any other law. Hence no information that is restricted from disclosure by the Data Protection Act may be disclosed by one regulator to another.

Public access to Register

34. Section 21 requires OSCR to make the Scottish Charity Register available for public inspection. It is expected that OSCR will use its web-site to make the register widely and freely available and to publicise its arrangements, but it will also be available, free, at the OSCR principal offices and otherwise as it thinks fit. This may, for instance, mean providing information from the register in Braille, large-print or other medium as requested. OSCR may also charge a fee, limited to the cost of supply, for preparing information if this is provided by alternative means or in other places.
Power of OSCR to obtain documents and information

35. Under section 22 OSCR may require, by notice, any charity to provide it with documents or information which it requires for the charity register, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session.

Entitlement to be given information by charities

36. Under section 23 a charity must provide to any person who makes a reasonable request, a copy of its constitution or latest statement of accounts (in what ever reasonable format that it is requested). The charity may charge a fee, limited to the lesser of the cost of supply or a maximum fee that the Scottish Ministers may set out in an order. However, the Scottish Ministers may make an order that exempts charities from this duty (section 23(3)).

Sharing information

37. Section 24 sets out provisions to allow OSCR to disclose information to other public bodies or officeholders (e.g. regulators) and for them to disclose information to OSCR for purposes connected with their functions. Subsection (1) permits OSCR to disclose information to any public body or office holder. Subsections (2) and (3) allow several Scottish public bodies to disclose information to OSCR to assist it in its functions. Such disclosure is subject to any obligations as to secrecy or other restriction on disclosure of information however imposed (section 25(1)).

38. Section 25 allows the Scottish Ministers to designate any public body or officeholder, whether in Scotland or not, such that OSCR may provide information to them (subsection (3)(a)) or may designate any Scottish public authority to allow it disclose information to OSCR (subsection (3)(b)), without any obligation as to secrecy or other restriction on disclosure of information. This section also removes restrictions on disclosing information to OSCR by a charity trustee, independent examiner or auditor of a charity’s accounts. Under section 26, it is an offence (with a penalty set at level 5 (currently £5000) or imprisonment up to 6 months on summary conviction) to provide false or misleading information to OSCR knowingly or to alter, conceal or destroy it deliberately.

Chapter 4 – Supervision of charities

Inquiries about charities etc.

39. Section 28 gives powers to OSCR to make inquiries about charities, other bodies or a person appearing to represent themselves as, or as acting for, a charity, for either general or particular purposes. Under subsection (2), OSCR may direct a person or body in regard to its inquiries, not to undertake specified activities for a period of up to 6 months. Subsection 5 provides that it is an offence to fail to comply with such a direction without reasonable excuse and subsection (5) sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

Power of OSCR to obtain information for inquiries

40. Under section 29, OSCR may require, by notice, any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled
to refuse on the grounds of confidentiality in the Court of Session. **Subsection (4)** prevents OSCR from disclosing any information or explanation obtained under this section except for the purposes of its inquiries. **Subsection (5)** allows OSCR to pay a person expenses reasonably incurred in providing information under subsection 1. **Subsection (6)** provides that it is an offence to fail to comply with a notice without reasonable excuse and sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

**Powers of OSCR where a charity no longer meets charity test**

41. **Section 30** requires OSCR to take actions if it is satisfied, as a result of inquiries, that a charity no longer meets the charity test. OSCR must either direct the charity to take steps OSCR considers necessary to meet the test (which may include applying to OSCR for approval of a reorganisation scheme to reform the charity’s constitution) or remove the charity from the register. If the charity fails to comply with the direction OSCR must remove it from the register.

**Other powers of OSCR following inquiries**

42. **Section 31** sets out further powers which OSCR may use following inquiries which have been made under **section 28**. If it is satisfied that there has been misconduct (which **section 103** defines as including mismanagement) in the administration of a charity or that it is necessary for action to be taken to protect a charity’s property or ensure that property is used for charitable purposes, OSCR may (**subsection (4)**) suspend a charity trustee, agent or employee. Alternatively OSCR may (**subsection (6)**) give a direction to restrict the transactions or the payments that may be made in the administration of the body without OSCR’s consent. This is intended to protect the assets of a charity or a body that was representing itself as a charity. OSCR may also (**subsection (7)**) direct a financial institution (bank) or person holding property for a charity not to part with it without OSCR’s consent. This will allow OSCR to ensure that assets raised for charitable purposes are not removed from a charity or body, protecting them for use for those purposes.

43. Where OSCR is satisfied, following inquiries, that a body has been falsely representing itself to be a charity, it may direct (**section 31(5)**) the body or person to stop doing so.

44. Where OSCR is satisfied, following inquiries, that a person has been claiming to act for a charity, it may (**section 31(8)**) direct the person to stop representing itself as a charity and to pay to the charity or body any assets that it had collected. OSCR may also direct a bank to pay sums collected for the charity or not to part with the property without OSCR’s consent. This will ensure that OSCR has powers to require any assets raised in the name of a charity to be passed on to that charity.

45. **Section 32** provides details concerning the making and delivery of directions and notices in **section 31**. The maximum period for which OSCR may make directions is 6 months. **Subsection (5)** provides that it is an offence to fail to comply with a section 31 direction from OSCR, with the maximum penalty on summary conviction being level 5 on the standard scale (currently £5000) or maximum of 6 months imprisonment, or both.
Reports on inquiries

46. Under section 33 if OSCR takes direct action following inquiries under section 28 it must prepare a report about the inquiry and send a copy to the person in respect of whom the inquiry was made and publish it as it sees fit. Under subsection (1)(b) OSCR must also prepare a report if it is requested to do so by the person of whom the inquiries were made. It is assumed that such reports will be published on the OSCR website. OSCR may also prepare reports about other inquiries it makes under section 28. In preparing these reports, subsection (3) provides that OSCR must not identify the name of any person except those in respect the inquiry is made or publish any particulars that could identify any person unless OSCR is satisfied that it is required to avoid impairing the effectiveness of the report.

Powers of Court of Session

47. After making inquiries, OSCR may (as described in relation to section 28 to 31) take certain actions directly for a maximum period of 6 months. However, under section 34, following its inquiries OSCR may apply to the Court of Session for certain other or further actions to be taken. If the court is satisfied by evidence from OSCR that misconduct has occurred, to protect the property of the charity or to ensure that property is used for the charity’s purposes it may interdict the charity from taking prescribed actions, appoint a judicial factor to manage the charity’s affairs, appoint a trustee to a charitable trust, suspend or remove a trustee or manager of a charity, freeze its bank account and property. If the court is satisfied that a body has been representing itself as a charity when it is not, it may interdict the body from this action, and also take similar actions that it may do against a charity.

48. Hence, if OSCR considers that action is required to be taken against a charity or body for longer than 6 months or to remove a trustee or appoint a factor, it must apply to the Court of Session.

Transfer schemes

49. Section 35 allows the Court of Session, if OSCR applies to it, to transfer the assets of a charity, or a body that has been representing itself as a charity, to another charity on certain conditions set out in subsection (2). These are that there has been misconduct or the transfer is necessary to protect the charity’s assets or merely to better achieve the charity’s purposes.

Powers in relation to English and Welsh charities

50. Section 36 allows the Court of Session to take action to protect the assets of a charity registered in England and Wales or a body not required to register (e.g. an exempt or excepted body under the Charities Act 1993) which are held in Scotland. The procedure (in subsection 5) is that the Charity Commission would request OSCR to apply to the court, and if satisfied that misconduct has taken place and that the assets require protecting, the court may order the person or institution holding the assets not to part with them without the court’s consent.

Delegation of functions

51. Section 38 allows OSCR to delegate certain of its regulatory functions to other regulators with devolved powers, hence the reference to a Scottish public authority with either mixed functions or no reserved functions. It may only delegate those functions relating to the
supervision of charities in sections 28 to 35 (except section 30) (i.e. inquiries about charities, obtaining information and powers following inquiries).

52. **Section 38(1)** places OSCR’s powers for its regulatory functions in relation to charitable registered social landlords in Scotland with the Scottish Ministers. It is intended that this function will be carried out by Communities Scotland (CS) on the Scottish Ministers’ behalf.

**Chapter 5 – Reorganisation of charities**

53. **Sections 40 and 41** provide a new regime allowing charities (which do not otherwise have the power in their own constitutions to reorganise themselves) to do so by seeking OSCR’s approval. Currently this process normally has to be undertaken by applying to the Court of Session.

54. Under **section 40**, OSCR may approve a reorganisation scheme of a charity as long as certain conditions are satisfied. These conditions are that the charity’s purposes have been fulfilled as far as possible, can no longer be given effect to, are no longer charitable purposes, no longer provide an effective means of using its property or that part of the charity’s constitution is no longer desirable. In addition, OSCR must be satisfied that the reorganisation will allow the charity’s resources to be better used for its charitable purposes. Under **sections 40(2) and (3)**, the Scottish Ministers may make regulations setting out the detailed procedures relating to OSCR’s dealing with charity reorganisations.

55. It is also worth noting that **section 43(4)** ensures that the new provisions do not prevent the Court of Session applying a *cy pres* scheme to reorganise a charity should it wish. This would normally be at the request of the charity or another person. **Section 43(5)** prevents charities established by Royal Charter, warrant or other enactment and a trust with property held by a local authority from using the provision in **sections 40 and 41**. However, a charitable endowment (either educational or non-educational) established under the Education (Scotland) Act 1980 may make use of the reorganisation provisions (**sections 43(6) and (7)**).

**Section 44 Endowments**

56. **Section 44** provides that educational and non-educational endowments that are also charities will be covered by the reorganisation provisions in this part of the Bill, rather than the regime set out in Part VI of the Education (Scotland) Act 1980. However, section 104 of that Act, which requires a register of educational endowments to be maintained by the Scottish Ministers (in fact by the Student Awards Agency for Scotland on the Scottish Ministers’ behalf) continues to apply.

**Chapter 6 – Charity accounts**

**Accounts**

57. As under current legislation (sections 4 and 5 of the 1990 Act), **section 45** requires all charities to keep proper accounting records. Charities must also prepare an annual statement of account and report on their activities, have these audited or independently examined (depending on the size of the charity) and provide a copy of the statement to OSCR. Accounting records
must be retained for at least 6 years. Subordinate legislation will be prepared to set out the
detailed requirements of the accounts to be prepared as this is the simplest means of allowing
updating of thresholds and keeping abreast of changes in accounting methods. It is expected that
the standard of accounts set out in regulations will accord closely with the UK Statement of
Recommended Practice for Charities an updated version of which is currently being prepared on
behalf of the Accounting Standards Board.

58. The regulations on accounting will also be used to set out different requirements for
different classes or type of charities. For instance, religious bodies may, as now, be allowed to
prepare accounts in a slightly different format, as long as they meet equivalent standards to other
charities. Regulations will also set out the thresholds by which different sizes of charity
(probably judged on the value of its income, turnover or other measure) must prepare different
levels of detail in their accounts and undergo different levels of audit or examination.

Failure to provide statement of account

59. Section 46 provides that OSCR may appoint someone to prepare a statement of accounts
for a charity that fails to send a copy to OSCR within the period prescribed in accounting
regulations. The appointed person has powers of entry to the charity’s premises, access to
financial documents and can demand information from charity trustees or employees. Costs of
OSCR and the appointed persons may be charged to the charity trustees. Subsection (6) also
provides that failure to comply with an appointed person’s requirements is an offence with a
liability for a fine of level 3 (currently £1000) on the standard scale.

Dormant accounts of charities

60. Sections 47 and 48 provide a revised regime to that set out in existing legislation (section
12 of the 1990 Act). This provides a means by which OSCR can redistribute sums of money
held in charity bank accounts that have not been used for several years, so that these sums may
be used for similar charitable purposes. A dormant account is defined (in section 48(2)) as one
held in a bank and for which no payments or transactions have occurred for 5 years except a
payment into the account or a transaction by the bank itself (e.g. payment of interest or bank
charges). OSCR must be satisfied that the body in whose name the account has been held is a
charity or was a Scottish Charity under the previous charity legislation before this bill is enacted.
OSCR is also to make reasonable enquiries to try to locate a person concerned with the
management or control of the body holding the dormant account before redistributing any funds.
OSCR must transfer the credit in the dormant account (less any expenses etc. in compliance with
regulations to be made by the Scottish Ministers under section 48(1)) to either a charity with
similar purposes, or another charity that OSCR chooses, if it cannot tell what the purposes of the
original charity were. Section 103 includes a definition of “relevant financial institution” such
that the deposit banks holding dormant accounts under consideration are those defined by the
Financial Services and Markets Act 2000. It is intended that a section 104 order under the
Scotland Act will be made following enactment of this Bill to ensure that this definition is
automatically updated as new banks become defined in that Westminster legislation.
Chapter 7 – Scottish charitable incorporated organisations

Scottish charitable incorporated organisation

61. Chapter 7 (sections 49 to 63) establish a new legal form that charities may wish to adopt. The Scottish Charitable Incorporated Organisation (SCIO) is a legal form designed specifically for charities to enable them to become a corporate body, without having to become a company or industrial and provident society. SCIOs will be regulated by OSCR.

62. Section 49 and 50 set out the basic mandatory requirements for a charity to become a SCIO. A SCIO is a corporate body and shall have a constitution, a principal office in Scotland and more than one member. The constitution of a SCIO must state its name and purposes and contain provisions about the membership and the trustees. Unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if it is wound up. The Scottish Ministers may make regulations specifying further matters relating to a SCIO’s constitution.

Name and status

63. Section 52 provides that the Scottish Ministers may specify in regulations which documents a SCIO’s name must be shown on if they are issued or signed on its behalf. If the body’s name does not include either the words “Scottish charitable incorporated organisation” or “SCIO”, then documents must include a statement that it is a SCIO. Because all SCIOs must also be charities, these provisions are instead of those in section 13 which require a charity to state on its documents that it is a charity. Section 53 establishes as an offence the issuing of any document which should include reference to SCIO, which does not. OSCR also has powers to direct a body which is not a SCIO from representing itself as such and failure to comply may lead to interdict by the Court of Session.

Creation of SCIO and entry in Register

64. Section 54 sets out the procedure for application for registration of a SCIO. These provisions are similar to those for an application to be on the Register, with specific requirements relating to a SCIO. The effect of registration (section 55) is that on entry to the register as a SCIO, the body becomes a body corporate as described in the application. If a SCIO ceases to be a charity, it also ceases to be a SCIO.

Conversion, amalgamation and transfer

65. Sections 56 and 57 make provisions to allow a charity that is a company or an industrial and provident society to be converted to a SCIO. Such bodies cannot transfer if they have any share capital that is not fully paid up or if they have only a single member. An application for conversion must be accompanied by copies of both the resolution of the body to be converted to a SCIO and adopting the proposed constitution of the SCIO.

66. If OSCR grants an application for a body’s conversion to a SCIO, as well as entering the body on the Register, it must send a copy of the body’s resolution to convert and a copy of the entry in the Charity Register to the registrar of the original body (i.e. Companies House or the Financial Services Authority). It is intended that once OSCR has confirmed that it will grant the
body’s application to become a SCIO, the relevant original registrar will cancel the body’s entry on the original register. To require this to occur is however reserved and as such it is intended to include this in a section 104 order made in Westminster as a consequence of this Bill.

67. **Section 58 and 59** provide for a number of SCIOS to amalgamate by application to OSCR. A resolution to amalgamate must be passed by either a two-thirds majority of those voting at a general meeting or a unanimous vote by the members of each of the SCIOS involved. If OSCR grants the application for amalgamation, it must enter the new SCIO on the register and remove the original bodies’ entries and all the property, rights and liabilities of all the old SCIOS belong to the new SCIO. Similarly, section 60 provides for a SCIO to transfer all its property, rights and liabilities to another SCIO, if OSCR confirms the application.

68. **Section 61** provides that a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. Third parties may also assume that charity trustees are authorised to act on behalf of the charity they represent in any matter. It is effectively for SCIOS themselves, and their trustees, to ensure that they have the relevant powers. This is intended to provide a level of protection to those dealing, in good faith, with SCIOS and their trustees, in a similar manner to that provided to those dealing with registered companies.

69. Under **section 63**, the Scottish Ministers may make regulations to set out further provisions on SCIOS such as the application process, the administration of SCIOS, amalgamations, transfers, the winding up, insolvency or dissolution of SCIOS, or as they see fit.

**Chapter 8 – Religious charities**

**Section 64: Designated religious charities**

70. **Section 64** allows OSCR to designate a charity that meets certain criteria as a designated religious charity. To be designated, the body its main purpose must be the advancement of religion, its main activity the regular holding of public worship and it must have been established in Scotland for at least 10 years and have a membership of at least 3,000 over the age of 16. In addition, it must have an internal organisation with supervisory and disciplinary functions over all its component parts and have a regime for keeping accounting record which OSCR considers correspond to those for other charities.

71. Designated religious charities will be exempt from certain provisions of the Bill; namely that it does not need to seek OSCR’s consent for certain of the changes to its constitution set out in section 16, OSCR may not direct the charity or its trustees to stop undertaking activities (under section 28(2)) nor to suspend its charity trustees (under section 31(4)) following its inquiries. The Court of Session may not (under section 34(4)) appoint a judicial factor, appoint a trustee, nor suspend a charity trustee or manager of the religious charity. Lastly, section 68 on those disqualified from serving as a charity trustee does not apply to designated religious charities.

72. Under **section 64(5)**, OSCR may withdraw the designated status from a designated religious charity if it considers the qualifying criteria no longer apply or if, following an investigation, OSCR considers that it is no longer appropriate for the body to hold that status.
73. These provisions largely replicate the existing regime under section 3 of the 1990 Act which allow the Scottish Ministers (now OSCR acting on their behalf) to designate religious bodies to allow similar exemptions where it is satisfied that an adequate supervisory and disciplinary regime is already in place.

Chapter 9 – Charity trustees

Section 65: Charity trustees: general duties

74. The term “charity trustees” (which is defined in section 103) is used throughout the Bill to describe those persons in control of a charity. Depending on the form of the body, this term refers to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Bill and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as “charity trustees” under this Bill.

75. Section 65 sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. Subsection (1) requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another’s affairs. A charity trustee has a duty to ensure that a charity complies with any requirements of this Bill (subsection (2)). However, subsection (3) provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties will be treated as misconduct in the administration of a charity.

Remuneration

76. Section 66 provides that a charity trustee may not normally be paid for carrying out duties and functions of being a charity trustee, unless specific authority for this is provided. This stems from the existing position that charities are generally understood to be voluntary organisations and that charity trustees will offer their services as such with no payment. However, under certain circumstances, it is acceptable that a charity trustee may also carry out additional services on behalf of the charity, i.e. services that another person (not a trustee) might otherwise undertake for payment. In these circumstances, and where the conditions set out in subsection 2 are satisfied, this “service provider” may be remunerated from the charity’s funds for those (additional) services. The conditions are that the maximum amount of the remuneration is set out in a written agreement, is reasonable, that the charity trustees are satisfied it is in the interests of the charity, that a minority of trustees are either paid in this way or connected to trustees who are, and that the constitution of the charity allows it to occur. Despite the above, subsection (5) ensures that a charity trustee or service provider may receive remuneration from a charity if they are entitled to receive it under a provision in the charity’s constitution (in force on the day that the Bill is introduced to the Parliament), as a result of a court order, or under any enactment. This means that charities may not make changes to their constitution merely to allow payment of charity trustees before this Bill comes into force and that trustees may be paid if other legislation specifically allows it.
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

77. **Section 67** sets out definitions for terms which are referred to in parts of **section 66**, such as those who would be considered to be connected with a trustee. Such a person is defined as “connected” to a charity trustee if they are married to them or living as if married, is a close family relative (i.e. a child, parent, grandchild, brother or sister of them or their spouse). Also an institution or body cooperate is considered to be “connected” with a charity trustee if it is controlled by them or a “connected” relative, or if they they have a substantial interest respectively.

**Disqualification**

78. **Section 68** sets out the types of person who are disqualified from serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Bill, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or from serving as a Company Director. **Subsection (4)** allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice company legislation. Under **section 69**, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.

**Chapter 10 – Decisions: notices, reviews and appeals**

79. **Sections 70 to 77** set out a process by which most decisions by OSCR (or those which are taken on behalf of OSCR) may be challenged by those directly affected in a process that is intended to be simple and more cheaply accessible to charities than the current process which relies on the courts. **Section 70** lists those decisions which may be reviewed and **section 71** sets out the persons that must be informed about different decisions. It also provides that notices of decisions must set out the decision, the reasons and advice about seeking a review. Further definition of a formal notification is given in **section 98**. **Sections 72 and 73** provide that, if requested by either the person or charity affected by the decision, OSCR must carry out an internal review of the decision. OSCR will publish procedures to set out how the internal reviews will be conducted, although a review is to be carried out within 21 days of receiving the request for it.

80. **Section 74** requires the Scottish Ministers to appoint individuals to serve on a Scottish Charity Appeals Panel, a new tribunal to be set up to provide an independent appeal mechanism for decisions made by OSCR. **Schedule 2** sets out further details of the Appeals Panel. **Schedule 4** adds the Panel to the list of bodies in Part 2, Schedule 1 of the Tribunals and Inquiries Act 1992 and hence the Panel will be under the jurisdiction of the Scottish Committee of the Council for Tribunals. Following open advertising, the Scottish Ministers will appoint individuals to be available to serve on the Panel. The number of Panels will depend on the caseload, but each panel will consist of 3 persons, and the chair at least will have been a solicitor or advocate for at least 5 years. It is intended that administrative support for the panel will be provided by the Executive. The Scottish Ministers will also establish procedural rules for the Panels.

81. Following an internal review of a decision by OSCR, a person who requested the review may (**section 75(1)**) appeal the decision to the panel, within 28 days of being notified of the
review decision. The panel will consider the appeal and may under subsection (5), either confirm a decision by OSCR, quash OSCR’s decision (and direct it to take such other action as the Panel prescribes), or remit the decision to OSCR for reconsideration, with the Panel’s reasons. Under section 76, if a decision is remitted to it by the Panel, OSCR must, within 14 days, either confirm, vary, reverse or revoke its decision and give its reasons.

82. Under section 77, either the person requesting an appeal or OSCR, may seek to have the appeal considered by the Court of Session. The Court may confirm or quash the decision. A decision by OSCR to suspend a charity trustee, agent or employee (under section 31(4)) can be appealed by that person directly to the Court of Session (rather than the Panel).

PART 2: FUNDRAISING FOR BENEVOLENT BODIES

General

83. Part 2 regulates fundraising not just for bodies on the Scottish Charity Register, but for all benevolent bodies and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are actually charities or not. This means that many bodies which may have charitable purposes but do not provide a sufficient level of public benefit or may have chosen not to be restricted by the added regulation which falls upon charities, may, for instance, undertake public collections or fundraise (as long as they are transparent and do not claim to be charities).

84. Section 78 sets out a number of definitions which relate to Part 2. Section 79 also clarifies that any reference to representation or solicitation in Part 2 refers to any manner of representation, e.g. oral, written or in a statement published in a newspaper, film or radio or television programme.

Control of fundraising

85. Sections 80 and 81 give benevolent bodies greater control over those fundraising on their behalf. Section 80 requires professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf. Regulations under section 82 can set out the requirements of this agreement. Any agreement which does not meet these requirements is only enforceable against the body through the courts. Professional fundraisers and commercial participators are entitled to remuneration or expenses as set out in the agreement.

86. Section 80 also gives benevolent bodies (and OSCR on behalf of charities) the right to seek an interdict preventing a professional fundraiser or commercial participator fundraising on the body’s behalf, if they are doing so without an agreement or outwith an agreement in the prescribed format.

87. Section 81 allows benevolent bodies to seek an interdict preventing anyone, other than a professional fundraiser or commercial participator (who would be covered by section 80), from fundraising on their behalf if they object to the methods of fundraising, if the person is not a fit and proper person to fundraise or if the body does not want to be associated with the venture.
88. **Section 82** provides the Scottish Ministers with powers to regulate fundraising through secondary legislation in a number of ways. This section will be used to make regulations setting out a requirement for professional fundraisers, paid charity fundraisers, commercial participators and possibly volunteers, to make a statement to potential donors regarding their remuneration or the amount of the donation that will go to the benevolent body. Regulations under this section will also cover the form of contract between professional fundraisers or commercial participators and benevolent bodies, as well as circumstances under which donations may be refunded. The Scottish Ministers have agreed to allow the sector time to develop a scheme of self regulation, however, powers under **section 82** may be used to further regulate benevolent fundraising if it was felt necessary.

**Public benevolent collections**

89. **Sections 83 to 91** set out a local authority led system for licensing public benevolent collections which replaces the provisions for the licensing of public charitable collections under section 119 of the Civic Government (Scotland) Act 1982. The provisions are very similar to those in the 1982 Act. The main changes are the extension of the definition of public benevolent collections in **section 83** to include collections of promises of money (such as direct debits), as well as collections of cash; clarification of the definition of public place under **section 83** and the inclusion of powers under **section 90** to regulate the collections of goods.

90. **Section 84** requires organisers of public benevolent collections (collections of cash or promises of money in a public place, or from house to house or business to business) to apply to the relevant local authority for permission to collect. **Section 85** requires local authorities to make any necessary enquiries before they either give permission to collect (with or without conditions), or refuse permission on a number of grounds. Local authorities may also withdraw permission already granted. Regulations under **section 85** may remove the duty on local authorities to undertake background checks for certain types of applications.

91. Under **section 86**, OSCR may designate charities who meet certain criteria as designated national collectors. This establishes a regime similar to the current provision under the 1982 Act by which the Scottish Ministers (now OSCR acting on their behalf) may designate bodies collecting in a number of local authority areas as “exempt promoters”. In the new regime, OSCR may specify the criteria to be met for the purposes of obtaining and retaining designated national collector status, and are required to consult certain persons beforehand. Collections by designated national collectors must be notified to the relevant local authority, who may prohibit the collection if it is likely to cause undue public inconvenience.

92. **Section 87** sets out a process for organisers of public benevolent collections to appeal against a local authority decision. Further procedures for public benevolent collections will be set out in regulations made under **section 89**.

93. **Section 88** gives OSCR powers to protect funds raised in a public charitable collection and **section 91** requires local authorities to consider guidance issued by OSCR in relation to public benevolent collections.
94. **Section 90** allows the Scottish Ministers to regulate the collections of goods from the public for charitable, benevolent or philanthropic purposes through secondary legislation. These regulations could include a requirement to notify local authorities about the collection, and can create offences for non-compliance.

**PART 3: INVESTMENT POWERS OF TRUSTEES**

95. **Sections 92 to 94** provide an extension to the investment powers of trustees (of all trusts, whether charities or not). The Trusts (Scotland) Act 1921 is amended by adding a provision (section 92(2)) allowing a trustee to make any kind of investment of the trust estate (including an investment in heritable property). The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. Subsection (2) also provides a new wide power for trustees to acquire heritable property for any other reason. These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (subsection (3)). Subsection (3) continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act. The new general power in subsection (2) is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. But if trustees in existing post-1961 Act deeds or in future deeds are prohibited from making certain investments then these prohibitions will continue to apply. This is because section 4(1) of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

96. **Section 93** provides a number of duties that apply to trustees and must be followed before exercising the wider investment powers under section 92(2). **Schedule 3** makes a number of consequential amendments to other legislation relating to powers of trustees. **Section 94** provides a power for the Scottish Ministers to amend other legislation in relation to the amendment of trustee powers of investment in **sections 92 and 93**.

**PART 4: GENERAL AND SUPPLEMENTARY**

**Financial assistance for benevolent bodies**

97. **Section 95** allows the Scottish Ministers to make payments to benevolent bodies in relation to their activities, or to any person in connection with work which enables benevolent bodies to implement their purposes better.

**Rate relief for registered community amateur sports clubs**

98. **Section 96** makes provision for organisations that are registered with the Inland Revenue under Section 58 of the Finance Act 2002 as a community amateur sports club to receive 80% mandatory relief from non-domestic rates. Local authorities have discretionary powers to top up this relief to 100%.
Transitional arrangements

99. **Section 97(1)** provides a transitional arrangement to ensure that all existing Scottish Charities at the time that **paragraph 5(a)(ii) of schedule 4** of this Bill is commenced become automatically entered by OSCR on the Scottish Charity Register. **Paragraph 1 of schedule 4** repeals the section of the 1990 Act which entitles a body recognised by the Inland Revenue (as eligible for tax relief through having exclusively charitable purposes) under the Income and Corporation Taxes Act 1988 to describe themselves as a “Scottish charity”.

100. **Subsection (2)** allows the Scottish Ministers to make further transitional orders as they consider necessary for the purposes of the Bill. It is intended that this subsection will be used to provide a period of grace to allow existing UK and “foreign” charities operating in Scotland to apply to be entered on the Register by OSCR. An order could also require a charity transferred onto the Register to provide whatever information OSCR requires to complete the body’s entry on the Register. Similarly, existing exempt promoters and designated religious bodies under the 1982 and 1990 Acts could be granted a period of grace, initially being considered as designated national collectors and designated religious charities under **sections 86 and 64**, until OSCR has established the new regime.

Notices, applications etc.

101. **Section 98** sets out details relating to the giving of notices, directions and consents or requests for review, applications and decision made. The formal communications must be in writing, but may also be made by electronic means (e.g. electronic-mail etc.). **Subsection (4)** sets out the specific conditions and related timing for when a formal communication may be considered as having been made.

Offences by corporate bodies etc.

102. **Section 99** provides that when an offence under this Act is committed by a body corporate, a Scottish partnership or an unincorporated association, with the consent or connivance of a person controlling the body, the individual is also guilty of the offence and is liable to have proceedings taken against them.

Ancillary provisions

103. **Paragraph (a) of section 100** allows the Scottish Ministers to modify any enactment in order to ensure a body established by an enactment is able to meet the charity test in section 7(3)(b) of the Bill. This provision may be used if it were to be decided that an existing charitable non-departmental public body (NDPB) should remain a charity but was prevented from doing so by an enactment providing the Scottish Ministers control of the body via a power of direction.

104. **Paragraph (b) of section 100** provides ancillary powers for the Scottish Ministers to make other incidental, supplemental or consequential provisions considered necessary for this Act.
105. **Section 101** sets out the procedures for the Scottish Ministers to make orders, regulations or rules by statutory instrument under the Act. Instruments are generally made by negative resolution, except commencement orders. Regulations under section 63(d) and ancillary orders which add to, replace or omit any part of primary legislation are subject to affirmative resolution in the Parliament.

106. **Section 102** relates to **schedule 4** which contains minor and consequential amendments to other primary legislation in consequence of this Act. **Schedule 4** includes amendments to several Acts:

**Part 1: Acts**

- Paragraph 1 which amends section 4(10)(a) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 to refer to charities entered in the Scottish Charity Register to ensure that all qualifying charities on the Scottish Charity Register are eligible to receive the appropriate reduction or remission of non-domestic rates;
- Paragraph 2 which adds a reference to charities on the Scottish Charity Register to the Sex Discrimination Act 1975 to ensure that Act will continue to apply to charitable educational endowments following enactment of this Bill;
- Paragraph 3 which replaces the existing definition of “charitable purposes” in section 122 of the Education (Scotland) Act 1980, referring instead to this Bill;
- Paragraph 4 which replaces previous references to “Scottish Charities” and “charitable” referring instead to this Bill and repeals the previous provisions on the regulation of charitable collections in section 119 of the Civic Government (Scotland) Act 1992 relating to public charitable collections;
- Paragraph 5 which repeals the existing link in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 between the recognition by the Inland Revenue of bodies eligible for tax relief and bodies eligible to describe themselves as Scottish Charities, and existing provisions on the regulation of Scottish Charities by the Scottish Ministers;
- Paragraph 6 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Charities Act 1992. Section 119 on the regulation of charitable collections is superseded by this Bill.;
- Paragraph 7 which updates section 19(3) of the Further and Higher Education (Scotland) Act 1992 to refer to charities as defined in this Bill instead of the Income Tax Acts. This section allows the Scottish Ministers to make modifications, by order, to the purposes and conditions of application for educational endowments ;
- Paragraph 8 which brings the Scottish Charity Appeals Panel within the jurisdiction of the Scottish Committee of the Council on Tribunals;
- Paragraph 9 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Local Government etc. (Scotland) Act 1994. This updated section 119 on the regulation of charitable collections bringing it into line with the 1994 local government reorganisations);
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

- Paragraph 10 which applies the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to OSCR;
- Paragraph 11 which updates sections 34(8) and 71(8) of the Land Reform (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions (Scotland) Act 1990;
- Paragraph 12 which applies the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to OSCR, ensuring that members of OSCR are appointed in accordance with the public appointments process overseen by the Commissioner for Public Appointments in Scotland;
- Paragraph 13 which updates paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Section 103: General interpretation

107. **Section 103** provides a number of general definitions of terms used throughout the Bill. Reference has been made to these in the relevant sections of the commentary above.

Section 104: Short title and commencement

108. **Section 104(1)** provides for the short title to the Bill. Subsection (2) provides that only sections 97, 100, 101 and this section come into force when the Bill receives Royal Assent. The remaining provisions of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders.

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**FINANCIAL MEMORANDUM**

**INTRODUCTION**

109. This memorandum sets out the financial implications of the Charities and Trustees Investment (Scotland) Bill.

**Background**

110. The Scottish Executive is committed to reforming the regulatory regime for charities, in order to support the charities sector and to safeguard the public interest in relation to charities.

111. Regulation of Scottish charities is currently governed largely by Part I of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, but a range of other statutes also apply. Organisations within the charities sector have called for reform and consolidation of the law for some time. The regulatory regime for charities proposed in this Bill seeks to address these gaps, and to deliver a system that is fit for purpose and protects the public interest without being overly burdensome or more costly than necessary. The draft Bill and ensuing regulations will apply to charities and their operations in Scotland only.
Consultation

112. There has been extensive consultation and dialogue with the charities sector around the development of this Bill. More than 40 meetings with stakeholders, in addition to the consultative work of the McFadden Commission in 2000/01 and the Scottish Executive Justice Department in 2001/02, have furthered debate on the options and regulatory proposals. The public consultation on the draft Bill concluded on 25 August (http://www.scotland.gov.uk/consultations/social/dctib-00.asp). Accompanying the consultation paper was a draft regulatory impact assessment (RIA) providing background information on the options which were considered prior to the drafting of the Bill, and the probable impact and cost of these options. Views on the detail of this were limited and mainly pointed to the need to ensure that the Office of the Scottish Charity Regulator (OSCR) was sufficiently funded (http://www.scotland.gov.uk/library5/social/ctisb-00.asp).

Costs

113. The Executive’s proposals aim to keep compliance costs to a minimum for charities, while improving both the operating environment of charities and public confidence in them. The improved transparency that will result from the Bill should have a positive impact on charities’ ability to raise funds from the public (currently charities in Scotland raise around £240 million from public donations) and from charitable trusts (recent estimates currently worth £60 million).

114. None of the provisions of the Bill are specifically directed at businesses, unless they are attached to charities or engaged in fundraising for charities. Nor is the regulation of charities as set out in the Bill expected to have any impact on competition. The provisions are aimed at making charities’ activities and finances more transparent, and clarifying the legal requirements on charities.

115. Tax relief, other than rates relief, is reserved to Westminster and granted by the Inland Revenue on a UK wide basis. This Bill will not change this.

116. The proposals set out in the Bill and consultation paper include a number of criminal offences. These will lead to a fine on conviction.

117. The regulator will be tasked with reviewing implementation of the legislation and regulations, and advising the Executive of any need for change. The Executive will review the impact of the legislation and associated regulations within ten years of it coming into force.

118. Consideration of the costs associated with each part of the Bill is set out below.

PART 1, CHAPTER 1 (OFFICE OF THE SCOTTISH CHARITY REGULATOR)

Costs on the Scottish Administration

119. The Bill provides for a number of new functions for the Office of the Scottish Charity Regulator (OSCR), such as determining whether bodies meet the new charity test and maintaining a register of those that do. In addition OSCR will be expected to start its monitoring
programme, approve reorganisations and provide information to the public and guidance to charities. This will all require additional resources for increased staff and system management costs. Provision has been made to increase OSCR’s budget from its current budget of £1.3 million to £2.3 million per annum from 2006-07.

Costs on local authorities

120. None.

Costs on others (including the charity sector)

121. None.

PART 1, CHAPTER 2 (SCOTTISH CHARITY REGISTER)

122. This chapter sets out a new definition of charity, removes the previous presumption of public benefit and creates a publicly accessible register of all bodies eligible to operate as charities in Scotland. It is possible that there may be additional non-charitable organisations which will seek charity status when the new definition is enacted and some current charities may either lose their charitable status or voluntarily seek to surrender it. As the new definition is largely in keeping with the existing definition, we do not however anticipate any significant change to either the size or growth of the charity sector as a result of this.

Costs on the Scottish Administration

123. Local authorities are currently required to provide 80% relief on non-domestic rates for charities, the cost of which is covered by the Executive. In addition local authorities may provide additional relief of up to 20% of which 75% is met by the Executive. This relief forms part of the rates relief granted under section 4 of the Local Government (Scotland) Act 1975. Relief for charities under this section for the financial year 2003-04 amounted to between £78 million and £85 million. Apart from the possible implications for NDPBs, which would be cost neutral (see paragraph 128), we do not, however, anticipate any significant change to this as a result of the new definition as we do not anticipate any significant change to the overall number of charities as a result of the Bill.

124. The Scottish Executive will have to take account of the additional costs to any charitable NDPBs as a result of their losing their charitable status – see paragraph 128. There are currently 13 Scottish NDPBs that have charitable status. It is planned to consider this on a case by case basis during the reviews of each of these NDPBs. These are due to take place between now and 2007. Should decisions to give up charitable status, alongside any other outcomes of the reviews, result in a net loss of income then the Executive will consider providing additional grant-in-aid funding to reflect this, but only if the restructuring of services is not feasible. The costs of any grant-in-aid would be partly offset by a reduction in rates relief provided to local authorities. This would result in a potential cost to the Executive of up to £7 million.
Costs on local authorities

125. The provisions of this chapter will not have any significant impact on local authority administrative costs.

126. The impact on the non-domestic rates income for local authorities is also likely to be minimal with the possible exception of lost rates relief relating to local authority managed charities. The same issues regarding the independence of charities from external direction discussed in paragraph 128 below could also arise in the context of charities controlled by local authorities. We cannot say what the impact of this would be without examining the individual constitutions and budgets of each charity under local authority control. This cannot be done without disproportionate effort on the part of local authorities. The administrative cost discussed in paragraph 130 may also apply to local authority managed charities.

Costs on others (including the charity sector)

127. Some existing charities might no longer meet the requirements of the law and could therefore lose the benefits of charitable status. Equally some organisations may now seek registration and benefit from charitable tax relief for the first time.

128. This chapter includes a provision excluding bodies whose constitutions oblige them to comply with the directions of a third party from being eligible for charitable status. It has been noted that there are a number of charitable NDPBs who are obliged to follow the directions of the Scottish Ministers. While the Bill reinforces this position, the Scottish Ministers have accepted that even under the current law, charities should be independent of government and have undertaken to look at the charitable status of each of the charitable NDPBs and decide whether or not they should cease to be either charities or NDPBs. The value of tax relief, non-domestic rates relief and donations flowing from the charitable status of these 13 bodies is estimated to be approximately £10 million per annum, including some £3 to 4 million of local rates relief. Without the rates relief, which is ultimately funded by the Executive and therefore cost neutral to the Scottish Consolidated Fund the total benefit to NDPBs from such sources is estimated to be between £6 and 7 million.

129. There has been some speculation as to whether or not some independent schools might lose their charitable status as a result of the new definition. It has not been possible to obtain detailed figures but it has been estimated that charitable status to all independent schools is worth roughly £3 to 6 million to them in rates and tax relief. This figure does not include gift aid or take account of donations that might be lost. Were an independent school to lose its charitable status the impact would be largely dependent upon the school itself but this may mean an increase in its fees or in exceptional cases, see it close down. The 2003 census indicated that there are 30344 pupils in independent schools in Scotland.

130. While OSCR will not charge for registration there may be some minimal administrative costs to charities in providing the information required and ensuring charity documentation includes references to registration. The one-off cost of this to new and existing charities will vary dependent upon the size of the organisation such that for most it should be minimal but for others it could be up to £2000. The transitional arrangements will allow sufficient time for a phased approach to minimise the impact of this cost.
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

PART 1, CHAPTER 3 (CO-OPERATION AND INFORMATION)

Costs on the Scottish Administration

131. These provisions oblige charities to provide such information as OSCR requires, without charge. Any costs or savings made in the acquisition or processing of such information will fall to OSCR’s budget as discussed in paragraph 119 above. There is no additional cost to the Scottish Administration outside of OSCR’s budget.

Costs on local authorities

132. OSCR will seek to work with local authorities and provide a useful single point of contact in relation to charities. Even though OSCR may require some information from local authorities regarding information they may hold about charities engaged in public benevolent collections, the overall impact should be minimal.

133. Local authority managed charities will also be subject to the costs discussed in paragraphs 134 to 135.

Costs on others (including the charity sector)

134. As is the position under existing legislation, charities will be under a duty to provide their constitutions and accounts when requested to do so by the public and will continue to be able to charge to recoup the cost of them doing so. These provisions do however also oblige OSCR to make its register public. A public register should reduce the direct demands for information and the administrative burden on charities of these. Members of the public will be able to access the information on OSCR’s website at no charge.

135. Concern has been expressed about the burden of dual registration and dual regulation of bodies that are charities. While there no doubt is some cost attached to this, the Bill obliges OSCR to seek to co-operate with other regulators to minimise the cost. For example we expect that this might see OSCR and the Charity Commission agreeing a protocol whereby charities subject to the jurisdiction of both regulators submit information in a common format.

PART 1, CHAPTER 4 (INQUIRIES AND SUPERVISION OF CHARITIES)

Costs on the Scottish Administration

136. This chapter sets out powers under which OSCR will be able to institute inquiries and take action to protect assets. There is no direct cost to the Executive under this chapter. The cost of undertaking the investigations and actions set out in this section will fall to OSCR’s budget as discussed in paragraph 119.

137. This chapter also makes various provisions that relate to charitable registered social landlords, designated religious charities and charitable educational endowments. This is not expected to have any direct cost implications for the Executive. The Bill allows the regulation of charitable registered social landlords by Community Scotland. Community Scotland has indicated that they do not believe that this will have any significant impact on their costs as they
already regulate these bodies under the powers set out in the Housing (Scotland) Act 2001. The cost of doing so is about £650,000 per annum. This is not a new cost and excludes the cost of any inspections. Community Scotland has indicated that there may be minor additional costs in respect of liaison with OSCR and the collection of information OSCR may require.

138. The current regime of charity regulation requires the Scottish Ministers to apply to the Court of Session to take action against a charity or charity trustee in respect of suspected misconduct. Over the last 10 years, an average of only 2 cases per year has gone to Court. While more cases of misconduct could come to light as the Bill envisages OSCR being more proactive in taking action in instances of misconduct that was previously possible, the Bill also allows OSCR to take action without recourse to the Courts. This will probably mean that the impact of the Bill on the Scottish Courts will be minimal.

139. It is estimated that training seminars to raise the level of awareness of the new legislation amongst charities would cost about £5,000 for every hundred delegates attending. We estimate that around £150,000 may be required to run the appropriate seminars. The Executive will consider whether this could be met through its funding of the voluntary sector. OSCR will also publish guidance on the legal requirements that charities and charity trustees will have to comply with. The cost of this is included in OSCR’s overall budget.

Costs on local authorities

140. None, although charities managed by local authorities may also be subject to the same costs discussed in paragraphs 141 to 143.

Costs on others (including the charity sector)

141. While there will be administrative costs associated with complying with an inquiry being conducted by OSCR these are likely to be minimal. Nor would such costs be new costs as OSCR already has the ability to conduct inquiries. OSCR will only take further action against a charity where it is satisfied that there is misconduct. The provisions relating to registered social landlords serve to clarify the regulatory regime of charities that fall into this category and in doing so, they seek to minimise the cumulative administrative cost of complying with the legislation.

142. Given that the Bill includes a number of duties charities may decide to provide additional training for trustees, staff and volunteers of charities to educate them as to the requirements of the new legislation. This would be additional to the awareness seminars funded by the Executive and the guidance published by OSCR – see paragraph 139. The cost for this is likely to marginal.

143. The Bill makes provision for the redistribution of money held for charities in dormant accounts. This will see funds held for charities by financial institutions that are currently unused being reunited with the original charity or passed on to a charity with similar purposes. While this will be of net benefit to the sector, this is not likely to be substantial as previous trawls by the Charity Nominee under powers in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 have already identified and dealt with the bulk of dormant accounts.
PART 1, CHAPTER 5 (REORGANISATION OF CHARITIES)

Costs on the Scottish Administration

144. There is no direct cost to the Executive under this part. Any cost will be included in the OSCR budget.

Costs on local authorities

145. This part of the Bill provides for OSCR to consent to the reorganisation of charities that previously could be done through the Court of Session. This will allow local authority-managed small charitable trusts to be amalgamated and more efficiently administered. The administrative savings of this are difficult to quantify.

Costs on others (including the charity sector)

146. The simpler provision for reorganisation in the Bill will allow for more efficient administration of charitable assets.

PART 1, CHAPTER 6 (CHARITY ACCOUNTS)

Costs on the Scottish Administration

147. This Chapter requires charities to prepare and provide accounts. There is no direct cost to the Executive under this chapter.

Costs on local authorities

148. None, although charities managed by local authorities will also be subject to the costs discussed in paragraphs 149 to 150.

Costs on others (including the charity sector)

149. There should be no new costs to charities under this section as they are already required to produce audited or independently examined accounts.

150. Regulations will set out the form of the accounts and thresholds. These will rely on the Accounting Standards Board’s Statement of Recommended Practice for charities (SORP). The nature of the accounts and the requirement for audit or independent examination of accounts will be according to certain income thresholds set out in the regulations. The levels of these thresholds have not yet been decided but they will be higher than existing levels, meaning that smaller and medium sized charities will be able to make some administrative savings.
PART 1, CHAPTER 7 (SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS)

Costs on the Scottish Administration

151. The Bill will establish a new legal form for charities – the Scottish Charitable Incorporated Organisation. This will be regulated by OSCR. There is no direct cost to the Executive under this chapter. Provision for the regulation of these will be included in OSCR’s budget.

Costs on local authorities

152. None, although charities managed by local authorities will also be able to convert to this form if they wish.

Costs on others (including the charity sector)

153. It is estimated that around 5000 of the more than 25,000 Scottish Charities currently have company status. While it is unlikely that charitable companies will wish to convert to SCIOs in the short term, unincorporated charities that are attracted to the benefits of incorporation may choose to do so. SCIOs will provide charities with a simple, accessible legal form of incorporation without the complexity and expense of dual regulation by the company regulator.

PART 1, CHAPTER 9 (CHARITY TRUSTEES)

Costs on the Scottish Administration

154. This chapter sets out broad legal duties for charity trustees. This chapter should therefore have no direct cost implications for the Executive.

Costs on local authorities

155. No direct costs.

Costs on others (including the charity sector)

156. The duties are based on existing duties not just in charity law but also company law and trust law. These duties were not designed to replace any existing duties and the Bill provides that they should not do so. The aim of this chapter is to clarify existing case law and good practice and should therefore not mean any additional costs deriving from the Bill.

157. The core of these duties, the need for charity trustees to act in the interests of their charity, runs alongside the requirement for charities to be independent of external direction. See paragraph 128.
PART 1, CHAPTER 10 (DECISIONS, NOTICES, REVIEWS AND APPEALS)

Costs on the Scottish Administration

158. The Bill makes provision for an internal review process and an appeals panel to allow charities to appeal OSCR’s regulatory decisions. The costs of the review process will be met from OSCR’s budget.

159. The Charity Appeal Panel will be directly funded by the Executive. It is estimated that it will cost approximately £160,000 to set up the panel and between £145,000 and £210,000 per annum to run it. The latter figure is based upon the assumption of between 50 and 100 cases annually as we estimate the basic running cost of the Panel will be around £80,000 per annum rising by about £1300 for each case it deals with.

Costs on local authorities

160. None

Costs on others (including the charity sector)

161. Charities wishing to dispute OSCR’s decisions will be able to do so in the first instance without incurring the costs associated with a court action. This potential saving will be variable depending on whether or not an appellant chooses to seek legal advice.

PART 2 (FUNDRAISING)

Costs on the Scottish Administration

162. There is no new cost to the Executive under this part.

Costs on local authorities

163. The provisions in the Bill may have some impact in terms of widening the scope of local authorities’ powers to license public benevolent collections and additional resources may be required to administer the system and deal with returns. This is expected to be minimal. Local authorities have indicated that they each process approximately 100 applications annually and that each application takes in the region of 20 minutes to deal with. This suggests a current labour cost of about £500 per annum per local authority.

164. The Bill will allow local authorities to manage this system more effectively by clarifying its purpose and receiving advice from OSCR on a more consistent national regime.

Costs on others (including the charity sector)

165. The cost in terms of public benevolent collections should largely be neutral as this is based upon existing law and good practice.
166. Although more charities and benevolent collectors may be required to submit licensing applications to local authorities, as for example face to face (direct debit) fundraising is brought into the regulatory scope for the first time, OSCR should assist in creating a more consistent application process across local authorities.

167. The improvements to the existing system should allow more efficient collections but may require some additional training for fundraisers, and may restrict the fundraising activities available to charities.

168. We believe that the Bill will promote public confidence and will increase willingness to give thus improving charities’ ability to raise funds from the public. However, as any increase in giving will also be dependent upon a number of economic factors, we would not be able to determine what percentage of any future change in giving patterns was a direct result of the Bill.

PART 3 (TRUSTEE INVESTMENT POWERS)

Costs on the Scottish Administration

169. The Bill provides for wider powers investment for trustees. There is no direct cost to the Executive or OSCR under this part.

Costs on local authorities

170. None, although charitable trusts managed by local authorities may also benefit from the wider investment powers.

Costs on others (including the charity sector)

171. There is no cost associated with this part. In proposing reform to existing legislation (the Trustee Investments Act 1961), the Scottish Law Commission indicated that not only would the reform enable many trusts to acquire and hold investments which are likely to produce a better return than the investments to which they are restricted at present, but it would also lessen the administrative burden and associated costs of maintaining the regime required by the 1961 Act.

PART 4 (GENERAL AND SUPPLEMENTARY)

Costs on the Scottish Administration

172. It is anticipated that much of Executive’s direct funding of the voluntary sector will be carried out under the new generic power set out in this Part. This is expected to amount to some £18.9 million per annum. There will however be no net cost to the Executive as this figure represents the pulling together of funding currently carried out under different funding powers.

Costs on local authorities

173. Section 96 brings rate relief for community amateur sports clubs (CASCs) in Scotland into line with those across the rest of the UK. This will make mandatory what is already being done on a voluntary basis by local authorities. Therefore, it is not expected that this provision will
These documents relate to the Charities and Trustee Investment (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004.

have any material effect on the level of rate relief already provided nor the administrative cost of providing it. The current level of rate relief to CASCs is not separately available but is included in the figure provided in paragraph 123.

Costs on others (including the charity sector)

174. CASCs will continue to benefit from the relevant rates relief.

### SUMMARY OF ESTIMATED ADDITIONAL COSTS ON THE SCOTTISH ADMINISTRATION

<table>
<thead>
<tr>
<th>Ref</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>OSCR para 119</td>
<td>£1 million pa</td>
</tr>
<tr>
<td>Net cost of possible additional grant-in-aid funding to NDPBs para 124 and 128</td>
<td>up to £7 million pa</td>
</tr>
<tr>
<td>Appeal Tribunal para 159</td>
<td>set up costs of £160,000 and between £145,000 and £210,000 pa</td>
</tr>
<tr>
<td>Awareness and training seminars para 139</td>
<td>up to £150,000</td>
</tr>
</tbody>
</table>

### SUMMARY OF ESTIMATED ADDITIONAL COSTS ON LOCAL AUTHORITIES AND OTHERS

<table>
<thead>
<tr>
<th>Ref</th>
<th>Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Possible loss of charitable status by local authority managed charities para 123 and 126</td>
<td>not known</td>
</tr>
<tr>
<td>NDPBs para 124 and 128</td>
<td>see above under “costs on the Scottish Administration”</td>
</tr>
<tr>
<td>Administrative costs to charities associated with registration para 130</td>
<td>mostly minimal but up to £2000</td>
</tr>
</tbody>
</table>
EXECUTIVE STATEMENT ON LEGISLATIVE COMPETENCE

175. On 11 November 2004, the Minister for Communities (Malcolm Chisholm MSP) made the following statement:

“In my view, the provisions of the Charities and Trustee Investment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

176. On 11 November 2004, the Presiding Officer (Right Honourable George Reid MSP) made the following statement:

“In my view, the provisions of the Charities and Trustee Investment (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”
INTRODUCTION

1. This document relates to the Charities and Trustee Investment (Scotland) Bill introduced in the Scottish Parliament on 15 November 2004. It has been prepared by the Scottish Executive to satisfy Rule 9.3.3(c) of the Parliament’s Standing Orders. The contents are entirely the responsibility of the Scottish Executive and have not been endorsed by the Parliament. Explanatory Notes and other accompanying documents are published separately as SP Bill 32–EN.

POLICY OBJECTIVES OF THE BILL

2. This Bill introduces a new regulatory regime for charities in Scotland. It sets up a new charity regulator and public register of charities. The objective of the Bill is to ensure there is a robust, proportionate and transparent regulatory framework that satisfies public interest in the effective regulation of charities in Scotland and meets the needs of the Scottish charity sector.

3. There are particular benefits to be gained by a body from being a charity. These range from specific UK tax reliefs, non-domestic rates relief, availability of gift aid on donations and access to funding from bodies which may have decided only to fund charities. The benefit of public confidence and trust may be less tangible but is nevertheless also valuable to many charities. Acceptance that the operations of charities are for public benefit can lead to easier access to public donations and volunteering, sponsorship etc. There is public interest in ensuring that bodies which are charities and receiving public support and donations are known to be carrying out useful work and providing public benefits. This interest stems both directly from the tax benefits from the public purse which are available to charities, and from the need to safeguard public trust. Robust regulation will ensure that charities are well-organised, and accountable, providing the services which the public expects and expending funding on projects which the public considers charitable. Bodies wishing to earn the benefits of being a charity have a responsibility to the rest of the sector to earn the “right” to be called a charity. Hence the intention of the Bill is to protect the charity “brand”.

4. There is also a need to assist charities to operate effectively in a modern society, as part of the Executive’s overall strategy to support the voluntary sector which has a massive potential value to Scottish society. Existing regulations can be restrictive and require modernisation, removing obstacles to the most efficient delivery of good value.
5. The Bill repeals existing provision for the recognition, supervision and reorganisation of charities and creates one single, modern framework for charity regulation in Scotland. Some of the provisions extend beyond charities to bodies which have analogous purposes to charities. In particular, the Bill regulates fundraising not just for charities but for a wider category of bodies which may be charitable, benevolent or philanthropic. The Bill also provides for an extension of the power of trustees to make investments under the Trusts (Scotland) Act 1921. This provision will benefit all trusts whether or not they are charities.

6. The Bill is divided into Parts which deal with proposed measures within each of the following categories:
   - Part 1 – Charities
   - Part 2 – Fundraising for benevolent bodies
   - Part 3 – Investment powers of trustees
   - Part 4 – General and supplementary.

CONSULTATION

7. There has been extensive consultation on charity law reform over several years. The McFadden Commission1 consulted widely in 2000 with every recognised Scottish charity. The Executive then carried out a public consultation exercise to seek views on the McFadden recommendations. In order to further investigate the details of some of the McFadden recommendations, the Executive established The Charity Law Advisory Forum which included representatives and experts from the charity sector.

8. Following the Executive’s announcement that a draft Bill was to be prepared, a Charity Bill Reference group was established in November 2003 to assist in formulating the details of the draft Bill and to provide an element of pre-consultation discussion. Representatives from small and large charities, the new regulator (OSCR), SCVO, Institute of Fundraising, the Scottish Consumer Council, the McFadden Commission, the Advisory Forum and the Home Office took part in the group. In addition, the Bill team took part in over 40 specialist meetings with individuals or groups of stakeholders dealing with particular sections of the Bill.

9. The draft Bill and accompanying consultation paper2 was published on 3 June for a period of 12 weeks formal public consultation. Almost 1,000 printed copies of the consultation paper were issued and the documents were viewed over 27,000 times via the Executive’s website. During this period, the Executive held 6 consultation events (a conference and 5 smaller regional seminars and workshops in Dundee, Inverness, Dumfries and Glasgow (twice)). Over 400 delegates attended these events and a summary of the workshop discussions was published on the Executive’s website3. The Bill team also spoke at several other events organised by the sector to help explain the Bill proposals to those involved with charities.

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2 Draft Charities and Trustee Investment (Scotland) Bill: Consultation (http://www.scotland.gov.uk/consultations)
3 Report to the Scottish Executive from the Consultation Events on the Draft Charities and Trustee Investment (Scotland) Bill June 2004 (http://sh45inta/about/unass/unass/00015300/page70039779.pdf)
10. The Executive received over 250 responses to the formal consultation, with the vast majority strongly supporting most of the proposals in the draft Bill. A number of useful suggestions were made to detailed aspects of the draft Bill and many of these were used in this Bill. In accordance with the Executive’s normal consultation procedures, the responses to the consultation were made available on its website and at the Executive’s library. A summary analysis of the responses is being prepared and will be published shortly.

11. The Executive also commissioned a number of focus groups to gauge the general public’s attitude to charities and the proposals in the draft Bill. This work indicated that lay people were generally likely to be supportive of the Executive’s proposals for a robust and transparent regulatory regime for charities and particularly the main proposals in the draft Bill. It also emphasised the need, in the general public’s view, for a review of charity regulation to encourage public confidence in charities in Scotland. The summary report of this work is published on the Executive’s website.

BACKGROUND

Current charity regulation

12. The current legislation governing charities in Scotland is set out in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (“the 1990 Act”). Only bodies with a Scottish connection, recognised as having charitable purposes and eligible as such for certain tax relief by the Inland Revenue may currently describe themselves as a “Scottish charity”. The Act provides the Scottish Ministers with powers to supervise charities, require information in the course of investigations and apply to the Court of Session for action to be taken to protect assets or remove a person from managing a charity if it appears that mismanagement or misconduct has occurred. Charities have to keep accounts and provide accounting information when requested. Separately, the Civic Government (Scotland) Act 1982 and regulations govern the licensing by local authorities of public charitable collections.

13. As a precursor of the present proposed legislation, The Office of the Scottish Charity Regulator (OSCR) was established as an Executive Agency in December 2003 to carry out the Ministers’ powers of regulation of charities.

14. The current definition of charity used by the Inland Revenue to judge whether a body is to be recognised as charitable is drawn from the preamble of the Statute of Charitable Uses 1601. Over the years this has been refined and modernised by case law and decisions of the Charity Commission for England and Wales. To be regarded as charitable within the UK, an organisation must currently fulfil two conditions: it must have purposes that are recognised as exclusively charitable and it must be established for public benefit. Charitable purposes are characterised by the courts as falling under four categories or “heads”:

- relief of poverty

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4 http://www.scotland.gov.uk/library/social/ctisb-00.asp
5 a link to this will be available on the Executive’s charity law website at http://www.scotland.gov.uk/about/UNASS/UNASS/00015300/page1193351391.aspx
6 ibid
• advancement of education
• advancement of religion
• other purposes beneficial to the community.

There has been a presumption that bodies falling under the first three heads provide a public benefit, while those coming under the fourth have to prove this.

15. There are certain UK tax benefits available to charities, and as it is the Inland Revenue that effectively grants this status in Scotland, any Scottish charity is eligible for these. Hence the same definition of charity is used for charity and tax purposes throughout the UK. Other tax benefits such as rates relief are provided by local authorities.

Other charities operating in Scotland

16. In England and Wales, any body carrying out a charitable activity is considered to be a charity, and unless covered by specific exemptions or exceptions, has to register with the Charity Commission and is subject to its regulation. Such bodies have to identify themselves as registered charities to the public. The actual operational activities of such charities in Scotland are not specifically regulated.

Calls for charity reform

17. In 1997 the Kemp Commission report recommended significant changes to charity legislation in Scotland. Following earlier research by the University of Dundee published in 1999, the Executive formed the Scottish Charity Law Review Commission (the McFadden Commission) which reported its recommendations for reforms to charity legislation in 2001. The McFadden Commission recommended that a new charity law should be prepared in Scotland with a new independent regulator established with powers to grant charity status.

18. In December 2002, following public consultation on the McFadden recommendations, the Executive published its response to the McFadden report, including a commitment to establish OSCR to more effectively deliver the existing powers under the 1990 Act.

19. Around this time, public and media attention of court actions taken against a small number of charities, fundraisers or trustees highlighted the calls for a more comprehensive charity regime in Scotland.

20. Following the election in May 2003, the Executive published a Partnership Agreement which included a commitment to legislate on charity law during the 2003-07 Parliamentary session.

PART 1 – CHARITIES

Policy objectives

21. The current regulatory regime for charities in Scotland is fragmented. The granting of charitable status in Scotland is currently carried out by the Inland Revenue, supervision and investigation is carried out by OSCR on behalf of Ministers, whilst action may only be taken by the Court of Session. The McFadden Commission called for a single independent regulator to undertake all these functions.

22. Indications from charities themselves in recent years have also highlighted that public support in the form of donations has been adversely affected by the high level of media attention given to a small number of court actions taken against Scottish charities and their trustees. The focus groups organised by the Executive during the consultation period also supported the view that public confidence in charities had been affected.

23. The current charity regime includes a system for bodies to apply for charitable status, for information about charities to be made available to the public if they request it, and for OSCR to investigate and promote action against wrong-doing by charities if this is found. However, the regime does not provide the level of transparency and accountability which is expected in a modern society. There have been accusations that the time taken between complaints to the regulator and action being taken in court is too long to be acceptable.

24. The overall policy objective on charities is therefore to establish a satisfactory regulatory regime that will encourage public confidence in charities whilst not over-burdening the charity sector with bureaucracy.

25. For regulation to be effective, it must promote five key principles.\(^9\) It must be:

- independent
- proportionate
- accountable
- transparent
- consistent.

The proposed regime set out in the Bill aims to meet each of these principles.

Office of the Scottish Charity Regulator (Chapter 1, Schedule 1)

26. Establishing OSCR as an independent statutory regulator will bring together the main functions of regulating charities in Scotland for the first time. The Bill (section 1) establishes OSCR as a corporate body. The Executive intends that OSCR will be established as a non-ministerial officeholder of the Scottish Administration (more usually known as a non-Ministerial Department) once an order under the Scotland Act has been made following enactment of this

Bill\textsuperscript{10}. OSCR will report to and be accountable directly to the Scottish Parliament, although its members will be appointed, following normal public appointment procedures, by Ministers (schedule 1).

**Scottish Charity Register (Chapter 2)**

27. OSCR will maintain a statutory register of charities in Scotland, the Scottish Charity Register (section 3). All charities either managed or controlled from Scotland or with significant operations (i.e. owning or occupying land or with activities in a shop, office etc.) in Scotland will have to provide information to OSCR for the register, which will be publicly available on OSCR’s website. As a transitional arrangement, all existing Scottish Charities, recognised as such by the Inland Revenue upon enactment of this Bill, will initially be included on the register.

**Charity test (Chapter 2)**

28. The McFadden Commission (and the Prime Minister’s Strategy Unit which reviewed the law and regulation of charities and other not-for-profit organisations in 2002\textsuperscript{11}) recommended that all charities should have to meet a public benefit test. This would remove the previous presumption of public benefit for charities whose purposes are the relief of poverty, or the advancement of religion or education. The Bill (section 7) sets out a two part charity test to define charities. The first part expands the current list of charitable purposes to more fully describe all purposes which are currently accepted as being charitable.

**Public benefit**

29. The second part of the test requires each organisation to provide public benefit to qualify as a charity. The definition has been prepared with the intention that it is compatible with that being proposed by the Home Office which is preparing the Charity Bill for Westminster as it is accepted that the link to the charity definition which will be used by the Inland Revenue for UK tax relief purposes is important to Scottish charities. It is expected, that as long as the definitions used in Scotland and the rest of the UK are not widely different, the Inland Revenue will accept OSCR’s decisions on charity status when making decisions on tax relief for Scottish charities. A number of criteria are also set out in the Bill (section 8) to which OSCR and the courts have to have regard in determining whether public benefit is provided by a body. This follows consideration of the responses to the consultation on the draft Bill and implements one of the options discussed in the consultation paper. The criteria require OSCR and the Courts to have regard to:

- a comparison of any benefit gained by members of the body (or other persons) as a result of its activities with the benefits gained by the public; and
- if the benefit is provided only to a section of the public, whether any condition for obtaining the benefit is unduly restrictive.

30. There has been much discussion and media coverage about the potential impact of strict public benefit criteria and the removal of a presumption of public benefit for the first three original heads of charity. Charities which currently rely on these heads (the relief of poverty,\textsuperscript{10} Such an order is required because non-Ministerial officeholders of the Scottish Administration are designated by section 126 of the Scotland Act 1998.  
11 “Private Action, Public Benefit” Prime Minister’s Strategy Unit September 2002
and the advancement of education and religion) for their charity status will now have to show they provide public benefit according to the new criteria. Some suggestions for public benefit criteria would have set an even stricter standard, possibly aimed at ensuring that certain classes of charity cannot retain this status. However the criteria that the Executive has proposed in the Bill (in section 8) are based on the existing case law and interpretation which has been followed in recent years. These require consideration of firstly the relative benefits that members of a charity and the public may gain from its activities, and secondly the extent to which any conditions on receiving benefits from a charity (e.g. charges for a service) may be unduly restrictive. This will ensure that OSCR and the Court take these factors into account in determining charity status, without setting inflexible rules as to the actual levels to be used in making decisions on these criteria. This will allow for future flexibility.

31. In addition, a body will fail the charity test if it is property-distributing (i.e. its constitution allows it to distribute its property for any purpose apart from its charitable purposes), not free from third party control, or has party-political purposes. The second of these criteria fulfils the Executive’s commitment (and codifies the existing position) that charities must be independent bodies, free from external control to act for its charitable purposes. The Executive has accepted that there may be a conflict between this policy and that of some charitable public bodies (such as non-departmental public bodies (NDPBs)) carrying out functions on behalf of Ministers being subject to direct Ministerial control to ensure they are answerable to them. The Executive has committed to reconsidering the need for either NDPB or charitable status of several such bodies when the next policy and financial management reviews are carried out. Some NDPBs have already undergone such reviews, with the conclusion that they should retain charitable status but not remain NDPBs. There may be a considerable cost to some bodies (e.g. cultural NDPBs such as National Galleries or Museums) if they were to lose their charitable status.

32. OSCR is given a statutory duty (section 9) to prepare guidance (following consultation) on how it determines whether a body meets the charity test.

Co-operation and information (Chapter 3)

33. In order to reduce the additional burden of regulation on charities, the Bill (section 20) requires OSCR to seek to co-operate with other relevant regulators and to share information. Relevant regulators are public bodies or officeholders with functions similar to OSCR’s and which are conferred by enactment. The intention is that OSCR will be able to obtain from and share information with other regulators thus avoiding having to obtain it directly from charities themselves, or may agree protocols with other regulators so that similar information can be obtained in a common format. The Bill places a duty (in section 24) on OSCR and other Scottish regulators to disclose information about charities to each other, subject to other restrictions (such as data protection or other relevant UK legislation). The Executive intends to seek agreement with other UK regulators for similar duties to be placed on them to co-operate with and disclose information to OSCR. The UK Government can then impose such duties via a section 104 order under the Scotland Act in Westminster as a consequence of this Bill. The Bill (section 22) also gives charities a duty to provide information to OSCR so that it can perform its functions.

34. To underpin the accountability of charities to the public, OSCR is required (section 21) to make the Register publicly available, while charities are required (section 23) (as they are at
present under the 1990 Act) to provide a copy of their constitution and latest accounts to anyone who reasonably requests it. As is presently the case, charities may charge a reasonable fee to cover the cost of supplying these documents. Scottish Ministers may, however, make an order setting the maximum level of such fees and may also exempt charities from having to provide the documents. It is intended that this power may be used by Ministers to exempt smaller charities from the burden of having to provide documents to the public, but this might only be considered when it is clear that such information is easily available elsewhere (such as via OSCR).

Supervision of charities (Chapter 4)

35. To fulfil its regulatory functions, OSCR will have powers (section 28) to make any inquiries into a charity, a body controlled by a charity, a body or a person representing themselves as a charity or acting for a charity. The intention of ensuring that OSCR may make inquiries into bodies controlled by a charity is so that a non-charitable trading or fundraising arm of a charity is not exempt from OSCR’s inquiries relating to the charity. OSCR will be able to demand information or documents for its inquiries. As a result of inquiries, if OSCR considers that misconduct in the charity has taken place or action is necessary to protect charitable assets, it may take direct action for a period of up to 6 months (sections 31 and 32). OSCR may stop the body acting as a charity, suspend a charity trustee, agent or employee, restrict the charity’s transactions or freeze its accounts. To extend these actions beyond 6 months, or have a judicial factor appointed to manage the body’s affairs, OSCR must apply to the Court of Session. This is intended to allow OSCR to take immediate action to protect a charity’s assets if it suspects misconduct but to ensure that OSCR is not able to continue such actions indefinitely without the agreement of the courts.

36. Section 38 of the Bill sets out modifications to the general regulatory regime for particular classes of charity which are already highly regulated. OSCR’s powers in relation to the investigation and supervision of charitable registered social landlords are to be carried out by Communities Scotland (on behalf of Scottish Ministers), which already operates a substantial regulatory regime for RSLs. This, and OSCR’s power to delegate these regulatory powers to other regulators for other classes of charity, will further allow OSCR to take steps to ensure that charities are not subject to unnecessary overregulation.

Reorganisation of charities (Chapter 5)

37. This part of the Bill aims to simplify and increase the freedom of charities to reorganise their constitutions. Many of these organisations are very old and have constitutions which have become out of date or difficult to work under. Unless the body’s constitution included a formal means of allowing the members to agree changes to it, currently the only method of legally changing is via the courts. This is because trust law requires a degree of control on such bodies to protect the trusters’ views. At present the provisions of the 1990 Act require such changes to be agreed by the Court of Session. This means that many organisations cannot afford to go through the necessary process to update their constitutions. In some cases this means that charitable funds are not able to be used to full benefit because the constitution of the body is out of date. Instances have been reported where funds are being held for the benefit of groups of people which no longer exist.
38. The Bill (sections 40 to 43) introduces a simpler system for reorganisations, allowing all charities to make alterations merely by seeking OSCR’s agreement rather than having to apply to the Courts. This regime is expected to be more attractive and cheaper for charities, encouraging them to undertake reorganisations where this will lead to more effective delivery of their charitable purposes. Many in the sector have claimed that the current reorganisation regime is so complicated and expensive that many charities have put off updating their constitutions, possibly leading to charitable funds either being unused or not utilised for the best purposes. OSCR will also have the power (section 41) to apply to the courts to reorganise a charity if it considers this is required.

39. In the consultation draft of the Bill, it had been proposed that the simpler reorganisation regime should also apply to non-charitable public trusts. However, further consideration and consultation indicated that it would be more appropriate to merely legislate for charities at this time, with a simpler regime, and for legislation on other public trusts to await the recommendations of the Scottish Law Commission which is currently considering reforms of trust law.

Endowments

40. The Bill (section 44) clarifies the position of all bodies which are both endowments (either educational or non-educational) and charities, ensuring that the new reorganisation provisions in the Bill prevail for all charities. These endowments are currently covered by the Education (Scotland) Act 1980 provisions.

Charity accounts (Chapter 6)

41. Charities already have to maintain accounting records and prepare annual accounts and this will continue. The Bill (section 45 and 46) sets out provisions to allow the introduction of a proportionate regime of charity accounting, so that small charities where there is little risk of major problems do not have to meet the same regulatory requirements as large charities which may be multi-million pound companies dealing with significant assets and many employees. Details of the regime with different thresholds etc. will be set out in subordinate legislation to ensure that the thresholds may be more easily amended to take account of changing circumstances. It is also intended that the accounting regulations will be more compatible with the Statement of Recommended Accounting Practice (SORP) for charities. This is the guidance, adopted by the Accounting Standards Board, used by professional accountants when auditing charity accounts. At present there is little correlation between the current statutory charity accounting regime in Scotland and the SORP. The charities SORP is currently being revised, with an exposure draft available for public consultation.

Scottish charitable incorporated organisation (Chapter 7)

42. The Bill will provide a number of improvements to the operating environment for charities. One of these is a new optional legal form (Scottish charitable incorporated organisation) designed specifically for charities to enable them to more simply take on corporate status and for their members to have no liability for the debts of the charity if it is wound up. At present, charities have to either become companies limited by guarantee or industrial and provident societies to achieve corporate status, and hence become subject to registration with Companies House or the Financial Services Authority. This new form is designed only for
Scottish charities and will be regulated by OSCR. To assist in the detailed plans for introduction of this legal form, the Executive commissioned the preparation of model forms of constitution which might be used by charities seeking this status. These examples will be published on the Executive’s website shortly\(^{12}\). Further details relating to the legal form and the regime for regulating it will be subject to subordinate legislation made by Scottish Ministers.

**Religious charities (Chapter 8)**

43. The Bill (section 64) gives OSCR the power to recognise certain charities as “designated religious charities” (DRCs) which will operate under a slightly tailored regulatory regime. The provisions in the Bill will slightly amend the existing system for “designated religious bodies”, where some religious bodies which are charities are exempted from some reporting and accounting requirements. These sections of the Bill have been developed in recognition of the particular constitutional position of the Church of Scotland, but designated status will in fact be available to any religious charity of any faith, if it can meet the criteria. The Executive recognises that many religious bodies operate effective self-regulatory mechanisms and does not seek to over-regulate these charities.

44. The criteria for DRC status will be the same as current criteria for “designated religious bodies” under the 1990 Act. OSCR will have the power to remove DRC status if it believes that the body no longer meets the criteria or if after investigation it is felt no longer appropriate for the body to be designated. Notice of revocation will be served and will be subject to an appeals process.

45. DRCs will be exempt (section 64(4)) from requirements to seek OSCR’s consent for certain changes to their constitution and the powers of OSCR and the Court of Session to suspend or disqualify a person from management or control of the body or to direct the body to cease operating will not apply to them. The regulations setting out the charity accounting details (under section 45) may make specific provisions on the format of accounts that DRCs will have to prepare. DRCs will be supervised and investigated in the same way as any other charity. Although OSCR will not be able to suspend or disqualify DRC stewards where it finds wrongdoing, it will be able to freeze bank accounts to protect charitable assets, and of course, remove DRC status.

**Charity trustees (Chapter 9)**

46. Charities are independent bodies and exhibit a very wide range of organisational forms. These range from multi-national companies to small community groups and trusts. However, whatever the form, those people in control of the charity have responsibilities to manage the charitable assets of the body and ensure they are used to further the charitable purposes for which it was established. There are a variety of names used to describe those controlling a charity, depending on its legal form, e.g. directors of a company, trustees of a trust, or merely committee members of many smaller membership groups. The Bill (section 65) establishes a set of duties to clarify the responsibilities of “charity trustees” (the most widely accepted name used for all types of charity). These duties highlight the need for charity trustees to act in the best interests of the charity, and always to act with the same duty of care that is reasonable to expect of a person managing the affairs of another. Failure to comply with these duties may be

\(^{12}\) www.scotland.gov.uk/viu
considered misconduct, and action may be taken by OSCR against the charity or charity trustee concerned.

**Reviews of OSCR decisions (Chapter 10)**

47. In order to satisfy the sector’s calls for a simple and freely available means of questioning OSCR’s decisions without recourse to the courts, the Bill (sections 70 to 77) sets out a review and appeal regime. Initially, a body affected directly by OSCR’s regulatory decisions may seek an internal review of the decision. This will ensure that OSCR considers the original decision again. In addition, if the appellant remains dissatisfied, they may request that a new body, the Scottish Charity Appeal Panel, considers the decision. Section 74 and schedule 2 provide details of the Panel. Lastly, if still dissatisfied, either the appellant or OSCR may appeal the case to the Court of Session.

48. The Appeal Panel will consist of 3 persons, available to consider the case and taken from a list of persons appointed by Scottish Ministers to be available for the Panel. The Panel will be a Tribunal under the aegis of the Scottish Committee on the Council for Tribunals and will have powers to either confirm a decision made by OSCR, quash a decision and direct OSCR to take such action as the Panel considers fit, or remit a decision to OSCR for reconsideration.

49. There is little evidence on which to estimate how many decisions by OSCR may need to be considered by the Panel. It is for this reason that the Panel has been established as effectively an *ad hoc* panel to be convened as necessary from a list of available persons, rather than a standing tribunal with full-time officials and members.

**Alternative approaches**

**Alternative form for regulator**

50. There are a number of different possible types of statutory regulator. For example:

- Executive agency (e.g. Communities Scotland, OSCR at present)
- non-departmental public body (e.g. Scottish Natural Heritage)
- non-Ministerial Department (e.g. Charity Commission for England and Wales)
- Parliamentary Commission (e.g. Scottish Information Commissioner).

The McFadden Commission considered various forms, but concluded that the regulator’s form was less important than its function.

51. The Executive considered what were felt to be the most important characteristics for a charities regulator:

- independence from government
- independence from the charities sector
- ability to contribute to Executive policy-making for the sector
- accountability (to its funding body)
- accountability (to the public and to stakeholders)
This document relates to the Charities and Trustee Investments (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

- governance structure represents a range of skills, interests and backgrounds
- decisions can be appealed cheaply and easily.

52. These characteristics are closely linked to our five principles of good regulation, set out above, and echo key recommendations of the Better Regulation Task Force’s report on independent regulators. Looking at all the available forms, we came to the view that it is best for OSCR to become a non-Ministerial department under the new law. We have based this decision on considerable research and consultation. The charity sector had strong views that neither an Executive agency nor a non-departmental public body would provide the required levels of independence from Ministers. We considered establishing OSCR as a Parliamentary Commission, but received feedback that this would be too much of a departure from existing practice, where the Scottish Parliament only appoints single Commissioners, and where those Commissioners generally have an important role in scrutinising Executive practice. It therefore seemed that a non-Ministerial department was the most appropriate vehicle which would allow OSCR to be established with a governing board independent of Ministers, with accountability to Parliament and to stakeholders.

Common UK definition of charity

53. An alternative to setting a Scottish definition of charity in the Bill would be to continue to rely on a definition set by Westminster. Because the UK tax benefits for charities are matters reserved to Westminster it may be more straightforward for charity status in Scotland to be governed by a single definition set out in the draft Home Office Charity Bill which has been considered in Westminster by the Joint Scrutiny Committee. This might be considered particularly helpful in some circles as charity status is currently based on Inland Revenue decisions, based on a UK definition. However, the regulation of charities is specifically devolved to the Scottish Parliament under the Scotland Act and many people would consider it wholly inappropriate for the Parliament to abdicate this responsibility. Instead, the proposed Bill aims to set a Scottish definition which, for good reasons, is very similar and compatible with that currently being proposed for England and Wales. There is, of course, no means of ensuring that these definitions, however similar in the Bill proposals, will eventually end up similar following different Parliamentary processes and interpretation by different charity regulators and courts.

Definition of “public benefit”

54. While the new definition of charity requires all bodies wishing to have charity status to demonstrate that they provide “public benefit”, there are alternative approaches to the detail which could be provided in the Bill. Three basic options present themselves, as shown below:

- No definition in the Bill – leaving interpretation to the regulator and the courts (and probably being strongly influenced by case law), but allowing reasonable flexibility to take account of changing public views.

- A detailed definition in the Bill which should give greater certainty to the sector about what a body must do to become a charity, but either ignores past case law or is fossilised, hence allowing no future flexibility.

- An interim approach with criteria set out in the Bill to set certain principles which the regulator and the courts must follow, but allowing them to develop the details and their actual interpretation over time.
55. The Executive initially favoured the first option above, with no definition being included in the draft Bill at the consultation stage. However, the accompanying consultation paper specifically sought views on this issue and suggested possible criteria which might be used for the third option. The responses to the consultation clearly indicated a majority in favour of more clarity with an element of flexibility, i.e. the third option. It is also worth noting that the Home Office’s draft Charity Bill published in May 2004 included no definition of public benefit but that many comments in evidence given to the Westminster Committee scrutinising the draft Bill also called for some form of criteria to be included in the Westminster Bill. The Committee’s report recommended that the Home Office Bill should include non-exclusive criteria (or alternatively for statutory guidance to be issued to clarify the definition of public benefit).

56. As discussed in paragraph 30, there has been much discussion, as the Executive has developed this Bill, about whether certain classes of charity would or should be able to meet a new requirement to demonstrate public benefit. There has been notable discussion about the status of charitable independent schools. Some respondees suggested that the public benefit definition should be strictly drafted to ensure that such bodies cannot meet the test. Others (e.g. SCVO) suggested alternative criteria, which may also have been drafted with the intention of having this affect.

Scottish charity register: should charities registered elsewhere register in Scotland?

57. The draft Bill was prepared with the intention that any organisation wishing to call itself a “charity” in Scotland would have to register with OSCR. This would mean that all UK charities with operations in Scotland, currently registered with the Charity Commission in England and Wales, or other bodies registered abroad, would also have to apply to OSCR. This would ensure that the Scottish public has an easily accessible means of finding details of all charities operating in Scotland. To minimise the impact of any potential dual regulation, the Bill gives a duty to OSCR to seek to co-operate with other regulators. It is expected that OSCR will come to an arrangement with the Charity Commission to ensure that, for example, similar registration and reporting formats are used so that the same information can be provided to each regulator. One alternative approach would be to accept that charities already registered elsewhere were able to operate in Scotland with no direct registration or regulation.

58. A further alternative is to require any organisation which has significant operations in Scotland to register with OSCR. This would mean that many UK charities, although operating here, would not have to register as their operations may amount merely to contacting their Scottish members, or providing grants to organisations in Scotland. However, should these bodies occupy land or premises in Scotland, or carry out activities in any office, shop etc., they would also have to register here. After careful consideration of the benefits and disbenefits, the responses to the consultation on the draft Bill and the potential impact on OSCR of thousands of charities registered in England deciding that they may wish to operate here, the Executive has adopted this option. The Bill defines (in section 14) the circumstances when a charity registered elsewhere also has to register with OSCR and when charities registered elsewhere may, as long as they clearly indicate where they are registered, describe themselves as a charity in Scotland.

14 UK Parliament Joint Committee on Draft Charities Bill http://www.publications.parliament.uk/pa/jt/jtchar.htm
59. Even where a UK charity is registered with OSCR as well as the Charity Commission, there will be no requirement to prepare separate accounts for each jurisdiction. This would have been an alternative, but was considered to be an unnecessary burden. However, it is expected that many charities will choose to prepare improved information to inform the public and their stakeholders about their operations in Scotland.

Alternative models for charity incorporation

60. It is generally agreed that it is useful for charities to have access to the benefits of incorporation. One alternative to creating a new legal form in the Scottish Charitable Incorporated Organisation would be to do nothing. Charities already have access to incorporation in the form of company or industrial and provident society status. However, neither of these forms have been designed with charities in mind, and the accompanying regulatory regimes do not entirely fit with charity regulation.

61. Another alternative would be to establish the new Scottish Charitable Incorporated Organisation along exactly the same lines as that proposed for charities registered in England and Wales. This allows charities to choose whether to register as a Charitable Incorporated Organisation with limited liability for members (similar to companies limited by guarantee) or to register as a CIO with no liability for members (the approach we have taken in this Bill). The Executive considers that the “limited liability” option is of little value for charities or their creditors, since members are usually liable to contribute very small sums (generally £1) on the winding up of the charity. For reasons of simplicity we have therefore discarded this option. Creditors will have a range of other avenues available to them in order to safeguard their investment in a “no-liability” SCIO, for example seeking personal guarantees from charity trustees, as is already common practice. Charities wishing to take the limited liability option will continue to have access to the company form.

62. A final option would be to allow the creation of single member SCIOs. This approach was proposed for charities registered in England and Wales. However it has been suggested in discussion with legal and other representatives of the charity sector that there are dangers in the independent governance of single member incorporated charities, and the Executive is inclined to agree with this analysis. For this reason the Bill confirms that SCIOs must have more than one member (section 49(2)), and at least three charity trustees (section 50(2)).

Independence and duties of charity trustees

63. The McFadden Commission recommended that the proportion of trustees appointed by the government to any charity should be limited to less than a third. This was to prevent undue influence on the charity which should be acting as an independent body. This would mean that many NDPBs where Ministers usually appoint all board members, and many charities established by local authorities, could not remain as charities. The Executive considers that the way that charity trustees act is more important than the way they are appointed, and the Bill (section 65) sets out specific duties of trustees to clarify that they must act for the best interests of the charity and its purposes, without outside influence. The Bill also confirms that charities themselves must be independent from third party control by including this as part of the charity test in section 7.
64. Another alternative would have been to provide exemptions to the need for independence for either specific charities or classes of charities (e.g. individual NDPBs or groups of cultural NDPBs) where specific enactments provide for Ministerial control in legislation establishing the charity’s constitution. However, this would not have been in accordance with Ministers’ commitments on charity independence and is not in accordance with many views put forward in responses to the draft Bill consultation.

Consultation

65. The responses to the draft Bill consultation provided useful guidance and confirmation that most of the provisions in the draft Bill were widely accepted and welcomed. In particular, there was almost unanimous agreement that OSCR should be established as a non-Ministerial Department with powers to grant charity status, maintain a register and regulate charities. There was also agreement that it was very important that a common or compatible definition of charity is used both north and south of the border as long as this definition was also right for Scotland, and that the Bill should contain criteria to guide the interpretation of “public benefit”.

Membership of OSCR

66. Schedule 1 of the Bill sets out the classes of individual who are to be disqualified from being a member of OSCR. As is normal in such bodies, this includes MSPs, MPs and MEPs etc. However, the consultation draft also proposed that a person serving as a charity trustee (termed “charity steward” at that time) should also not be allowed to be members of OSCR. This was intended to ensure that those effectively being regulated by OSCR could not also be in control of the regulator. Many respondees pointed out that there is much to be gained from having OSCR members who have direct recent experience of controlling charities, suggesting that this proposed provision should be removed. The Executive has accepted this suggestion. In order to ensure that there is no risk of a conflict of interest by a charity trustee taking part in decisions affecting the charity they control or themselves, OSCR will be required (by virtue of being included in the provisions under the Ethical Standards in Public Life etc. (Scotland) Act 2002 by paragraph 10 of schedule 4) to prepare a Code of Practice for approval by Scottish Ministers. This Code will set out procedures to avoid conflict of interests by OSCR members and staff.

Public benefit

67. The Executive has carefully considered the responses to the consultation on the criteria to be used to judge public benefit. As discussed in paragraph 56, some respondees suggested that the criteria should be set with the aim of specifically excluding certain classes of body from being charities. SCVO suggested specific criteria. The Executive considers that the criteria now adopted (in section 8) meet the spirit of what was proposed, providing a guide to OSCR and the courts to assist them in determining charity status, but both basing it on the existing position and providing a degree of flexibility.

Scottish charity register: should charities registered elsewhere register in Scotland?

68. On the issue of whether all charities operating in Scotland should be required to register with OSCR, there was a divided view. Some respondees felt that this is wholly appropriate, but many UK charities complained that this requirement was unnecessary and was over-bureaucratic. It was also felt that if co-operation between charity regulators was successful,
there would be little benefit and indeed it might over-burden OSCR because most of the 180,000 charities in England and Wales may decide that they would wish to register with OSCR in case they ever wished to operate in Scotland also. In light of this, the final Bill therefore only requires charities with significant operations in Scotland to register with OSCR. All charities either managed or controlled from Scotland or with significant operations (i.e. owning or occupying land or with activities in a shop, office etc.) in Scotland will have to register here. A UK charity merely writing to its Scottish members or advertising in a national newspaper, would not have to register. These bodies would however be expected to describe themselves accurately, identifying themselves perhaps as a “charity registered in England and Wales” rather than merely a “charity”.

Independence and duties of charity trustees

69. The views expressed in responses on the need for independence of charities and charity trustees were mixed. Whilst the majority view was that charities should be strictly independent of government and other third party control, several views were expressed that the great value of charitable status to many charities which are carrying out functions of benefit to the wider public or the “nation” (such as those conserving national assets, e.g. National Museums or National Trust Scotland) should be preserved. Many respondees agreed with the Executive, that it is the actions of trustees and their freedom to act independently which is most important, rather than the means by which they are appointed. However, a fairly strong body of opinion from the voluntary sector repeated their agreement with the McFadden Commission’s recommendation to specifically limit the number of trustees appointed by government. The Executive has decided to ensure that charities are independent from third party control by including this as an additional part of the charity test. Bodies may not be charities if their constitution expressly permits a third party to direct or otherwise control its activities.

Reorganisation of charities’ constitutions

70. The majority of consultation responses confirmed that the proposals to provide a simpler regime for charity reorganisations were welcomed. A further more general addition to the conditions when these reorganisation provisions may be used has been added in the light of suggestions in responses. This is that a reorganisation may also take place when the charity’s constitution (except its purposes) is no longer desirable.

71. The consultation version of the draft Bill set out a common graduated regime for the reorganisation of all charities and public trusts. Hence a body wishing to reorganise would have had to apply to either OSCR, the Sheriff Court or the Court of Session, depending on its size. However, in response to comments from the court services and in a move to simplify the proposed regime even further for charities, the Executive has decided that OSCR, rather than the courts, should consider and determine all reorganisation schemes, whatever their size. Hence the Bill now provides that charities not having a power to amend their constitution themselves will have to apply to OSCR for approval of a proposed reorganisation scheme. This simplifies the regime, especially for the larger charities which would otherwise have had to apply to the Court of Session. Decisions on reorganisations by OSCR may be appealed to the Scottish Charity Appeals Panel by applicants, with a further appeal to the Court of Session.

72. This change has another impact. Currently reorganisations of non-charitable public trusts are covered by the 1990 Act and require consideration by the Court of Session. It was proposed
in the consultation draft that reorganisations of small public trusts would be considered by OSCR in the same way as reorganisation of small charities. Now that it has been decided that all reorganisations of charities should be considered by OSCR, with an appeal to the Scottish Charities Appeal Panel, rather than to the sheriff court, it is considered that it is no longer appropriate for OSCR to oversee the reorganisation of non-charitable trusts. OSCR is the charity regulator, with no real remit for non-charitable bodies, and it is not considered appropriate that the Scottish Charities Appeal Panel should act as an appellate body for non-charitable public trusts. It has therefore been decided to exclude non-charitable public trusts from the reorganisation provisions of the Bill, and leave the current regime of the 1990 Act in place for all such trusts at present. The Scottish Executive will ask the Scottish Law Commission to take the 1990 Act regime into account in its ongoing programme of work to review trust law.

Scottish charitable incorporated organisation

73. Only three respondees to the consultation suggested that they disagreed with the creation of the Scottish Charitable Incorporated Organisation as a new legal form. The vast majority of respondees who expressed a view welcomed the new form as an addition to the range of options currently open to charities. Two respondees felt that the form should be mandatory for charities. There was an equal division of views regarding whether members of SCIOs should have limited liability for debts, or no liability. The Executive has taken the view that the limited liability option is already catered for through company law, and that SCIOs should take the simpler, “no-liability” form.

Remuneration of charity trustees

74. Another issue raised in the consultation response was that the Bill ought to clarify the position on the remuneration of charity trustees. Many respondees considered that charity trustees should be prevented from receiving payment for their normal duties as trustees but that they should be able to be paid for providing other services. Provisions have been added to the Bill (sections 66 and 67) to allow payment of charity trustees only where expressly permitted (with a block on charities changing their constitution from the date of introduction of this Bill to avoid a largescale move to change constitutions to allow this now). In addition, payments to charity trustees for normal or other duties will only be permitted where it is considered reasonable and in the charity’s best interests, is subject to a transparent written agreement, and that only a minority of trustees are paid.

PART 2 – FUNDRAISING FOR BENEVOLENT BODIES

Policy objectives

75. Part 2 of the Bill aims to set out an important foundation of statutory regulation of charity fundraising, which can be further developed by self-regulation within the charity sector.

76. 21st century charity fundraising is big business. Estimates from the Scottish Council for Voluntary Organisations show that Scottish charities raise over £2 billion a year to spend in our communities. Charities raise funds from a vast range of sources: from government grants and contracts; from local authorities; from the National Lottery; from other charities; from trading and investments; from corporate sponsorship; and of course from public donations (which provide around £240 million a year to charities in Scotland).
77. The Prime Minister’s Strategy Unit report recommended the establishment of a self-regulation scheme, with powers for the government to introduce statutory regulation of fundraising if necessary. In response to the recommendation in the Strategy Unit report, the Institute of Fundraising set up the Buse Commission to devise a structure for the self-regulation of fundraising organisations and activities. The Buse Commission reported with a model for self-regulation in January 2004. The Executive has decided to allow a self-regulation scheme time to prove its worth, by setting out the fundamentals for transparent charity fundraising in our Bill, which can be complemented by good practice standards drawn up and overseen by a self-regulatory body. The exact model of self-regulation is obviously an issue for the sector to consider and implement. However, the Bill includes powers to regulate fundraising further if it is felt that self-regulation has not been effective. The proposals for regulation of fundraising in Scotland, overlaid by a self-regulatory structure, are set out below.

Control of fundraising

78. The Bill is drafted to capture fundraising by, and for, “benevolent bodies” and charitable, benevolent and philanthropic purposes. This is a wider concept than charity, and means that it can regulate any fundraising for a good cause, whether or not the body raising funds is a registered charity. Existing legislation regulating public charitable collections (section 119 of the Civic Government (Scotland) Act 1982) applies to all benevolent collections, and not just those for registered charities, and it was felt that any further regulation of fundraising should cover all benevolent fundraising in order to maximise public confidence. As mentioned above, OSCR will have the power to investigate individuals purporting to be a charity or to be collecting on behalf of one when they are not, and to protect any funds raised in this way. OSCR will have a general power to protect charity assets or money raised, even if they are not held by a charity.

79. The Bill (section 81) gives benevolent bodies (and hence also charities) the right to seek an interdict preventing unauthorised fundraising by anyone who uses fundraising methods in their name which the body objects to, who is not a fit and proper person to fundraise or if the body does not wish to be associated with that venture.

80. The Bill (section 80) requires professional fundraisers and commercial participators (a normal business which undertakes a promotion from which a good cause will benefit) who solicit money or other goods on behalf of a named charity or benevolent body to have an agreement with that body to do so. The Bill allows the content or format of the contract to be set out in secondary legislation. Charities, benevolent bodies and OSCR will have the right to seek an interdict to stop professional fundraisers and commercial participators who are fundraising in a charity’s name without an agreement or outwith an agreement in the required form.

81. Regulations will require benevolent fundraisers (including commercial participators and professional fundraisers) to make a statement to potential donors regarding their remuneration or the amount that will go to the body or cause.

82. To ensure the public is properly protected, the Bill (section 82) includes powers to allow further statutory regulation of fundraising in Scotland if Ministers feel that self-regulation has not been effective in improving public confidence in charities. Regulations could cover the

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manner in which funds are raised, and could set out different provisions for different methods of 
fundraising or different classes of person or institution. Failure to comply with these regulations 
could be an offence. The Bill requires Ministers to consult before making any regulations.

Public benevolent collections

83. The Bill (sections 83 to 91) sets out a local authority led system for licensing public 
benevolent collections, similar to the current system of licensing public charitable collections 
under the Civic Government (Scotland) Act 1982. Organisers of public benevolent collections 
defined in the Bill as collections of money and promises of money from the public in a public place 
or by means of visits from place to place will be required to apply to the relevant local 
authority for permission to hold the collection. If the collection is to be held on private land, the 
owner’s permission will be required and the owner will have discretion to refuse permission, 
notwithstanding local authority permission.

84. The local authority must consult the police and may undertake other background checks 
before deciding whether to grant permission, although regulations may remove this duty for 
certain types of application. If granting permission, the local authority may impose conditions, 
including when, where or how the collection should take place. The provisions also specify on 
what grounds a local authority may refuse or withdraw permission. Local authorities will have 
discretion to fast-track applications for emergency appeals (disaster relief, for example) when 
necessary. There will be more detail on how public benevolent collections should be carried out 
in regulations, which could provide different, appropriate systems for cash collections and for 
promises of money (e.g. direct debits).

85. OSCR will have a role (section 91) in working with local authorities and police forces in 
Scotland to provide advice on the law, and to support them to agree consistent practice in their 
processes for dealing with public benevolent collections. This should ensure that local 
authorities are better supported to carry out this role, and that charities can operate on a more 
level playing field across Scotland.

86. “Designated national collectors” will take the place of the current “exempt promoter” 
scheme for charities collecting across a range of local authority areas, and will be recognised and 
regulated by OSCR. OSCR will be required to establish the criteria for achieving this status, and 
to consult on this. The Bill (section 86) requires designated national collectors to provide the 
local authority with three months’ notice of any public benevolent collections they intend to 
hold. They will not be able to give more than eighteen months’ notice, in order to avoid “block 
booking” years in advance. The local authority will be able to refuse permission if the collection 
raises public order issues. It is intended that transitional arrangements will provide that all 
existing “exempt promoters” will be known as designated national collectors on enactment of the 
Bill until OSCR reviews this designation.

87. Door-to-door collections of goods by charity shops are not included in the definition of 
public benevolent collection, since evidence suggests that existing codes of practice work well, 
and there is little negative effect on public confidence from these types of collections. However, 
some consultation responses suggested that the Bill should require organisers of the goods 
collections to notify local authorities of their intention to collect. Accordingly, the Bill includes 
powers (section 90) allowing Ministers to make regulations, if it is considered necessary,
This document relates to the Charities and Trustee Investments (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004

requiring goods collectors to notify a local authority of their intention to carry out such collections.

**Alternative approaches**

**Statutory fundraising controls**

88. An alternative to introducing reserve powers which may be used by Ministers if it is considered that the industry’s self-regulation scheme is not successful, would for the Bill to introduce a statutory regulation scheme immediately. This would probably involve preparing a statutory code of practice to be followed by all fundraisers, with a kitemark or other mark of compliance, regulated by either OSCR or another new regulator. Making use of the industry’s plans for self-regulation is more cost effective and ensures that the sector is closely involved in establishing the regulatory regime it will have to follow. Given that charity fundraising has borne the brunt of recent media attentions and public lack of confidence, it is probably not tenable to consider the status quo of not establishing any controls on fundraising.

**Public benevolent collections**

89. An alternative to developing the existing local authority-led licensing system for public collections would be to establish an entirely new regime or remove the current controls entirely. The level of complaints reported by local authorities about public collections, particularly concerning “tabard” collectors seeking promises of money in the street or door-to-door (not covered by the existing legislation) argues in favour of extending the current regime. It is also apparent from discussion with local authority and charity representatives that the current system is not implemented consistently. Charities report that different authorities require licences for different activities and monitor collections to varying degrees.

90. The Home Office proposals are based on an alternative regime, with a collection organiser having to apply for a certificate of fitness to collect. An individual licence is then also obtained from each authority where a collection is to take place.

**Consultation**

91. The responses to the draft Bill consultation indicated a high level of support for the Executive’s proposals to regulate fundraising for benevolent bodies. In particular, provisions allowing benevolent bodies greater control over those fundraising for them, and the requirement for professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf were welcomed. As a result of the responses, the Executive intends to extend the requirement to make a statement to potential donors regarding the fundraiser’s remuneration or the amount of the funds going to the benevolent causes to include fundraisers directly employed by benevolent bodies, and possibly to volunteers. Details of this will be provided by secondary legislation.

92. The responses to the draft Bill consultation also indicated a high level of support for the Executive’s proposals to develop the existing local authority licensing system for public charitable collections. There was strong support for the proposal to extend the public collection regime to cover promises of money as well as cash collections. Maintaining the current provisions (with amendments) for exemptions for charities collecting across most of Scotland as
national collectors was also welcomed. As a result of responses made to the consultation, the Executive has added reserve powers to the Bill (section 90) which allow Ministers to promote secondary legislation requiring prior notification to local authorities of all collections of goods. The Executive do not consider that, at present, this activity leads to undue malpractice, but there was a view that this provision may be required in future if improper practices develop. Following the consultation the Executive has also added a power in section 85 allowing Ministers, through regulations, to remove, for certain types of application, the requirement for local authorities to undertake background checks.

PART 3 – INVESTMENT POWERS OF TRUSTEES

Policy objectives

Widening trustees’ powers of investment

93. Part 3 of the Bill implements the recommendations of the Scottish Law Commission to widen the powers of investment of trustees of Scottish trusts (whether or not they are charities, public or private trusts), while still requiring them to act prudently to safeguard the capital of the trust. The recommendations were contained in a joint report of the Law Commission and the Scottish Law Commission which was published in May 1999 and recommended reform of the law in England and Wales and in Scotland to give trustees wider investment powers because the existing legislation was considered to be outdated and unduly restrictive. The Trustee Act 2000 implemented the provisions for England and Wales, but implementation for Scotland was deferred until the McFadden report had been considered. The changes in this Bill will benefit trusts in Scotland which do not have adequate powers in their trust deeds by enabling them to invest trust assets in ways which may produce a better return than the investments to which they are restricted at present.

Alternative approaches

94. The alternative approach of not extending powers of trustees of Scottish trusts would maintain the current financial disadvantage that exists compared with trusts in England and Wales able to follow a less restrictive range of investment options. This would be a missed opportunity for Scottish charities and trusts.

Consultation

95. The draft Bill consultation responses strongly supported the removal of these restrictions on Scottish trustee investment powers. Minor amendments have been made following several suggestions in responses.

PART 4 – GENERAL AND SUPPLEMENTARY

Policy objectives

96. Part 4 of the Bill provides general and supplementary provisions and details relating to the rest of the Bill.
97. The Bill (section 95) provides a new power for Scottish Ministers to be able to make payments to benevolent bodies or persons with a view to assisting the body to implement their purposes better. This power is mainly provided to ensure that an appropriate general funding power is available to Ministers should they wish to provide funding for the voluntary sector or to persons working to improve the operation of the sector. In the past, much funding of this type has been provided by use of sections 9 and 10 of the Social Work (Scotland) Act 1968 or other legislation. It is considered that this legislation may not always be the most appropriate and the opportunity is being taken to provide a specific power (in section 95) to allow Ministers to provide funding for benevolent bodies.

98. Section 96 gives legislative backing to the voluntary rates relief for registered community amateur sports clubs which has already been announced and implemented by local authorities for the Executive.

99. Specific transitional provisions (section 97(1)) ensure that all existing “Scottish Charities” which are those bodies recognised by the Inland Revenue for charitable tax relief will automatically be entered onto OSCR’s charity register initially. This ensures that there is a seamless transition from the existing regime to the new and that these existing bodies maintain the benefits of being charities. OSCR will then systematically review the register to ensure that all charities entered continue to meet the charity test. Section 97(2) provides general transitional arrangements to allow Ministers to make, by order, provisions considered necessary in consequence of the Bill.

100. One of the definitions included in section 103 (General interpretation) is of “charity trustees”, the term adopted throughout the Bill for those in control of a charity – whatever actual legal form the body takes. This therefore provides a generic term covering, for instance, directors of charitable companies, trustees of charitable trusts, elected committee members of many unincorporated charities etc. This term does not alter the normal use of the descriptors for each of these specific forms of body, but merely provides a generic term which can be used in the Bill for those controlling a charity. It is useful to ensure a common understanding of the duties and responsibilities arising from charity law for persons in this position.

Alternative approaches

101. In the consultation, the Executive proposed a new term (“charity steward”) to be used to describe those in control of a charity, partly in an attempt to avoid any confusion with the term “trustee” which is commonly used but relates mainly to trust law.

Consultation

102. Respondees understood the benefit of a generic term in the Bill for those in control of a charity, but preferred the term “charity trustee”. Whilst some legal advisors agreed there may be some confusion with the term trustee in Scottish trust law, it was felt that this would be minor and was outweighed by common understanding and use of the term charity trustee in charity circles as well as in England and Wales.
103. Some respondees also pointed out that the consultation draft of the Bill did not contain any specific transitional provisions to ensure existing Scottish charities would retain their status and be transferred to the new register. This intention was explained in the consultation paper, but has now been included within the Bill (at section 97(1)) as described in paragraph 99 above.

**EFFECTS ON EQUAL OPPORTUNITIES, HUMAN RIGHTS, ISLAND COMMUNITIES, LOCAL GOVERNMENT, SUSTAINABLE DEVELOPMENT ETC.**

**Equal opportunities**

104. The Bill is intended to improve the regulation and operating environment of charities, public trusts and other benevolent bodies. Many charities provide benefits for disadvantaged or needy persons who may experience prejudice on the grounds of race, religion, gender, age, disability or sexual orientation both in Scotland and elsewhere. Improved regulation of charities is expected to enhance their effectiveness both operationally and in relation to fund raising and as such should have a positive impact on equal opportunities.

105. Following responses to the consultation an overarching duty for OSCR to perform its functions in a manner that encourages equal opportunities and in particular the observance of the equal opportunity requirements has been added to the Bill (subsection 1(5)). “Equal opportunities” “and equal opportunity requirements” have been given the same meaning as in section L2 of Part 2 of Schedule 5 to the Scotland Act 1998.

106. OSCR as a public body has relevant statutory obligations under the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995. Individual charities themselves also have specific legal responsibilities to comply with this legislation. No parts of the Bill are considered to have negative equal opportunities impacts and none are discriminatory on the basis of gender, race, disability, marital status, religion or sexual orientation.

107. Specific provisions have been included in section 3 to allow OSCR to provide exemption to the requirement for contact names and addresses for a charity or charity trustee to be made publicly available where it is satisfied that is a risk to the safety or security of any person or premises. This follows responses from representatives of several groups who felt that providing the names or addresses of certain charities or representatives on the register could put them at risk.

108. A large range of equalities organisations have been included in the Executive’s consultation on the draft Bill16 which specifically sought views on any potential impact the Bill provisions might have on equal opportunities. The following equalities organisations were consulted: Equality Network, Scottish Disability Equality Forum, Commission for Racial Equality Scotland, Disability Rights Commission, Equal Opportunities Commission, Black and Ethnic Minority Infrastructure in Scotland, Engender, Inclusion Scotland, LGBT Youth Scotland, Scottish Interfaith Council, Age Concern Scotland.

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16 Chapter 6 – Equality considerations: Draft Charities and Trustee Investment (Scotland) Bill: Consultation (http://www.scotland.gov.uk/consultations)
109. Most of these groups have responded to the consultation noting that they are satisfied with the proposals or have confirmed that they have no specific comments to make.

**Human rights**

110. Section 29 of the Scotland Act 1998 sets out the limits on the legislative competence of the Scottish Parliament. One of those limits is the need not to contravene any of the rights granted by the European Convention on Human Rights (ECHR) which are listed in Schedule 1 to the Human Rights Act 1998 (known as “the Convention rights”). OSCR is a public authority for the purpose of the Human Rights Act 1998. The Executive is satisfied that the provisions in the Bill are consistent with the European Convention on Human Rights.

111. In particular, the provisions in Part 1 on information powers and supervision of charities were considered in relation to Articles 6 and 8 of ECHR, particularly in relation to OSCR’s reporting activities and the publishing of information which could relate to an individual’s correspondence or relating to a fair trial. However, as the publishing of information in these circumstances only arises following investigation and a finding of a maladministration or misconduct we consider that the provisions are compatible with ECHR. The requirements for the reporting of investigations by OSCR are proportionate in the light of the public interest in the proper regulation of charitable activity. The provisions on issuing a notice for producing documents, also in Part 1, is qualified to the extent that disclosure may be refused on the grounds of confidentiality and such a requirement is subject to review.

**Island communities**

112. There are no apparent implications specifically for island communities. Many charitable organisations are established mostly for local benefit and can lead to increased local community involvement and pride. Responses from two of the main island local authorities confirmed their support for the Bill’s provisions, especially those seeking to improve the operating environment for charities.

**Local government**

113. Local government is affected in several ways by the Bill. Some charities have been established by local government to help provide local services. Where local government representatives play a part in governing a charity, the Bill makes clear that their duties as charity trustees requires them to act in the interests of the charity and not for the body they represent.

114. Scottish charities are eligible for mandatory 80% non-domestic rates relief, administered by local authorities, and authorities have the option of also allowing exemption from the remaining 20%. The Executive reimburses authorities for most of this relief.

115. The public benevolent collections regime dealt with in Part 2 of the Bill makes improvements on the existing local authority licensing provisions. Local authorities will continue to assess applications for, and issue licences to, those wishing to undertake public collections. Several meetings have been held to discuss the Bill proposals with representatives of local authority licensing representatives (mainly via SOLAR - the Society of Local Authority
Lawyers and Administrators in Scotland). Local authorities also responded to the consultation paper and their views have been fully taken into account in developing the final provisions. Officers have noted that local authorities receive many complaints from the public about charity fundraisers seeking direct debit funding and are currently unable to take any action as this form of fundraising is not regulated. The provisions in Part 2 of the Bill remedy this position. Several charities and local authorities have commented that the assistance of OSCR in guiding and advising on the public collection regime will lead to more consistency between authority areas, assisting charities and authorities alike.

116. The improvements to the regime for reorganising charities are expected to be a particular benefit to local authorities which often oversee several small old local bodies which could usefully be reorganised to provide increased public benefits. The reorganisation of educational and other endowments which are also charities will in future be covered by provisions in the Bill rather than the Education (Scotland) Act 1980. The Bill’s provisions in Part 1 allow these reorganisations to be approved by OSCR rather than having currently to be considered by the Court of Session. This should be a benefit to local authorities which often oversee several small or some large endowments as the costs of reorganisation will be reduced.

117. The Executive held several meetings during development of the draft Bill to discuss detailed proposals and matters affecting local authorities with local authority officials dealing with the licensing of public charitable collections, reorganisations and other matters. Around half of the local authorities responded to the consultation on the draft Bill, generally being very supportive of the proposals.

**Sustainable development**

118. Many charities are already established for environmental protection or sustainable development purposes and one of the proposed charitable purpose “heads” in section 7(2)(i) relates specifically to environmental protection or improvement.
Communities Committee

1st Report, 2005 (Session 2)

Stage 1 Report on the Charities and Trustee Investment (Scotland) Bill

Published by the Scottish Parliament on 2 March 2005
Communities Committee

1st Report, 2005 (Session 2)

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1 December 2004 (29th Meeting, 2004 (Session 2))
8 December 2004 (30th Meeting, 2004 (Session 2))
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8 December 2004, (30th Meeting, Session 2 (2004))

Oral evidence
Scottish Executive


Written evidence
Charity Law Association
Turcan Connell
Anne Swarbrick, Anderson Strathern
Charity Law Research Unit (CLRU), University of Dundee
Institute of Fundraising Scotland
Scottish Council of Voluntary Organisations
Network of Councils for Voluntary Service (CVS) Scotland
Volunteer Development Scotland

Oral evidence
Charity Law Association
Turcan Connell
Anne Swarbrick, Anderson Strathern
Law Society of Scotland
Charity Law Research Unit (CLRU), University of Dundee
Institute of Fundraising Scotland
Scottish Council of Voluntary Organisations
Network of Councils for Voluntary Service (CVS) Scotland
Volunteer Development Scotland

Supplementary written evidence
Turcan Connell
Anne Swarbrick, Anderson Strathern
Law Society of Scotland
Institute of Fundraising Scotland
Scottish Council of Voluntary Organisations
Volunteer Development Scotland


Written evidence

Scottish Council of Independent Schools (SCIS)
Nuffield Hospitals
Scottish Inter Faith Council
Scottish Churches Committee

Oral evidence

Scottish Council of Independent Schools (SCIS)
Donaldson’s College for the Deaf
St Aloysius College
Edinburgh Rudolf Steiner School
Nuffield Hospitals
Scottish Inter Faith Council
Scottish Churches Committee
Humanist Society of Scotland

Supplementary written evidence

Humanist Society of Scotland

19 January 2005, (2nd Meeting, Session 2 (2005))

Written evidence

Co-operation and Mutuality Scotland
National Collections Institutions
  • National Museums of Scotland
  • National Library of Scotland
  • National Galleries of Scotland
  • Royal Botanic Garden Edinburgh
  • Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS)
Universities of Scotland
Association of Scottish Colleges
Institute of Chartered Accountants of Scotland
Scottish Grant Making Trust Group

Oral evidence

Co-operation and Mutuality Scotland
Link Group Limited
National Collections Institutions
  • National Museums of Scotland
  • National Library of Scotland
  • National Galleries of Scotland
Universities of Scotland
Association of Scottish Colleges
Institute of Chartered Accountants of Scotland
Scottish Grant Making Trust Group

Supplementary written evidence

National Collections Institutions
  • National Museums of Scotland
  • National Library of Scotland
  • National Galleries of Scotland
• Royal Botanic Garden Edinburgh
• Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS)
  Association of Scottish Colleges
  Institute of Chartered Accountants of Scotland

26 January 2005, (3rd Meeting, Session 2 (2005))

Written evidence
  The City of Edinburgh Council
  Oxfam in Scotland
  Capability Scotland
  The Wise Group
  Office of the Scottish Charity Regulator (OSCR)
  COSLA

Oral evidence
  The City of Edinburgh Council
  Edinburgh Leisure
  Highlands and Islands Arts Limited (Hi-Arts)
  Oxfam in Scotland
  Capability Scotland
  The Wise Group
  Office of the Scottish Charity Regulator (OSCR)

Supplementary written evidence
  The City of Edinburgh Council


Oral evidence
  Deputy Minister for Communities

ANNEX E: OTHER WRITTEN EVIDENCE

Association for Charities
Association of Charity Independent Examiners
Brakeley Limited
BTCV Scotland
Cancer Research UK
Charity Check
Church of Scotland Trust
East Lothian Community Development Trust
Fairbridge in Scotland
Fettes College
Hospital Broadcasting Association
International Play Association and PlayRight Scotland Trust
Keep Scotland Beautiful
Lloyds TSB Foundation for Scotland
Mary MacKenzie
National Trust for Scotland
National Union of Students Scotland
Neville P Judd
Play Scotland
Public Fundraising Regulatory Association (Scotland)
Royal College of Nursing Scotland
Royal National Lifeboat Institution
Royal Society for the Protection of Birds (RSPB) Scotland
Salvation Army
Scottish Council of Jewish Communities
Scottish Arts Council
Shetland Charitable Trust
Victim Support Scotland
Wellcome Trust
West Dunbartonshire CVS
YouthLink Scotland

NB The Committee also received one confidential submission which is not published in this report.

Note:
The following evidence was also received but is not printed here. Copies of this evidence may be obtained from the Clerk to the Committee (except where indicated with an asterix *).

Evidence from the Scottish Churches Committee

- Extracts from ‘The Laws of Scotland –Stair Memorial Encyclopedia’
- ‘The Constitution & Laws of the Church of Scotland’, James I Weatherhead (Editor), 1997 *
- ‘Confidence in a Changing Church’ by Finlay A J Macdonald, 2004 *

Evidence from Dr Patrick Ford, Charity Law Research Unit (CLRU), University of Dundee

- ‘The Scottish Charity Test: Do We Really Need It?’ by Dr Patrick Ford, extract from The Edinburgh Law Review, Vol 8, 2004, pages 408-414
Communities Committee

Remit and membership

Remit:

To consider and report on matters relating to housing and area regeneration, poverty, voluntary sector issues, charity law, matters relating to the land use planning system and building standards and such other matters as fall within the responsibility of the Minister for Communities. (As agreed by resolution of the Parliament on 23 February 2005)

Membership:

Karen Whitefield (Convener) Scott Barrie Cathie Craigie Linda Fabiani Donald Gorrie (Deputy Convener) Christine Grahame Patrick Harvie Mr John Home Robertson Mary Scanlon

Committee Clerking Team:

Clerk to the Committee
Steve Farrell

Senior Assistant Clerk
Katy Orr

Assistant Clerk
Jenny Goldsmith
Stage 1 Report on the Charities and Trustee Investment (Scotland) Bill

The Committee reports to the Parliament as follows—

Introduction

1. The Charities and Trustee Investment (Scotland) Bill (SP Bill 32) was introduced in the Scottish Parliament on 15 November 2004 by Malcolm Chisholm, the Minister for Communities. The Bill was accompanied by Explanatory Notes (SP Bill 32-EN) which include a Financial Memorandum, and by a Policy Memorandum (SP Bill 32-PM) as required by Standing Orders. On 17 November 2004, the Parliament designated the Communities Committee as lead committee in consideration of the Bill. Under Rule 9.6 of the Standing Orders, it is for the lead committee to report to the Parliament on the general principles of the Bill.

2. The provisions of the Bill that confer powers to make subordinate legislation were referred to the Subordinate Legislation Committee under Rule 9.6.2. In addition, the Finance Committee took evidence on matters relating to the Financial Memorandum accompanying the Bill. The reports of these Committees are attached at Annex A.

Pre-legislative Scrutiny

3. The Communities Committee was particularly interested to hear the opinions of charitable and voluntary organisations on the draft Bill. Charitable and voluntary organisations of varying sizes and from a range of sectors were invited to three half-day meetings. These meetings were held in Glasgow on 26 October, in Perth on 2 November and in Aberdeen on 16 November 2004. Each meeting covered key areas of the draft Bill, including the Office of the Scottish Charities Regulator (OSCR), regulation and compliance costs, independence and governance, and fundraising. The Committee found these meetings to be extremely useful and would like to thank all of those who participated so constructively. A copy of the report of the meetings in Glasgow, Perth and Aberdeen is included at Annex B.

4. The Communities Committee would like to thank the Scottish Council for Voluntary Organisations (SCVO) for facilitating these meetings and reporting on
them. The Committee also received an informal briefing from the SCVO on the draft Bill.

5. The Communities Committee held a meeting with representatives of independent schools at a meeting in Perth on 2 November 2004. A copy of the report of this meeting is included at Annex B.

6. The Committee had an informal meeting with the Office of the Scottish Charity Regulator on 17 November 2004.

7. The Committee held an informal video-conference with the Joint Committee at Westminster, which was considering the draft Charities Bill for England and Wales, on 30 June 2004. This useful exchange of views and information allowed members of both Committees to increase their awareness of issues which were common to the then proposed charities legislation both north and south of the border, as well as key differences.

8. Following the designation of the Communities Committee as the lead committee, a call for evidence on the Bill was issued with a deadline for replies by 24 January 2005. 31 written submissions were received in response and these are included at Annex E.

9. The Scottish Parliament Information Centre (SPICe) published three separate briefings on the Bill.¹

The Scottish Executive Consultation Process

10. The Scottish Charity Law Review Commission (the ‘McFadden Commission’) was appointed by the Deputy First Minister, Mr Jim Wallace, in March 2000. Chaired by Mrs Jean McFadden, the Commission was composed of representatives of the legal profession, accountants, local government and the charity and voluntary sectors. Its remit was ‘to review the law relating to charities in Scotland and to make recommendations on any reforms considered necessary.’


12. The Scottish Executive established a Bill Reference Group in November 2003, which met seven times during the drafting of the Bill. In addition, between December 2003 and May 2004, around 40 meetings were held with individuals or stakeholders on specific sections of the Bill.

13. On 3 June 2004, the Scottish Executive issued the Draft Charities and Trustee Investment (Scotland) Bill Consultation Paper. The consultation period lasted until 25 August. During this period the Executive held six consultation events, which

¹ SB 04-84 Charities and Trustee Investment (Scotland) Bill – an Overview; SB 05-01 Charities and Trustee Investment (Scotland) Bill – the Charity Test; SB 05-05 Charities and Trustee Investment (Scotland) Bill – governance issues.
were attended by over 400 delegates. The Executive also commissioned a number of focus groups to assess the public’s response to the draft Bill.

14. Over 250 submissions from a wide variety of bodies were received in response to the Executive’s consultation. In general, there was a positive response to the draft Bill. A consultation report was published in December 2004.

15. In the oral evidence heard by the Communities Committee, the overwhelming majority of individuals and organisations commented favourably both on the consultation process and the consideration by the Executive of comments made on the draft Bill.

16. The Committee commends the Executive for conducting an extensive and inclusive consultation exercise, and for the fact that it has been seen to have listened to and responded to comments and concerns raised from stakeholders during this process. The Committee considers that this exercise provides an excellent blueprint for effective consultation on legislative proposals, and would suggest that the approach taken could be applied and further developed by the Executive in future consultations.

Executive Summary

17. The following paragraphs 18-32 summarise the main findings, recommendations and conclusions contained within the report.

18. The Committee believes that the Bill will establish a fair and effective regulatory framework for the charitable sector in Scotland which will also help to promote public confidence in the sector.

19. The Committee believes that reference should be made either in the long title or in the body of the Bill to the promotion of a flourishing charitable and voluntary sector in Scotland.

20. The Committee supports the establishment of the Office of the Scottish Charity Regulator and a discrete Scottish Charity Register.

21. The Committee believes that the Bill has achieved the appropriate balance between ensuring that the charitable sector is properly regulated without imposing a heavy burden on the resources of charities. Nevertheless, it recommends that formal agreements should be reached by the Scottish Executive with the Inland Revenue and by OSCR with the Charity Commission for England and Wales and the Inland Revenue in order to ensure that UK-wide charities are not disadvantaged by the differences in the legislation across the two jurisdictions. The Committee also encourages the Executive to ensure that charities have the advice and support necessary help them adapt to the new regulatory framework.

22. The Committee believes that the ‘charity test’ introduced by the Bill is fundamental to maintaining the philanthropic and charitable character of the sector. Moreover, it guarantees that charities must operate for the benefit of the public and the common good.
23. The Committee welcomes the inclusion of an extensive list of charitable purposes in the Bill. However, it recommends that a series of amendments should be made to these in order that they more truly reflect the objectives of the charitable sector in Scotland.

24. Whilst the Committee recognises that independence must be a fundamental principle underpinning the charitable sector, it is not convinced that section 7(3)(b) is the appropriate method for ensuring that charities and their governing bodies operate independently. The Committee looks forward to considering the amendments that the Executive has committed to introduce in this respect, particularly those that will guarantee that the National Collections Institutions can continue to benefit from charitable status.

25. The Committee welcomes the removal of the previous presumption of public benefit and the inclusion of a public benefit test on the face of the Bill. It is content that OSCR should develop guidance on the test, although it recognises the complexity of this task.

26. The Committee believes that OSCR must take a proportionate approach in all matters relating to information and accounts in order to avoid any unnecessary duplication of effort or additional burdens on the resources of charities.

27. The Committee recommends that the Executive should amend the definition of “misconduct” in section 103 to reduce the possibility of those charity trustees who make relatively minor and genuine errors of mismanagement having action taken against them.

28. The Committee welcomes the capacity for OSCR to carry out inquiries and the establishment of the Scottish Charitable Appeals Panel.

29. The Committee welcomes the establishment of a new legal personality in the form of the Scottish Charitable Incorporated Organisation.

30. The Committee believes that the provisions relating to fundraising will be sufficient to prevent scandals similar to those that have been seen in recent years and will positively promote charitable giving in Scotland by helping to restore and develop public confidence. It also commends the introduction of regulation of fundraising carried out by benevolent bodies.

31. The Committee welcomes the Charities and Trustee Investment (Scotland) Bill as a means of providing a robust, fair and proportionate framework for regulating charities in Scotland.

32. The Committee recommends that Parliament should agree to the general principles of the Bill.

Key Issues

Office of the Scottish Charity Regulator and the Scottish Charity Register

33. The Office of the Scottish Charity Regulator (OSCR) was established as an Executive Agency in October 2004. Sections 1 and 2 of the Bill establish OSCR as a body corporate and outline its general functions and reporting requirements.
Schedule 1 makes further provisions concerning OSCR in terms of its membership, structure and management.

34. Once the Bill has been enacted, the Executive plans to introduce an order under the Scotland Act which will make OSCR a non-ministerial officeholder of the Scottish Administration (a non-Ministerial Department). OSCR must comply with any directions of the Scottish Ministers in relation to its annual reports and will report and be accountable to the Scottish Parliament, although its members will be appointed by Scottish Ministers following normal public appointment procedures.

35. Some witnesses expressed concern about whether OSCR would be sufficiently independent. The Charity Law Association indicated that ‘there is concern that certain of the powers that Scottish ministers have taken will lead to some restrictions on OSCR’s independence of action. For example, the powers of Scottish ministers to determine the terms and conditions of the chief executive and other staff, the number of employees that the body has and the form and content of its annual report suggest that ministers will have quite a lot of control over the way in which OSCR discharges its functions and reports to Parliament.’ SCVO stated that ‘the role of making appointments to the board of OSCR should emanate from sources other than the Scottish ministers. That would be a way to establish at the highest level that Scottish ministers have a low involvement in the governance of OSCR.’

36. When questioned by the Committee on the independence of OSCR, Jane Ryder, the Chief Executive of OSCR, emphasised that ‘it is appropriate for the form and content … to be directed by ministers. …there are many other opportunities for scrutiny and challenge of OSCR, which should both secure its independence and, I hope, ensure that it is seen as independent. …I think there are sufficient opportunities to ensure public accountability and I am not troubled at all about the accountability of OSCR.’

37. The Deputy Minister emphasised that the requirement placed on OSCR to comply with ministerial direction on the form and content of its annual report ‘will not detract from OSCR’s independence but will ensure that OSCR remains accountable for its use of public funds.’

38. The Committee, whilst noting the concerns expressed in evidence on the independence of OSCR, is reassured by the Minister’s statement that appointments to OSCR will be overseen by the Commissioner for Public Appointments in Scotland. However, as Scottish Ministers will have powers to issue directions on the form and content of OSCR’s annual report, the Committee believes that the level of OSCR’s independence will be dependent on Ministerial direction being restricted to indicating a framework for the annual report. The Committee is firmly of the view that it is essential that there should be no direction from Ministers as to the specific matters on which OSCR should report or the manner in which it should report.

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3 Communities Committee, Official Report 15 December 2004, column 1532.
4 Communities Committee, Official Report, 26 January 2005, columns 1680-1681.
5 Communities Committee, Official Report, 2 February 2005, column 1708.
39. The Committee takes the view that the establishment of OSCR as a body corporate is appropriate. The Committee is satisfied that the proposals do not inhibit OSCR from acting independently.

40. OSCR is currently a Scottish Executive agency under the terms of the Scotland Act 1998. One of the objectives in its current remit is to ‘provide independent advice and information to the Scottish Ministers and the Scottish Parliament on regulatory matters’. This function has not been included in the current Bill. In oral evidence OSCR expressed a concern that there might be a doubt about OSCR fulfilling such a role in the future and indicated that they would like to see this role made explicit in the Bill.

41. The Deputy Minister for Communities expressed the view that it was implicit in the general functions of OSCR and stated that ‘if OSCR thinks it will be necessary to advise ministers, it will be able to do so.’

42. The Bill provides for regulations in key areas such as the procedure for applying and determining applications for entry in the Scottish Charity register, for the form and content of accounts, Scottish Charitable Incorporated Organisations (SCIOs) and fundraising, as well as providing Scottish Ministers with the power to exercise OSCR’s functions in certain circumstances in accordance with section 38. The Committee believes that OSCR can provide valuable advice and information to the Scottish Minister in the making of such regulations.

43. The Committee therefore recommends that there should be an explicit reference on the face of the Bill to OSCR providing independent advice and information to Scottish Ministers.

44. OSCR’s general functions are to determine whether bodies are charities; to keep a public register of charities; to encourage, facilitate and monitor compliance by charities with the provisions of the Act; and to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.

45. Whilst the general functions are laid out on the face of the Bill, no objectives are outlined for OSCR. Douglas Connell stated that ‘it would be immensely helpful if one of the stated objectives was the promotion and nourishment of philanthropic giving in Scotland.’

46. Some witnesses drew attention to the fact that the draft English and Welsh Bill included objectives for the Charity Commission for England and Wales. The five objectives set for the Charity Commission are to promote public confidence, the public benefit, compliance, charitable resources and accountability. In written evidence, the SCVO expressed regret that ‘there is still nothing in the Bill that places OSCR under a duty to discharge its functions in a manner that will generally

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7 Communities Committee, Official Report, 2 February 2005, column 1707.
8 Communities Committee, Official Report, 15 December 2004, column 1500.
protect or enhance the integrity and assets of the sector or encourage public confidence in the sector.' The important thing is that a strong charity brand emerges from the bill and that that brand is aligned as closely as possible with what the public understand a charity to be. If we have such a strong brand, that will create the conditions for the charitable sector in Scotland to flourish, develop its work and extend its contribution to Scotland.'

47. When this point was raised with OSCR, Jane Ryder argued that ‘objectives will change over time and I am not sure that it is helpful to treat legislation like a corporate plan. I am content with the functions.’

48. The Committee considers that given the fluidity of the voluntary and charitable sector, any specific objectives which may be set for OSCR in legislation might become prescriptive and constraining over time. The Committee is therefore of the opinion that it is not appropriate to include objectives for OSCR in the Bill.

49. Nevertheless, the Committee does see a value in including a wider and more general reference to promoting a flourishing charitable and voluntary sector in Scotland and suggests that the Executive should give consideration to whether this would be most appropriate in the long title or in the body of the Bill.

50. Under subsection 1(2)(c), one of OSCR’s general functions is ‘to encourage, facilitate and monitor compliance by charities with the provisions of this Act.’ The Financial Memorandum makes reference to the need for OSCR to ‘provide information to the public and guidance to charities’ on the new legal requirements that charities and charity trustees will have to comply with. The Financial Memorandum also makes a provision of £150,000 for training and awareness seminars at a cost of £5,000 for each seminar of 100 delegates.

51. At the Committee’s three pre-legislative meetings with charitable and voluntary bodies, a clear concern emerged over the additional burden which would be placed on the resources of charitable and voluntary bodies in adapting to the new regulatory regime and the support that would be available to help them do so. Whilst there was a clear consensus that there would be a need to provide guidance to charities on the new regulatory framework that will be established once the Bill is enacted, there was a divergence of opinion in written and oral evidence as to whether OSCR should also provide advice to the sector on good governance.

52. In commenting on the role of OSCR, the Charity Law Association highlighted that:

‘...the job of giving advice and guidance on best practice, in addition to advising ministers on issues that affect charities—charity law and so on— should be built into OSCR’s remit. That would go beyond assistance with compliance with the

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9 Written evidence submitted by the SCVO, Annex D.
10 Communities Committee, Official report, 15 December 2004, column 1537.
11 Communities Committee, Official Report, 26 January 2005, column 1682.
12 Charities and Trustee Investment (Scotland) Bill, Financial Memorandum, paragraph 119.
terms of the legislation, into the advice and guidance function. ... That is needed somewhere in the Scottish charitable sector; the question is whether it should fall within OSCR's remit.\textsuperscript{13}

53. A number of witnesses testified that the representative bodies of the charitable and voluntary sector would be best placed to provide such support. Margaret Wilson of Community Service Volunteers emphasised that:

‘...SCVO and CVS are already involved in that work. We have built up a body of expertise in that work so the advice would be much better delivered in that way.’\textsuperscript{14}

Similarly, Stephen Phillips of the Law Society of Scotland stated that ‘it would be valuable if the bill could make a better connection between the work of SCVO, CVS Scotland and the range of other umbrella organisations in the voluntary sector and the kind of initiatives that OSCR would develop.’\textsuperscript{15}

54. When questioned on this issue by the Committee, Jane Ryder, the Chief Executive of OSCR, expressed the opinion that:

‘...it is appropriate – and I hope that it is agreed that it is appropriate – for OSCR to advise, facilitate and make recommendations to charities where there is cause for concern, instead of simply exercising intervention powers. ... I would much rather see prevention than cure; I would also much rather recommend than intervene.’\textsuperscript{16}

She also indicated that there was a spectrum of bodies other than OSCR that had a role to play in advising charities, particularly on specific issues:

‘Where we can, and where there is an obvious other reputable and assured source of advice, we direct charities to that source of advice. For example, on accounting matters, we send charities to the Institute of Chartered Accountants of Scotland. One of OSCR's roles is to work with intermediaries such as ICAS. If legal advice is needed, we send charities to the Law Society of Scotland. We also send charities to the sectoral intermediaries such as the SCVO or one of the other umbrella groups, which have an important role to play. That is the spectrum. I do not see OSCR's role as being to engage in the direct training of trustees, for example. We would not give out that sort of direct advice. However, we regularly appear at seminars that are organised by charities or advisers so that we can give attendees the benefit of our experience to date.’\textsuperscript{17}

55. In evidence to the Finance Committee, the SCVO recommended that a ‘budget of £500,000 in the first year of implementation with a need for a tapering budget year on year thereafter to carry out training to entrench new practice and to provide for new trustees taking up their responsibilities in the years to come.’\textsuperscript{18}

\textsuperscript{13} Communities Committee, Official Report, 15 December 2004, column 1501.
\textsuperscript{14} Communities Committee, Official Report, 15 December 2004 column 1532
\textsuperscript{15} Communities Committee, Official Report, 15 December 2004, column 1502.
\textsuperscript{16} Communities Committee, Official Report, 26 January 2005, column 1683.
\textsuperscript{17} Communities Committee, Official Report, 26 January 2005, column 1683-4.
\textsuperscript{18} Finance Committee, Official Report, 18 January 2005, column 2185
56. Whilst the Finance Committee agreed that there were wider ‘cost implications for the charitable sector than those detailed in the Financial Memorandum,’ it was ‘not convinced that the SCVO’s estimate of £500,000 is entirely accurate either: the CVS already receives £14 million in funding, while SCVO could not specify exactly how much of this is spent on training; it seems reasonable that some of the new training costs could be absorbed from existing training budgets; and, that some bigger charities may be able to meet training costs themselves.’ 19

57. The Minister concurred with the view that representative bodies in the sector were the best placed to provide training and more specific advice:

‘Well-respected charitable organisations—in particular the Scottish Council for Voluntary Organisations and CVS Scotland—represent and understand the sector and have worked to develop capacity in the sector. If we were starting at year zero, it might be logical to ask the regulator to do that work, but significant funding is provided to organisations that are already doing it.’ 20

58. The Committee firmly recommends that there should be an extended role for OSCR in providing generic advice on best practice and good governance. However, in order to prevent any conflict of interest or create any problems relating to OSCR’s lack of indemnity to give specific advice to a charity on how to act in a certain situation, OSCR should be further encouraged to promote co-operation with a range of bodies, particularly the representative networks or umbrella bodies of charities and voluntary organisations. This would help to promote an understanding of the new requirements that will be established by the Bill once enacted, and to promote the development of best practice. In addition, information on sources of additional or specialist advice to charities could be included in OSCR’s more general advice material.

59. One of the chief responsibilities of OSCR is to maintain a Scottish Charity Register which will be a publicly accessible register of all bodies eligible to operate as charities in Scotland. Under the transitional arrangements outlined in section 97, all existing Scottish Charities recognised by the Inland Revenue at the time of enactment of the Bill, must be entered on the Register by OSCR. OSCR will not charge bodies to register as charities, but there may be costs to some organisations in terms of providing the information and documentation necessary to register.

60. The Financial Memorandum states that ‘the one-off cost of this to new and existing charities will vary dependent upon the size of the organisation such that for most it should be minimal but for others it could be up to £2000.’ The SCVO, in written evidence to the Finance Committee, stated that ‘£2,000 is a substantial cost by any reckoning and even a charity that might appear to be able to afford it ‘on paper’ might struggle to allocate further resources to administrative requirements, possibly at the expense of delivering on its charitable objectives.’

61. The Committee very much welcomes the fact that OSCR will not charge bodies to register as charities. Nevertheless, it is of the view that the...
situation must be avoided whereby charities – and particularly smaller charities - are deterred by the potential costs involved in the registration process. The Committee therefore seeks a commitment from the Executive that every effort will be made to ensure that any costs which might result from an application to register should be kept to the minimum necessary to ensure compliance.

62. The requirement to re-register as a charity with OSCR marks a fundamental difference with the English and Welsh Charities Bill, under which the charitable status of existing charities will be retained. All charities will have to demonstrate to OSCR that they satisfy the charity test in order to be included on the register. However, as the Bill stands, there is no duty on any body to register as a charity. The Charity Law Association has commented that ‘it would be helpful if the Bill were to specify that all institutions which qualify for registration are under a duty to register, as in England.’

63. The Committee questioned the Deputy Minister on whether there would ‘be a mechanism for public notice of applications for registration as a charity?’ The Deputy Minister indicated that we ‘might ask OSCR to reflect on the matter.’ The Committee invites the Executive to consider the case for giving transparency to the applications procedure and suggests that it would be useful to have a publicly accessible list of bodies that have applied for charitable status.

64. The Inland Revenue is currently responsible for maintaining an index of charities in Scotland. Following a data cleanse of the list in 2003, there are now just under 18,000 charities which are regarded as being active in Scotland. According to research conducted by the SCVO on behalf of the Scottish Executive, there may be as many as 10,000 dormant or defunct charities in Scotland.

65. The Charity Law Sub-Committee of the Law Society of Scotland argued in written evidence that the register should consist of three parts: current and active charities, foreign-based charities and defunct charities. They argue that ‘having an accessible list of defunct charities will be a service of great importance to potential donors.’

66. The Committee supports the provisions in the Bill which will establish a publicly accessible register of all bodies eligible to operate as charities in Scotland. Given the high number of dormant or defunct charities that were previously registered with the Inland Revenue, the Committee believes that an accurate and up-to-date list - that is easily accessible by the public - is a crucial means of allowing the public to check on the status of a body purporting to be charitable. The Committee believes that placing a duty on charities to register would facilitate the establishment of such a list by OSCR.

21 Written evidence submitted by the Charity Law Association, Annex D.
22 Communities Committee, Official Report, 2 February 2005, column 1736.
23 Communities Committee, Official Report, 2 February 2005, column 1737.
25 Written evidence submitted by the Charity Law Sub-Committee of the Law Society of Scotland, Annex D.
67. The Committee recommends that in addition to a list of current and active charities, there would also be merit in maintaining a list of charities that are no longer functioning. It considers that this would be of particular benefit where charities that are no longer functioning have remaining revenue or other assets. It would also allow such charities to be revived where appropriate and their assets to be used for the public benefit. The Committee therefore invites the Executive to consider this proposal, with a view to bringing forward an appropriate amendment at Stage 2.

68. In order to register as a charity in Scotland, all bodies which are either ‘managed or controlled from Scotland or with significant operations (i.e. owning or occupying land or with activities in a shop, office etc.) are required to register with OSCR.’ However, it is clear from evidence that there might be certain types or arrangements such as contractual obligations for the delivery of services or charities that do not fit easily with the definition of ‘significant operations’. For example, the Hospital Broadcasting Association expressed an uncertainty about the requirement. It is registered with the Charity Commission for England and Wales, yet has some operations in Scotland. However, as all of the volunteers work from home, and other activities in Scotland are restricted to members meetings, the Hospital Broadcasting Association remained unclear of its exact responsibilities in respect to registration.

69. In evidence, two key points were raised by witnesses in relation to the registration of charities in Scotland. The first concerned whether there would be sufficient regulation of fundraising in Scotland by charities that might be based in another jurisdiction and the second to ensuring that UK-wide charities did not face overly burdensome dual regulation requirements due to the fact that there will be three different jurisdictions for charities operating in the UK (England and Wales, Scotland, and Northern Ireland).

70. In the Committee’s pre-legislative meetings, concerns were raised about organisations fundraising in Scotland without performing any charitable activities in the country, and there was a general view expressed that there was a need for a high degree of transparency in fundraising so that the public could be aware of where a charity was based and where the money was spent.

71. In oral evidence it emerged that this issue was one of importance to some bodies. For example, Capability Scotland indicated that:

‘There are organisations that are based wholly in England and Wales – providing their services there, the locus of their remit is there and they are registered with the Charity Commission for England and Wales – that might have signed-up campaign supporters or members in Scotland or might take part in UK-wide fundraising campaigns that include Scotland, although the money goes back down south to be spent.’

72. There are also UK-wide charities and funding bodies that spend significant amount of money in Scotland. Douglas Connell of Turcan Connell noted that:

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26 Charities and Trustee Investment (Scotland) Bill, Policy Memorandum, paragraph 27.
27 Written evidence submitted by the Hospital Broadcasting Association, Annex E.
‘…as well as raising money in Scotland, Cancer Research UK distributes large sums for medical research here. It has office premises and carries out activities in Scotland. Under the bill, it would need to register with OSCR and perhaps meet OSCR’s differing requirements as regards the paperwork that would have to be lodged and its accountability.’

73. The Communities Committee welcomed the assurances of the Executive Bill team that the fundraising provisions in the Bill would be applicable to any benevolent body fundraising in Scotland: ‘the organisation would not be required to register with OSCR, but the fundraising provisions later in the bill apply much more widely than just to charities that are registered with OSCR; they include any fundraising by benevolent bodies, and any body that is registered as a charity elsewhere would be considered to be a benevolent body, so the fundraising provisions would cover it.’

Nevertheless, the Committee believes that it will be necessary to monitor closely the practical implementation of these measures, especially given the growth in the use of the media and the internet for fundraising.

74. There are significant numbers of charities that operate at the UK level or across borders within the UK. In evidence, some charities have expressed concern that there may be duplication in terms of the need to provide information to the Charities Commission for England and Wales and to OSCR and that charities might be treated differently according to where they operate. Dr Eilidh Whiteford of Oxfam in Scotland stated:

‘In the bill as introduced, no distinction is made between the regulation of all a charity’s activities and those that just happen in Scotland. We perceive that as a problem. The Charity Commission for England and Wales currently regulates Oxfam and we do not want a burden of dual regulation, whereby we have to do everything twice. That would be counterproductive to the bill’s aims of trying to improve how charities are regulated. We believe that the Charity Commission regulates us effectively and we want charity regulation in Scotland to improve standards up here. However, we do not want extra administrative and cost burdens from having to do everything twice.’

75. Simon Mackintosh of the Charity Law Association stated:

‘…the bill is clearly designed to remove the registration requirement from English charities that solicit funds in Scotland through newspapers, television and telephone. My reading of the bill is that it does not intend to force charities that are registered in England and Wales to register in Scotland just because they advertise in Scottish newspapers and newspapers that happen to circulate in Scotland, or because they have a television advertising campaign that is shown in Scotland.’

76. The Committee also heard concerns about the difficulties that UK-wide grant makers might face in working across the border if there was not a common framework for charity regulation across the UK and that this could have an effect on funding in Scotland.

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30 Communities Committee, Official Report, 8 December 2004, column 1477.
77. The Committee welcomes the Deputy Minister’s assurance on regulation:

‘It is a question of balancing, being proportionate and not creating onerous and unnecessary work for people—and the bill has tried to do that—against ensuring that charities are regulated if they are operating in Scotland, have premises in Scotland, and so on. That is reasonable. OSCR would need to be alive to complaints that the regulation was burdensome and was creating difficulties. We recognise that there must be a balance, but we think it has been struck.’

78. The Committee is of the view that the Bill has struck a balance between the need for regulation without making the regime too stringent for charities. The Committee believes that a formal agreement with the Charity Commission that covers registration requirements and reporting formats will be crucial to ensure that charities and funding bodies working at the UK level are not overburdened by regulation to the detriment of their activities.

79. In written evidence, Anne Swarbrick drew attention to the provision in section 97 which might allow for some bodies to call themselves Scottish Charities even if they are not on the register, arguing that there could be a number of such bodies:

‘Section 97(3)(a) of the Bill potentially creates two new categories of Scottish charities which may not appear on the Register. These are (i) bodies which may call themselves charities, but which do not appear on the Register and (ii) temporary, or time limited, charities.’

80. The Committee believes that section 97(3)(a) could potentially undermine the integrity of the Scottish Charity Register and the role of OSCR as the charity regulator. It therefore recommends that the Scottish Executive should reconsider the appropriateness of this subsection of the Bill.

The Charity Test
81. The Bill introduces a new charity test that bodies based in Scotland must satisfy in order to be registered as charities. A body will no longer be considered charitable on the presumption that it provides public benefit if it carries out activities to relieve poverty, advance education, advance religion or other purposes beneficial to the community. The new test has two parts: the Bill requires a charity to demonstrate at least one of the thirteen charitable purposes and provide public benefit in Scotland or elsewhere. Whilst the Inland Revenue previously took decisions on applications for charitable status from bodies based in Scotland – as well as elsewhere in the United Kingdom – decisions on whether a body is charitable or not will now be taken by OSCR in Scotland. Section 9 places an obligation on OSCR to produce guidance on the charity test.

82. A Charities Bill covering England and Wales was introduced to the House of Lords on 20 December 2004. The second reading of the Bill took place on 20 January 2005 and a Grand Committee of the House of Lords started its consideration of the Bill on 3 February 2005. The Charities Bill also includes a list of charitable purposes, which are broader than those contained in the Charities and Trustee Investment (Scotland) Bill. The Bill for England and Wales also removes the

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33 Communities Committee, Official Report, 2 February 2005, column 1725.
34 Written evidence submitted by Anne Swarbrick, Annex D.
presumption of public benefit, but proposes to define it in terms of the ‘law relating
to charities in England and Wales,’ that is, to draw on existing case law.

83. The Committee heard a variety of opinions in evidence on the approach adopted
in the Bill, which effectively establishes a clean slate in determining charitable
status in Scotland. There was a general recognition that the new, broader
definitions of charitable purpose contained in the Bill were positive. For example,
Dr Eilidh Whiteford of Oxfam in Scotland said in oral evidence: ‘…we welcome the
charitable purposes heads that the bill outlines, as they are a marked improvement
on what has been used before.’ However, there were a considerable number of
concerns expressed over the potential for differences between Scotland and
England and Wales due to the different tests for obtaining charitable status in the
two Bills. Anne Swarbrick commented:

‘…the Scottish charity test does not start with the present definition …. Instead,
it ... replaces it with a completely new definition. The proposed new Scottish
charity test therefore potentially excludes activities which would be charitable in
terms of the new Westminster test. It also potentially excludes activities which
would be charitable under the present UK wide test.’\textsuperscript{35}

Similarly, the Law Society of Scotland is ‘of the view that pre-existing charity law
and charities recognised under that law should be acknowledged and specified in
the Bill. This will enhance certainty as to a charity’s status and promote
consistency with charities operating under English and Welsh law.’\textsuperscript{36}

84. In oral evidence, Scottish Executive officials gave detailed explanation to the
Committee on the contact that they had with the Home Office when drafting the
Bill:

‘We have had regular meetings with Home Office officials and we discussed the
policy proposals that we put to our draftsmen and the drafts of the bill that we
received from them. We also discussed the impact of the different wordings and
what the intentions of the two bills were. We discussed whether there would be
differences in practice in what was produced. ...We are confident from the
discussions that we have had with the Home Office that either any differences
will be insignificant or we will be able to make progress on the final wording as
the bill is developed and in further discussions with the Home Office.
Nevertheless, we probably need to accept that a difference between the two
definitions could arise because two different parliamentary processes will be
involved.

‘The public benefit criteria that are set out in the bill were discussed with people
from the Charity Commission for England and Wales and the Home Office. They
were content that the criteria in the bill merely encapsulate existing charity case
law in England and Wales and will not create a difference between Scottish
charity law and what will be proposed for the rest of the United Kingdom.’\textsuperscript{37}

\textsuperscript{35} Written evidence submitted by Anne Swarbrick, Annex D.
\textsuperscript{36} Written evidence submitted by the Charity Law Sub-Committee of the Law Society of Scotland,
Annex D.
\textsuperscript{37} Communities Committee, Official Report, 8 December 2004, column 1479.
85. When questioned by the Committee, the Deputy Minister emphasised that although the Bill introduced a new charity test, this did not mean that it would not draw on existing case law. She stated that ‘it would be fair to say that there would be an expectation that OSCR would refer to case law from other places’ in preparing guidance on public benefit.\(^{38}\)

86. The Committee welcomes the principle of introducing a ‘charity test’ for all bodies wishing to have charitable status in Scotland. It believes that it is important to set criteria that bodies should meet in order to benefit from tax relief and to ensure that there is public confidence in the charitable and voluntary sector as a whole. The Committee recognises that the new ‘charity test’ may require some adaptations or adjustments on the part of some existing charities to ensure compliance and therefore suggests that the transitional period referred to in section 97 should be of sufficient length to allow for this.

Charitable Purposes
87. Section 7(2) lists 13 charitable purposes and a body applying to be a charity must demonstrate that it satisfies one or more of them. During the Committee’s pre-legislative meetings, as well as in evidence, a number of specific comments were made about the list of charitable purposes. Many also raised concerns about the differences between the list in the Scottish Bill and the English and Welsh Charities Bill, especially as the English and Welsh list is broader. Jane Ryder, the Chief Executive of OSCR, stated that she would be ‘more than comfortable with having the wider, English categories.’ This desirability of having similar or identical lists in both jurisdictions was one shared by the majority of witnesses.

88. The Minister acknowledged that there was ‘strong support for the definitions being compatible and I am certainly willing to consider some minor changes that will bring them closer together. However, it would not be satisfactory for a Scottish Bill to refer to or be reliant on English charity law.’\(^{39}\)

89. Witnesses testified that the differences between the lists of charitable purposes in Scotland and England and Wales might result in some charities which were registered in Scotland by OSCR not qualifying with the Inland Revenue for tax relief and lead to an uneven ‘playing field’ for charities in the United Kingdom as a whole. Equally, as Simon Mackintosh of the Charity Law Association pointed out that ‘if a body meets the Inland Revenue test but not the OSCR test, it ends up obtaining the UK tax reliefs but not having to be registered by OSCR and therefore not being regulated by OSCR.’\(^{40}\)

90. The Policy Memorandum states that ‘it is expected that as long as the definitions used in Scotland and the rest of the UK are not widely different, the Inland Revenue will accept OSCR’s decisions on charity status when making decisions on tax relief for Scottish charities.’\(^{41}\)

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\(^{38}\) Communities Committee, Official Report, 2 February 2004, column 1742.

\(^{39}\) Communities Committee, Official Report, 2 February 2005, column 1704.

\(^{40}\) Communities Committee, Official Report, 15 December 2004, column 1511.

\(^{41}\) Charities and Trustee Investment (Scotland) Bill, Policy Memorandum, paragraph 29.
91. When questioned by the Committee on the possibility of a charity either passing ‘OSCR’s test but not the Inland Revenue’s test, or to be acceptable to the Inland Revenue but not to OSCR,’ Jane Ryder stated:

‘I cannot guarantee that we have overcome all potential problems, but the trend of our discussions with the Inland Revenue and the Charity Commission reassures me, and I hope, charities and their advisers in turn. There might be one or two hard cases, but that is almost inevitable, as there are two parallel bills and as the Inland revenue is in a unique position – its position in relation to OSCR is different from its position in relation to the Charity Commission which, under charities legislation, has statutory recognition that binds the Inland Revenue.’

92. The Institute of Chartered Accountants of Scotland, in written evidence, recommended that:

‘In awarding tax related benefits to Scottish charities, the Inland Revenue defers to decisions made by OSCR on charitable status. With this in mind, we would urge the Inland Revenue and OSCR to reach a memorandum of understanding on the matter and issue a formal statement making public the detail of such an understanding prior to the date the Act becomes effective.’

93. The Committee supports the Minister’s point that the Bill aims to regulate the operating environment for charities and voluntary bodies in Scotland and agrees that it is not necessary to ensure that the lists of charitable purposes in the two jurisdictions are strictly identical. The Committee considers that the need to ensure that the Scottish list accurately reflects the nature and activities of the sector in Scotland outweighs any desire to mirror that which will apply elsewhere in the UK.

94. The Committee recognises that any differences in the list of charitable purposes could potentially lead to difficulties in the future in terms of a lack of consistency between what is recognised by the Inland Revenue as a charitable purpose and what is recognised by OSCR. The Committee therefore recommends that the Executive should, as a matter of urgency, reach an agreement on this issue with the Inland Revenue. OSCR should then engage in discussions with the Inland Revenue as soon as possible with a view to reaching a protocol or memorandum of understanding which can enter into operation as soon as the Bill has been enacted. The Committee considers that this would assist in ensuring that the distinct list of charitable purposes in Scotland is acknowledged and understood by the Inland Revenue and thus avoid the prospect of any body recognised by OSCR being at a disadvantage for taxation purposes.

95. During the course of taking evidence, the Committee heard a number of suggestions that could make the list more appropriate to the purposes and objectives of charities in Scotland. These are discussed at paragraphs 96 to 109 below.

42 Communities Committee, Official Report, 26 January 2005, column 1688.
43 Communities Committee, Official Report, 26 January 2005, column 1688.
44 Written evidence submitted by the Institute of Chartered Accountants of Scotland, Annex D.
96. The Scotland Branch of the International Play Association and the Trustees of the PlayRight Scotland Trust argued in written evidence that due to the large – and growing - number of organisations engaged in promoting recreation, play and leisure time activity, that play and recreation should be specifically mentioned under the list of charitable purposes. The provision of recreational activities and other leisure time occupation is currently recognised in England and Wales as charitable under the Recreational Charities Act 1958 for England and Wales, but it is not in Scotland. In written evidence, Play Scotland also drew attention to the recognition of the importance of play in the United Nations Convention on the Rights of the Child and called for a reference to play and recreation in the list of charitable purposes.

97. At the pre-legislative meeting in Perth, the Scottish Sports Association pointed out that the definition of amateur sport contained within the draft Bill was not perceived as being sufficiently robust or inclusive. It was highlighted that under the Inland Revenue’s rules for Community Amateur Sports Clubs, an organisation could still be amateur despite having a number of professional members.

98. The Committee is of the opinion that the Executive should revise the wording of the charitable purpose promoting ‘the advancement of amateur sport.’ Whilst the Committee in no way wishes to discourage any sporting activity, it invites the Executive to consider ways in which this charitable purpose could be strengthened in order to preclude bodies promoting commercial sport from being able to register as charities. Furthermore, it believes that the advancement of recreation and play should also be included here.

99. In oral evidence, the Humanist Society called for ‘the reference in the bill to “the advancement of religion” to have “or belief” added to it.’ It was pointed out that Human Rights legislation consistently uses the terminology ‘religion or belief.’ Furthermore, the 2001 census provided evidence that over a quarter of Scots had no religious belief and the Humanist Society felt that ‘society is becoming more complex and people are making different choices. We must try to get the legislation to anticipate some of that, as well as to catch up with where we are now.’

100. In relation to the charitable purpose promoting the advancement of religion, the Scottish Churches Council questioned how OSCR would determine the meaning of ‘religion’ without the benefit of prior case law, pointing out that:

‘...this is a matter which has evolved through case law over a long number of years and the scope of religions which are recognised as charitable has become progressively wider from being initially solely the ‘established’ churches, then the other Christian denominations and now embracing other faith communities.'
However a statutory definition would be very difficult indeed to formulate and it would seem self-evident that reference to existing case-law should be permitted.\textsuperscript{51}

101. The Scottish Inter Faith Council also expressed a concern that it ‘is not clear how OSCR will seek to tackle the issue of the definition of religion, and we would welcome an assurance that OSCR will utilise criteria which is inclusive of single deity, multi-deity and non-deity religions.’\textsuperscript{52}

102. The Scottish Council of Jewish Communities called for the introduction of ‘an additional charitable purpose for ‘the promotion of religious harmony, racial harmony and equality and diversity.’\textsuperscript{53} Kate Higgins, of Capability Scotland, commented in oral evidence that ‘the fact that the bill does not mention equality per se is an omission.’\textsuperscript{54}

103. The Committee is of the opinion that ‘religion’ should be interpreted in as broad and inclusive a sense as possible. It also believes that it is important to acknowledge the increasingly diverse nature of modern society and is of the view that this would not be accurately reflected were this purpose to cover the advancement of religion only. The Committee therefore recommends that the Executive should bring forward a form of wording that would extend this charitable purpose to cover the wide spectrum of religious, faith and belief organisations. The Committee would also like to see the inclusion of a reference to the promotion of ‘equality and diversity.’

104. The Royal National Lifeboat Institution (RNLI) submitted written evidence to the Committee calling for the charitable purpose promoting ‘the advancement of health’ to be extended to ‘the advancement of health or the saving of lives.’\textsuperscript{55} This change would ensure that the key objective of bodies such as the RNLI or mountain rescue services would be reflected in the charitable purposes.

105. The Committee agrees with this view and recommends that ‘the saving of life’ should also be included with the charitable purpose of advancing health.

106. The Committee also seeks assurances that ‘support and advice’ related to the provision of accommodation and care are covered by subsections 7(2)(j) and 7(2)(k) respectively.

107. Volunteer Development Scotland, in supplementary evidence presented to the Committee, calls for the replacement of the term ‘civic responsibilities’ with ‘citizenship’ as it would achieve a ‘fuller, more balanced concept of both rights and responsibilities, and in turn could be interpreted as including the promotion of volunteering.’\textsuperscript{56}

\textsuperscript{51} Written evidence submitted by the Scottish Churches Committee, Annex D.
\textsuperscript{52} Written evidence submitted by the Scottish Inter Faith Council, Annex D.
\textsuperscript{53} Written evidence submitted by the Scottish Council of Jewish Communities, Annex E.
\textsuperscript{54} Communities Committee, Official Report, 26 January 2005, column 1668.
\textsuperscript{55} Written evidence submitted by the Royal National Lifeboat Institution, Annex E.
\textsuperscript{56} Written evidence submitted by Volunteer Development Scotland, Annex D.
108. The Committee also agrees with this point, but recommends that it should be redrafted to cover ‘the advancement of citizenship, civic responsibility or community development.

109. The Committee believes that many of the arguments made in evidence for amending the list of charitable purposes are valid and would more effectively encompass the types of activities carried out by charities and voluntary organisations in Scotland. It therefore urges the Executive to give consideration to the above recommendations which propose amendments to certain of the charitable purposes.

Independence of Charities
110. In addition to demonstrating that at least one of the charitable purposes is met, a body must also satisfy OSCR of its independence. Subsection 7(3)(b) – states that a body will not fulfil the charity test if ‘its constitution expressly permits a third party to direct or otherwise control its activities.’

111. This subsection was not included in the draft Bill which was the subject of the consultation process. Dr Gordon Rintoul of the National Museums of Scotland commented that for this reason:

‘…the full ramifications of some of the emerging issues were not quite appreciated by our institutions. We discussed the matter with Scottish Executive officials and understood that the current situation of NDPBs and charities would continue. In hindsight that assumption was wrong.’

112. A number of bodies - including Non-Departmental Government Bodies (NDPBs), higher or further education colleges, trusts established by local authorities and some private charitable trusts may not satisfy this requirement.

113. There are currently thirteen NDPBs with Charitable Status in Scotland. In the Scottish Executive response to McFadden report, it referred to a five-year review of the status of NDPBs which was initiated in 2001 with the publication of Public Bodies: Proposals for Change by the Executive. The Deputy Minister referred to this in evidence, stating that at the time ‘ministers decided that although the proposal may impact on some such bodies, both the policy that public bodies be directly accountable to them and the principle that charities be independent should be maintained; hence, the Executive accepted the fact that that conflict may mean that some bodies may have to lose either their NDPB status or their charity status.’

114. In the process of hearing evidence, it became clear to the Committee that the joint status of being a public body and a charity was essential to some of the NDPBs. A loss of charitable status on the basis that they did not satisfy the independence criteria would have particularly significant consequences for the five National Collections Institutions: the National Galleries of Scotland, the National Libraries, and the National Museums of Scotland.

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58 These are: Scottish Natural Heritage, Scottish Qualifications Authority, General Teaching Council, Learning and Teaching Scotland, Scottish Arts Council, Scottish Screen, sportscotland, National Galleries of Scotland, National Library of Scotland, National Museums of Scotland, Royal Commission on the Ancient and Historical Monuments of Scotland, Royal Botanic Gardens and Scottish Hospital Endowments Research Trust (scheduled to be reconstituted as a charity only).
59 Communities Committee, Official Report, 2 February 2005, column 1703.
Library of Scotland, the National Museums of Scotland, the Royal Botanic Garden Edinburgh and the Royal Commission on the Ancient and Historical Monuments of Scotland. It was pointed out that the situation of these institutions is particular in that they all hold valuable collections on behalf of the Scottish nation and that there are strong reasons for these institutions to remain public bodies to ensure proper accountability. In written evidence, the National Galleries of Scotland argued that the status of an NDPB 'creates a higher degree of accountability and transparency for the public.'

115. In their evidence to the Communities Committee, the National Collections Institutions highlighted the impact of the loss of charitable status on their ability to:

‘…continue maintaining, developing and enhancing … services and facilities for people in Scotland and across the world. Among those impacts would be a loss of charitable rates relief; a loss of charitable discounts in purchasing; a significant loss in individual and corporate donations; a significant loss of grants from charitable foundations; and the creation of a competitive disadvantage with respect to …counterpart institutions in London.’

The Institutions also claimed that they would no longer be able to enhance donations by gift aid and gifts would not be exempted from inheritance tax. This would make it more difficult for them to attract private sector support for capital projects in the way that the National Galleries did for the Playfair Project.

116. Whilst the constitution of each of the National Collections Institutions differed, it was pointed out that:

‘…the institutions have a long tradition of being open, especially since the passing of the Freedom of Information (Scotland) Act. The discussions of the trustees are recorded and are in the public domain. The corporate planning processes and the financial processes of the institutions are all completely open and transparent.’

The representatives of the National Collections Institutions indicated categorically that they would be content with the prospect of being regulated by OSCR.

117. The National Collections Institutions also highlighted that their status as charities was important in terms of attracting volunteers, whose work was vital to the day-to-day and ongoing development of the Institutions.

118. It was argued that the financial impact of losing charitable status might result in a reduction in the capacity of the Institutions to hold major exhibitions or develop new facilities. This would have a knock-on effect on tourism as such initiatives played an important role in attracting people to visit Scotland. It would also reduce the opportunities for the Scottish people to have access to such events in their own country.

119. In evidence heard by the Finance Committee of the Scottish Parliament and in supplementary evidence received by the Communities Committee, it was clear that the estimate contained in the Financial Memorandum of the cost to NDPBs of

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60 Written evidence submitted by the National Galleries of Scotland, Annex D.
losing charitable status of up to £7 million was considerably lower than the cost estimated by the National Collections Institutions themselves based on their corporate plans for fundraising in the future. They were of the view that the real cost would be nearer £20 million per year.\(^{62}\)

120. The National Collections Institutions expressed the belief ‘the interests of the people of Scotland would be best served by provision being made in the bill for the national collections institutions to continue as accountable NDPBs that retain their charitable status.’\(^{63}\)

121. The strength of the case presented by the National Collections Institutions – as well as the cost of these Institutions losing charitable status - was recognised by the Deputy Minister. In giving evidence to the Committee, she indicated that:

‘On average, the annual value of charity status is now estimated to be £20 million for the remaining charitable NDPBs—that is double what was previously estimated. The Executive has considered the matter carefully and has taken into account the high level of public and committee support for those bodies, which is apparent from recent communications, and their reliance on charity status to carry out the work. The Executive now agrees that those NDPBs should retain charity status.’\(^{64}\)

122. The Committee also received written evidence from one of the other NDPBs, the Scottish Arts Council, which expressed a concern about losing charitable status as a result of its constitution allowing it to ‘distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,’ in accordance with subsection 7(3)(a). If wound up, all the assets of the Scottish Arts Council would be returned to the Scottish Executive. In addition, in the Scottish Arts Council’s Royal Charter, it is stated that ‘members of the Council shall be appointed by Our Scottish Ministers,’ who determine the terms of appointment or each member. In addition, a number of actions are subject either to the consent or agreement of Scottish Ministers.\(^{65}\)

123. The Scottish Arts Council points to similar types of losses of income in the event of losing charitable status as the National Collection Institutions. These would include the loss of rates relief, charitable donations and legacies, discounts on purchases and a reduction in partnership projects. The Scottish Arts Council would thus be at a disadvantage in comparison to the Arts Council of England, the Arts Council of Wales and the Arts Council of Northern Ireland. There are also specific implications for the National Theatre of Scotland, which is a wholly owned subsidiary of the Scottish Arts Council. Evidence submitted by Scottish Screen and Scottish National Heritage to the Finance Committee also indicated a potential loss of income for these bodies.\(^{66}\)

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\(^{62}\) Supplementary written evidence submitted by the National Collections Institutions, Annex D.

\(^{63}\) Communities Committee, Official Report, 19 January 2005, column 1618.

\(^{64}\) Communities Committee, Official Report, 2 February 2005, column 1704.

\(^{65}\) Written evidence submitted by the Scottish Arts Council, Annex E.

\(^{66}\) Finance Committee Report on the Financial Memorandum for the Charities and Trustees Investment (Scotland) Bill, Annex A.
124. Although evidence has not been received from any of the other seven NDPBs, the Committee is concerned that there may be significant financial repercussions to some of these bodies if they lose charitable status.

125. The Communities Committee welcomes the Executive’s commitment to ‘propose amendments during the bill’s progress to enable the five national collection cultural bodies to retain their charity status because of the national significance of their work in holding and developing assets that are of national public importance and which are part of our heritage.’ However, it also asks the Executive to examine closely the possible impact that the loss of charitable status might have on some of the other NDPBs in light of the written submission from the Scottish Arts Council.

126. The Committee also heard evidence from the City of Edinburgh Council, Edinburgh Leisure and Highlands and Islands Arts Limited (Hi-Arts) on the possible implications of section 7(3)(b) on charitable companies or trusts established by local authorities to deliver or promote services for the community. A number of such trusts have been established by local authorities throughout Scotland in recent years. Whilst many such companies or trusts may have local authority councillors on their boards, each company or trust has its own unique constitution and governance structure and it is consequently difficult to estimate the number of such bodies that might not retain their charitable status under the terms of the Bill as introduced. OSCR indicated that ‘a number of local authorities have set up independent trusts that are charities and we and they would have to consider those constitutions on a case-by-case basis.’

127. In evidence, it was highlighted that there were a number of advantages in services being delivered by charitable companies or trusts at the local level. In addition to the tax relief enjoyed by all charities, such bodies can attract extra funding as they are both charitable and structurally independent of local authorities. Their independent status also allows them to establish effective working partnerships with other bodies. David Jack, Head of Strategic Support at the City of Edinburgh Council, indicated that the City of Edinburgh Council gave approximately £20 million in grant aid each year, £7 million of which went to Edinburgh Leisure. He emphasised the importance of ensuring that public funds were spent in an accountable manner, but argued that this did not necessarily conflict with the independence of the body concerned:

‘In most cases we require more intense and clear service-level agreements, funding criteria and levels of monitoring and oversight. … Although the relationship has intensified particularly in relation to audit, scrutiny and the need to deliver best value…that does not mean that there has been a direct impact on the independence of funded bodies.’

128. The Committee welcomed the assurances given by the Deputy Minister that local services would not be inadvertently lost as a result of the bill:

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67 Communities Committee, Official Report, 2 February 2005, column 1704.
68 Communities Committee, Official Report, 26 January 2005, column 1696.
Charity trustees are charged with the responsibility of operating in the interests of the charity and its charitable purpose, which, in such cases would be to deliver the provisions at a local level.\(^{70}\)

129. The Association of Scottish Colleges (ASC) expressed a concern in written evidence that ‘the proposals in the Bill for tighter rules on the independence of charities would mean Colleges losing their charitable status unless the Bill is amended.’ The ASC is concerned about subsection 7(3)(b) as:

‘…ministers have the powers to make, close and merge colleges that are consequential to their general duty to provide further education. Most of that duty is now delegated to the Scottish Further Education Funding Council, which the Further and Higher Education (Scotland) Bill will merge with the Scottish Higher Education Funding Council.’\(^{71}\)

The potential loss in terms of tax relief could amount to £13 million across the College sector in Scotland if they were to lose their charitable status.

130. In written evidence, Douglas Connell of Turcan Connell also indicated that this subsection 7(3)(b) could be problematic for a number of private charitable trusts:

‘Many private charitable trusts which are set up by philanthropic benefactors may also be caught by the provisions of section 7(3)(b). It is quite normal for the trust deeds of these charitable trusts to allow the benefactor (or ‘Settlor’) to act as a Trustee and to retain the power to appoint additional Trustees. The wording of section 7(3)(b) could treat these types of arrangements as third party control, thus removing charitable status from these very important grant-making trusts.’\(^{72}\)

131. In the process of taking evidence it also became clear that a number of other charities might also be deemed to be under ‘third party control or direction’ due to the structures of some national charitable bodies. There are a large number of voluntary and charitable bodies that have a structure under which local branches are registered as charities, but their constitutions might permit some form of control by the parent charity.

132. The Scottish Churches Committee indicated in written evidence that subsection 7(3)(b) ‘could have serious repercussions for many Church bodies.’ The Scottish Churches Committee explained that there were a number of church trusts established by churches which had members appointed directly by another part of the church. Similarly, under the internal structures of churches, there were supervisory and disciplinary roles taken by the governing structure of the church concerned over individual congregations. These points were illustrated by means of reference to the Church of Scotland:

‘There are numerous ‘Church’ trusts where trustees are appointed by the General Assembly, a Board of the Church or another church related charitable trust which could be struck at by this provision. For example, congregations often wish to carry out outreach projects involving members of the wider

\(^{70}\) Communities Committee, Official Report, 2 February 2005, column 1716.

\(^{71}\) Communities Committee, Official Report, 19 January 2005, column 1633.

\(^{72}\) Supplementary evidence submitted by Turcan Connell, Annex D.
community. Alternatively, they may wish to share Church premises with other community groups and to give them a ‘say’ in how the premises are managed. To facilitate this, a new charitable body may be set up with representatives both of the congregation and the community as the Charity Trustees but with the congregation retaining the right to appoint a majority of the Trustees.\(^\text{73}\)

133. The Committee welcomed the Deputy Minister’s recognition of the potential difficulties posed by subsection 7(3)(b), and her commitment to make sure that it is not too restrictive: ‘discussion has highlighted the fact that the test may be too severe and unworkable. I therefore undertake that the Executive will consider whether further clarity is required to ensure, for instance, that funding conditions, being controlled by a parent charity, or other problems, are not obstacles.’\(^\text{74}\)

134. The Committee is of the opinion that while the principle of independence must be fundamental to the charitable and voluntary sector, section 7(3)(b) should in no way inhibit charities from continuing to operate under the same constitutions where there are reasons in the public interest for a link to a third party. The Committee therefore looks forward to hearing from the Executive as to how it proposes to bring clarity to this issue.

Public Benefit
135. Section 8 of the Bill, which concerns public benefit, was not included in the consultation draft of the Bill. In its report on the consultation on the draft Bill, the Scottish Executive commented that there was a slight majority in the responses received in favour of including broad public benefit criteria in the Bill.\(^\text{75}\) Section 8 effectively removes the presumption of public benefit and gives outlines the criteria to be considered in regard to the determination of public benefit. The Explanatory Notes seeks to provide an explanation of section 8:

‘The first criterion covers the extent to of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body’s functions compared to the benefit to the public. The second criterion covers the extent to which any condition restricting persons from obtaining the benefits from a body’s functions many be unduly restrictive if only a section of the public can receive those benefits.’\(^\text{76}\)

136. In giving oral evidence to the Committee, the Deputy Minister provided an explanation of the Executive’s approach in relation to including public benefit criteria on the face of the Bill:

‘As a result of its consultations, the Executive chose to add some criteria to the bill, which set out issues that OSCR and the courts must consider, but it is not an exclusive list. OSCR may certainly consider other issues and must consult on its guidance. Some people have said that the test is too tough and some have said that it is not strong enough, which is why we do not feel that the test should be set in stone in the bill. It is important to recognise the significance of

\(^\text{73}\) Supplementary written evidence submitted by the Scottish Churches Committee, Annex D.
\(^\text{74}\) Communities Committee, Official Report, 2 February 2005, column 1703.
\(^\text{76}\) Charities and Trustee Investment (Scotland) Bill, Explanatory Notes, p.4.
that. In removing the previous presumption of public benefit and requiring all charities to pass the test, we are ensuring that all charities must live up to public expectations of what a charity is. Public views evolve and the test should be able to evolve with those views.\textsuperscript{77}

137. In evidence submitted to the Committee, concerns were raised about the clarity of section 8. Janette Wilson of the Scottish Churches Committee expressed concern over the use of the word ‘disbenefit’:

‘How can a body like OSCR be asked to assess religious bodies and other bodies on the basis of a disbenefit test? Will the test be subjective? How will it work in practice...? There is a lot of uncertainty, which is probably inevitable given the clean-sheet approach that is being taken.’\textsuperscript{78}

Similarly, the SCVO – although it welcomed the inclusion of a definition of public benefit on the face of the Bill – described the language of the formulation adopted as ‘convoluted and obscure.’ Furthermore, the SCVO insisted that ‘it should always be the case that public benefit clearly outweighs any other consequences, including public disbenefit and private benefit, and the Bill should state this explicitly.’\textsuperscript{79}

138. Particular concerns were raised in evidence over the removal of the presumption of benefit in terms of religious organisations. The Scottish Inter Faith Council indicated that they were not clear how the removal of the presumption of public benefit would impact on religious organisations:

‘Some members feel that the presumption of public benefit should be retained in the case of organisations which have the advancement of religion as their purpose. There is a concern that the public benefit test may be used by opponents of any particular religion or religion in general to attempt to remove charitable status.’\textsuperscript{80}

It was also not clear to the Committee whether the removal of the presumption of public benefit might have an impact on monasteries, convents and other small, religious communities.

139. The Committee heard evidence from the Scottish Council for Independent Schools, as well as a number of individual independent schools. It also invited Nuffield Hospital to give evidence on the effect of the Bill on private health care providers that are registered charities.

140. It will no longer be presumed that independent schools provide public benefit by advancing education and such institutions will now have to demonstrate to OSCR that they provide public benefit in order to register as charities. The Scottish Council of Independent Schools (SCIS) did not perceive that this would be problematic, arguing that ‘this is not likely to pose difficulties as the schools have

\textsuperscript{77} Communities Committee, Official Report, 2 February 2005, columns 1704-5.
\textsuperscript{78} Communities Committee, Official Report, 12 January 2005, column 1591.
\textsuperscript{79} Written evidence submitted by the SCVO, Annex D.
\textsuperscript{80} Written evidence submitted by the Scottish Inter Faith Council, Annex D.
an in-built tradition of providing public benefit, which accords with their ethos and founding principles.\textsuperscript{81}

141. The Committee questioned the representatives of independent schools on the ways in which they provided public benefit, the proportion of subsidised places they provided, the criteria under which parents received financial assistance with fees and the benefits of charitable status for independent schools. On the issue of public benefit, Judith Sischy - of SCIS - argued:

‘...the schools have tried, extremely staunchly ... to adhere to the principles on which they were founded....They have tried not to give up their charitable principles through giving assistance, as far as it can be afforded, to children who cannot afford the fees...such schools are charities because they provide for advancement of education without personal gain or profit. As they see it, they give back to society more that they receive in terms of public benefit.'\textsuperscript{82}

142. David Mobbs stated ‘Nuffield Hospitals believes that it provides public benefit intrinsically by preventing an alternative to the state sector, by providing complementary services to the state sector...by relieving the pressure on the state sector and by providing confidence and assurance that the things that we do are for those purposes.'\textsuperscript{83}

143. It emerged from the evidence heard by the Committee that there were a variety of ways and degrees to which independent schools or hospitals might be perceived as providing public benefit. However, it is clear that these bodies will have to demonstrate to OSCR that they provide public benefit in terms of the guidance that will be developed.

144. In evidence to the Committee on the removal of the presumption of public benefit Jane Ryder, the Chief Executive of OSCR, emphasised that there should be an equal treatment of all bodies in relation to the need to demonstrate public benefit:

‘I am perfectly comfortable with and, indeed, I welcome the removal of the presumption of public benefit in favour of any classes of charity. That approach creates consistency and, as someone else put it, a level playing field.'\textsuperscript{84}

145. When asked by the Committee about the 'degree of interpretation that will be required for bodies to indicate that there is sufficient public benefit to justify charitable status', the Deputy Minister provided the following clarification:

‘The bill is not about creating measures that prevent charities from doing things; it is about creating measures that protect charities. ...It is recognised that, through consultation, OSCR will develop a view on the public benefit test. However, I would not have thought that a public benefit test could be applied in a proportionate way. We could not say that public benefit is established if 50 per cent of what a body does is good works. I hope that, through consulting fully and

\textsuperscript{81} Written evidence submitted by the Scottish Council of Independent Schools, Annex D.
\textsuperscript{82} Communities Committee, Official Report, 12 January 2005, 1570.
\textsuperscript{83} Communities Committee, Official Report, 12 January 2005, 1570.
\textsuperscript{84} Communities Committee, Official Report, 26 January 2005, column 1687.
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putting out guidelines, OSCR will capture what we understand to be public benefit.¹⁸⁵

146. The use of the term ‘unduly restrictive’ in section 8(2)(b) was questioned by the Committee, and it was pointed out that ‘almost every charity is restrictive in some ways.’¹⁸⁶ The Deputy Minister provided the following clarification on the issue:

‘OSCR will be responsible for dealing with cases charity by charity and it will be asking what the purpose of each charity is. Is it unduly restrictive for a charity to identify itself as supporting a particular religious group? It is not the intention of section 8(2)(b) to say that. If there were a very narrow group, or a group within a group, that might lead to a further difficulty.’¹⁸⁷

147. The Committee questioned the Deputy Minister as to whether high charges or fees could be construed as ‘unduly restrictive’. The Deputy Minister responded:

‘They could be. If a wide range of fees was being charged, OSCR would need to explore what was causing that wide difference and what the point of it was. If the point was to ensure that only a very small group of people would apply to use a facility that might be deemed to be unduly restrictive. However, that would be a matter for OSCR to decide. I am confident that OSCR will have such powers that people will feel that that issue has been and will be explored thoroughly. There is no presumption in the bill about who would pass or fail the test; the important thing is that there is a test and that people see that test as reasonable, rigorous and robust.’¹⁸⁸

148. Section 9 of the Bill places an obligation on OSCR to produce guidance on the charity test ‘after consulting such persons as it sees fit.’ The Committee welcomed the Deputy Minister’s statement that ‘it is very much for OSCR to consult, to talk to people and to work with them to get definitions and a consensus around its views.’¹⁸⁹ Nevertheless, the Committee would like to emphasise that this will be a challenging and contentious task for OSCR.

149. The Committee recognises the complexities of providing a definition of public benefit. It concurs with the approach taken in the Bill to remove the presumption of public benefit as it believes it is central to the positive perception of the charity sector that it should be acting in the interests of public benefit and able to prove this.

150. The Committee recognises the importance of ensuring that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status. It suggests that the Executive should consider placing greater emphasis on the need to meet the public benefit test on the face of the Bill.

151. The Committee is of the view that where a body only benefits a particular membership, group or section of society it could be viewed as operating for the public benefit. Whilst it will be for OSCR to consider each application on

¹⁸⁵ Communities Committee, Official Report 2 February 2005, column 1717.
¹⁸⁶ Communities Committee, Official Report, 2 February 2005, column 1712.
¹⁸⁷ Communities Committee, Official Report, 2 February 2005, column 1712.
¹⁸⁸ Communities Committee, Official Report, 2 February 2005, column 1718.
¹⁸⁹ Communities Committee, Official Report, 2 February 2005, column 1711.
its merits, the Committee believes that OSCR must be content that any particular or exclusive targeting of benefits is justified.

152. It is content with the suggestion that it should be for OSCR to develop the public benefit test. However, in doing so, OSCR must ensure that its approach is seen to be reasonable and that there is transparency in relation to the factors taken into account and the methodology which is applied in determining whether a body clearly operates for the public benefit.

Co-operation and Information
153. Under section 20 of the Bill, OSCR must ‘so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators.’ There are a number of regulators in the United Kingdom which either have functions ‘similar to those of OSCR’ or which are ‘designed to allow the body or office-holder to regulate persons for other purposes.’ The issue of co-operation between OSCR and the Charity Commission for England and Wales proved to be an area of particular concern in the evidence heard, as many perceived that it was vital for as unified an approach as possible to be taken in relation to the regulation of charities in England, Wales and Scotland by these two bodies.

154. In particular, attention was drawn to the fact that there should be a duty on other regulators to reciprocate by co-operating with OSCR, an opinion which was shared by OSCR. In written evidence submitted to the Committee, OSCR stated that ‘we feel that reciprocity is an appropriate principle in relation to a regulatory framework which is intended to be proportionate and as far as possible to avoid the burden of dual regulation.’

155. The Deputy Minister pointed out that it would be outside the legal remit of the Bill to include a reciprocal duty on OSCR. The Minister explained:

‘OSCR will have a statutory duty to seek co-operation with other regulators. The bill—rightly—focuses on the role of OSCR and how it will operate. We are not allowed or able to impose a duty on regulators outwith Scotland. The powers under section 24 will allow other Scottish public bodies, including regulators, to disclose information to OSCR. The Executive’s view is that that is sufficient to ensure that OSCR can do its work.’

156. When questioned by the Committee on whether it would be necessary to adopt a formal protocol for co-operation between OSCR and the Charity Commission, Jane Ryder, the Chief Executive of OSCR, stated: ‘that is inevitable and it is welcome, in fact I have already submitted a draft.’

157. The Committee welcomes the indication from OSCR that a formal protocol is in the process of being agreed by OSCR and the Charity Commission for England and Wales. It believes that this, and ongoing and regular communication between the two bodies, will be vital to promoting a more consistent regulation of charities in the three countries.

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90 Written evidence submitted by OSCR, Annex D.
91 Communities Committee, Official Report, 2 February 2005, column 1721.
92 Communities Committee, Official Report, 26 January 2005, column 1691.
158. Section 20 also refers to section 38 of the Bill, under which Scottish Ministers are given some of OSCR’s powers in relation to registered social landlords (RSLs), while OSCR has the discretion to consider whether to delegate its powers to other regulators.

159. The fact that Communities Scotland would regulate the 92 charitable RSLs was a cause of concern to the SCVO:

‘Communities Scotland… while expert in their own field may not be or come to be as expert as OSCR will presumably become in the field of charity law. We are also concerned that such fragmentation could lead to inconsistency through the different practice of various regulatory bodies acting with respect to the same issue (charity law). Furthermore it is not clear to us why the Bill gives OSCR’s power to Scottish Ministers with respect to Registered Social Landlords yet OSCR will have the discretion to delegate or not in other sub-sectors of the voluntary/charity subsector.’93

160. The Deputy Minister justified the approach taken in the Bill, pointing out:

‘…as we want efficient, proportionate regulation, we have rightly sought to delegate certain regulatory functions to Communities Scotland. However, I should point out that the organisations that it regulates have to register first with OSCR. Communities Scotland’s regulation of registered social landlords covers not only money and funding, but governance, how RSLs deal with tenants and so on.’94

161. In oral evidence, Jane Ryder – the Chief Executive of OSCR – indicated that it had not been the ‘preferred option’ of OSCR that charitable RSLs should be regulated by Communities Scotland as this fragmented the regulation of the sector, however she recognised that it was a pragmatic decision and that the RSL sector was closely regulated by Communities Scotland. She confirmed that OSCR had already engaged in discussions with Communities Scotland on this, with a view to ensuring that ‘that there is a level playing field and a consistent application of charity regulation.’95

162. The Committee is of the view that given the specific character of the RSL sector it is appropriate for Communities Scotland to remain the principle regulator of these bodies. It is reassured by the fact that RSLs will first have to register with OSCR. The Committee concurs with OSCR having the principal role in reviewing the charities test and ensuring that there is a uniform regulation of charities. The Committee believes that OSCR should be fully informed and kept up-to-date on the results of Communities Scotland’s system of regulation and inspection.

163. Communities Scotland is the only regulator for whom this arrangement will be put in practice under section 38, a similar approach has not been proposed for either the Scottish Commission for the Regulation of Care or the Scottish Higher Education Funding Council (SHEFC). OSCR may also delegate its regulatory

93 Written evidence submitted by SCVO, Annex D.
94 Communities Committee, Official Report, 2 February 2005, column 1722.
95 Communities Committee, Official Report, 26 January 2005, column 1694.
functions relating to the supervision of charities in sections 28-35 (except 30) to a Scottish public authority with either mixed or no reserved functions.

164. The Deputy Minister elaborated on the reasons for taking one approach for Communities Scotland and a different approach for SHEFC:

‘Although we do not want bodies that are already heavily regulated to face further regulation, we also do not want desperately to offload everyone onto other bodies. The very clear case that has been made for Communities Scotland could not be made for SHEFC. We must ensure that the objectives of setting up OSCR are met, and we know from its work that Communities Scotland will meet those objectives. Indeed, it is very important that Communities Scotland and OSCR co-operate to ensure that that happens.’

165. The Association of Scottish Colleges (ASC) indicated in written evidence that ‘it was not clear whether the Scottish Further Education Funding Council falls within the definition of “other relevant regulators” in section 20.’ Universities of Scotland made it clear that they did not wish to see the Scottish Higher Education Funding Council become the charities regulator for the education sector, but emphasised that they are already subject to ‘a rigorous accountability regime and undergo 17 separate monitoring processes’ and therefore wished to avoid a situation whereby dual regulation might result in additional accounting requirements, notably through an obligation to use the Charities Statement of Recommended Practices (SORP).

166. The Committee sought a reassurance from the Deputy Minister that dual regulation would not result in an additional administrative burden for bodies such as colleges or universities. The Deputy Minister confirmed that: ‘the Office of the Scottish Charity Regulator has already been working very closely with other relevant regulators and it is important that their information can be used in the form in which it is provided, instead of having to ask people to redo things.’

167. The Committee welcomes the indication from the Deputy Minister that there should not be additional accounting requirements for bodies that are already substantially regulated. It also recommends that OSCR should reach formal agreements with the relevant regulators to ensure that these sectors develop an awareness of and confidence in the new arrangements.

Information

168. Sections 21-27 of the Bill concern information. In evidence, two key issues emerged in relation to these sections of the Bill. The first related to information that OSCR might request from charities. This was of particular concern to UK-wide charities, which brought up issues about the uniformity in the documentation that would be required by OSCR and by other charity regulators in the UK, notably the Charity Commission, and to smaller charities that might lack the resources to provide information. The second issue was the provision and use of online information.

96 Communities Committee, Official Report, 2 February 2005, column 1722-3.
97 Written evidence submitted by the Association of Scottish Colleges, Annex D.
98 Written evidence submitted by Universities Scotland, Annex D.
169. In oral evidence, Oxfam in Scotland raised the issue of dual regulation and the additional burden that it could place on UK-wide charities through the requirement to provide information to OSCR under section 22, as well as to the Charity Commission. Oxfam pointed out that ‘the Charity Commission for England and Wales currently regulates Oxfam and we do not want a burden of dual regulation, whereby we have to do everything twice….we do not want extra administrative and cost burdens from having to do everything twice.’

170. In the Committee’s pre-legislative meetings it was stressed that smaller charities would not have the resources to provide a high level of detailed information to OSCR.

171. In order to make information as accessible as possible, and at a low cost, it was pointed out in evidence that as much information as possible should be made available online by OSCR.

172. The Scottish Executive Bill Team clarified that OSCR:

‘…will be quite happy to accept accounts that refer only to that body’s activities and structures in Scotland. Of course, many charities might find it onerous to try to drive a wedge between their Scottish operation and their operations elsewhere, so OSCR will also be able to accept unified accounts. In other words, where a body wishes to return accounting information about only its Scottish functions and operations, it should be able to do so.’

173. The Committee is of the view that all provisions in relation to the information required by OSCR should be implemented with a light touch to avoid any unnecessary duplication of effort and additional costs to charities.

Inquiries

174. Sections 28-33 empower OSCR to make inquiries with regard to a charity and bodies or individuals connected to that charity, and sections 34-39 on the powers of the Court of Session to act when it is satisfied that there has been misconduct in the administration of a charity or a body controlled by a charity.

175. Martin Sime, the Chief Executive of the SCVO, indicated it understood ‘why the court should be encouraged to act swiftly to protect charitable assets in prima facie cases of misconduct’, but expressed concerns about the difficulties that a charity might face in re-establishing itself, ‘even if the inquiries are subsequently proven to be inaccurate or if it is established that the case was a result more of mismanagement than of misconduct. That is why we feel that cases should not go on for long and that OSCR should publish its final verdict.’ The SCVO suggested that the Charity Commission’s practice of publishing a digest of cases should be followed in order to prevent the spread of misinformation about cases. The CVS pointed out that this also contributed to the development of best practice in the sector.

176. The Institute of Chartered Accountants in Scotland expressed concerns about ‘the potential harm to a charity’s reputation and ability to fundraise should its
charitable status be in doubt' and recommended that 'consideration is given to if and when such investigations are made public.'

177. In oral evidence to the Committee, Jane Ryder acknowledged the sensitivities of the situation and explained the process that OSCR had already put in place:

'We have issued an inquiry and intervention policy, which will assist charities and the public by setting out what they can expect. Our commitment is to treat charities with respect and discretion. We have said that we will feel free to comment at any time but, in so doing, we will take into account the rights of organisations and individuals. It is hard to be more definitive than that. We cannot, for example, say that we will not comment.

'Quite often, something enters the public domain, not from us, but from a complainer or a charity. It might be in the charity's interests that we comment and say, for example, that something is not such a grievous matter, that we are simply making an inquiry or that we are not carrying out a fraud investigation. There might be issues while an investigation is continuing. The bill requires us to produce a report at the end of an investigation, to clear it with the charity involved and to publish it as we think fit. I warm to the approach taken by the Charity Commission for England and Wales, which has been publishing reports on individual investigations for the last five years or so that are discreet and tight, with wider lessons for the sector. We recognise that it will be hard for the first Scottish charity about which a report is published, so we must handle things sensitively.'

178. The Committee believes that consideration should be given to introducing a requirement in the Bill for OSCR to publish the results of its inquiries unless there are strong reasons not to do so. However, it also considers that the question of when information about an inquiry should be made public needs to be handled sensitively by OSCR to avoid any unnecessary effect on the reputation of the charity concerned and its ability to operate.

179. Concerns were raised about the use of the term 'satisfied' in section 34 as the Law Reform (Miscellaneous Provisions)(Scotland) Act 1990 provides that the court may act in cases 'where it appears' that there has been misconduct or mismanagement. In oral evidence to the Committee, Simon Mackintosh of the Charity Law Association commented that:

'The terms are different. If a court is "satisfied", the implication is that it has seen evidence that satisfies it of a matter, which is right if the court is to exercise permanent powers. A higher standard of proof is needed before permanent measures can be applied.'

180. In oral evidence to the Committee, the Deputy Minister indicated that given the confusion over this section that the 'issue is one of tightening up the language'.
The Committee is of the view that the use of the term ‘satisfied’ in sections 31 and 34 is not appropriate on the basis that it appears to imply a form of deduction from evidence. It was recommended by a member of the Committee that it might be more appropriate to use an alternative terms such as ‘reasonable grounds for believing’. The Committee recommends that the Executive should give consideration to amending the terminology either as suggested or by using another form or words.

Charity Accounts

Section 45 describes the obligations on charities to keep accounts. Scottish Ministers may by regulation make provision on the nature and form of these accounts. The Explanatory Notes indicate that:

‘Subordinate legislation will be prepared to set out the detailed requirements of the accounts to be prepared as this is the simplest means of allowing updating of thresholds and keeping abreast of changes in accounting methods. It is expected that the standard of accounts set out in regulations will accord closely with the UK Statement of Recommended Practice for Charities.’

In the pre-legislative meetings, the charitable and voluntary bodies that attended stressed the need for a proportionate regime. In giving evidence to the Committee, Maureen Harrison of the CVS emphasised that it was important ‘to use graduated instruments to ensure that a charity that has £10,000 or less is not treated the same as is one that has £10 million or less.’

Martin Sime gave evidence to the Committee on the factors that should be considered:

‘One is the level at which an audit by a qualified auditor, rather than an accountant, is required. Another is the content of accounts and the extent to which charities have to keep accounts in different formats; for example, charities are required to produce a statement of financial activities and the level at which that kicks in is important. The third variable is, of course, the turnover of the charity. Those matters, which are the subject of regulations associated with the bill, ought to be the subject of pretty wide consultation in order to ensure that thresholds are right so that charities account appropriately but smaller charities are exempt from the more onerous provisions. We must not have the same regime for a charity that has £10,000 as we have for one that has £10 million. There is general acceptance of that principle, but we need to create consensus about where the different thresholds should be located.’

The Executive Bill Team explained that ‘is intended that we will consider different thresholds for the different types of accounts that charities might have to produce or for the level of auditing that might be needed.’

The Institute of Chartered Accountants in Scotland (ICAS) commented that they believed that ‘the thresholds for charities … set out in the Charities Bill for England

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107 Charities and Trustee Investment (Scotland) Bill, Explanatory Notes, p.12.
and Wales are too currently too high for the Scottish situation.\textsuperscript{111} The Deputy Minister concurred with this, saying:

‘There is a view that the thresholds set in England and Wales are not appropriate to the Scottish charity sector and are too high to allow a reasonable number of charities to be audited, given the nature of the charitable sector in Scotland, which comprises more, smaller charities. We would want to capture more charities, because the principle of transparency and public confidence in the system might be undermined if there is not sufficient auditing.’\textsuperscript{112}

187. \textbf{The Committee agrees that the accounting thresholds should be set at a level commensurate with the nature of the charities sector in Scotland. It recommends that the Executive should consult as widely as possible with the sector and the relevant professional bodies on this issue, with a view to setting an appropriate level which ensures as high a level of transparency and confidence in the accounts of charities as can reasonably be achieved.}

188. The Institute of Chartered Accountants in Scotland also highlighted a potential problem with regard to the lack of legal protection for auditors who disclose information to OSCR. They expanded upon this position in oral evidence:

‘The bill refers to a right to report, but we believe that there should also be a duty to report, so that if an auditor comes across something that should be reported they are bound to report it… Discretion must be left not just to auditors but to reporting accountants and independent reporters to report to OSCR only material items—in other words, things that they cannot sort out with the charity concerned. In that process, however, we are destroying client confidentiality, and we think that there must be some protection for reporters so that they cannot be pursued by the people on whom they report, be they the charity’s staff or individual trustees.’\textsuperscript{113}

189. \textbf{The Committee considers that there is merit in the point raised by ICAS in relation to the difficulties auditors may face in terms of their client confidentiality responsibilities if the reporting of concerns about accounts to OSCR is left to their discretion. The Committee considers that there is value in the suggestion that a duty should be placed on auditors to report wrongdoing, on the basis that this would prevent legal action being taken against them by those reported to OSCR. The Committee therefore recommends that the Executive should bring forward an appropriate amendment at Stage 2 to address this matter.}

190. Section 46 gives OSCR the power to appoint a suitably qualified person to prepare a statement of accounts when a charity has failed to send a copy to OSCR. In written evidence, the SCVO indicated that they did not ‘agree with provision to make charity trustees personally liable for the expenses of an accountant appointed by OSCR to produce charity accounts when these are late’ and instead proposed a sliding scale of fines.\textsuperscript{114} The Committee suggests that the Executive might wish to reconsider the burden that this provision could place on

\textsuperscript{111} Written evidence submitted by the Institute of Chartered Accountants in Scotland, Annex D.
\textsuperscript{112} Communities Committee, Official Report, 2 February 2005, column 1726.
\textsuperscript{113} Communities Committee, Official Report, 19 January 2005, column 1643.
\textsuperscript{114} Written evidence submitted by the SCVO, Annex D.
smaller charities and whether it would be appropriate for it to be applied in all cases where there is a failure to submit a statement of accounts.

**Scottish Charitable Incorporated Organisations**

191. Chapter 7 of the Bill establishes a new legal form, that of the Scottish Charitable Incorporated Organisation (SCIO). This has been specifically developed for charities. A member of the Scottish Executive Bill Team explained the principal benefits of SCIOs:

‘Charities that become SCIOs will not have to adopt other, not necessarily suitable forms. They will be able to get the benefit of legal corporate personality, but the trustees will not be liable for any debts when the bodies are wound up. That will provide protection for the trustees and will stop people being deterred from becoming trustees.’\(^{115}\)

192. Simon Mackintosh of the Charity Law Association testified to the value of the SCIO as it provided a simple structure which:

‘…will limit the liability of the members and directors of the organisation in a way that is difficult to achieve with a trust, but it does so without having to go into the requirements of the Companies Act 1989, which are perhaps inappropriate for charities to have to deal with. Further, it ensures that there is one regulator for that creature, OSCR, which will deal only with charities. The proposal seems to meet a need in relation to the way in which charities operate.’\(^{116}\)

193. Similarly, Stephen Phillips of the Law Society of Scotland stated: ‘I believe that that model will solve a problem that has existed in the charity sector for years. It addresses not so much the position of a conventional charitable trust, in relation to which… there are technical issues to do with succession and demonstrating a link in title between the original trustees and trustees further down the line, but that of a smaller type of charity that would normally use an ad hoc constitution, become an unincorporated voluntary association and have a management committee that would be exposed to personal liability.’\(^{117}\) The charitable and voluntary sector also welcomed the introduction of the SCIO. Martin Sime of the SCVO stated that it was seen as a ‘very good news story’ and that ‘we expect that, over time, there will be a gradual migration to the form as the preferred legal personality for charities in Scotland.’\(^{118}\)

194. The Committee notes the broad support for the establishment of Scottish Charitable Incorporated Organisations as outlined in the Bill. It welcomes the provisions and believes that this model will make a worthwhile contribution to the development of the charitable sector.

**Religious Charities**

195. Section 64 gives OSCR power to confer Designated Religious Charity (DRC) status on a charity which appears to have the advancement of religion as its principal purpose, the regular holding of public worship as its principal activity and has been established in Scotland for at least ten years. This effectively supersedes

\(^{115}\) Communities Committee, Official Report, 8 December 2004, column 1486.


\(^{117}\) Communities Committee, Official Report, 15 December 2004, column 1547.
the designated religious bodies provided for in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 Act with designated religious charities.

196. In written and oral evidence to the Committee, the Scottish Churches Committee (SCC) summarised the perspective of the Churches:

‘In some cases, it is difficult to draw the line between matters that are appropriate for civil authorities and those that are appropriate for church authorities, but the Church of Scotland’s view, which the Scottish Churches Committee endorses, is that some aspects of the bill—as highlighted in our submission—cross the line.’

197. Particular attention was drawn to the position of the Church of Scotland. The Church of Scotland Act 1921 acknowledges the declaratory articles of the Church of Scotland. Janette Wilson of the SCC explained her interpretation of the legal situation to the Committee in oral evidence:

‘I think that it is accepted that the 1921 Act was an acknowledgement by the Westminster Parliament that there are certain areas within which its writ does not run. By extension, the same thing must apply to the Scottish Parliament. Therefore, if there were a circumstance in which the church said that something was a matter for it to decide on and the Office of the Scottish Charity Regulator or the Court of Session were saying that that was not the case, the courts would be placed in the difficult situation of having to sort out which arena the particular provision fell within. It is of concern to me that the provision that I have highlighted might cross the line. Certainly, it is analogous to the provisions that Westminster exempted in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 for the reason that I have outlined.’

198. In oral evidence, the Committee questioned the Deputy Minister on why a different approach should be taken to the regulation of religious charities as opposed to any other large and established charities with strong internal governance structures. The Deputy Minister explained:

‘The concept of designated religious charities is taken from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under the existing law, religious charities that satisfy strict criteria may be granted exemption from some of OSCR’s regulatory controls. A feature of such charities is a long-established system of internal controls and some charities have a special status in law.

‘I suppose that we are capturing a recognition of the role of religion in society. We are addressing the regulation of what are deemed to be charities and in regulating designated religious charities we recognise such charities' systems of internal governance. The status of religion in society underpins that approach. The bill is intended not to address that status but to reflect it and to regulate charities on that basis.’

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121 Communities Committee, Official Report, 2 February 2005, column 1728.
199. The Scottish Inter Faith Council also gave evidence on the Bill, expressing the belief that 'there are no faith communities in Scotland, outside the Christian faith, that would currently qualify. They would meet the first three criteria, but none of the other faith communities in Scotland at the moment would meet the criterion of having a centralised internal structure.'

200. The Committee acknowledges that the Minister has indicated that the regulation of religious charities should only impact on the charitable aspect of their activities. It does not consider that the provisions in the Bill will result in the involvement of OSCR in any other aspect of the internal operations of those bodies which meet the requirements to become DRCs.

201. The Committee notes the provisions in the Bill which relate to DRCs.

Charity Trustees

202. Section 65 places a duty on a charity trustee to exercise his or her function ‘in the interests of the charity’. In particular, the trustee must ‘seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.’

203. The Committee is of the view that section 65 is vital to help ensure that trustees act independently and in the interests of the charity. It recommends that this should be emphasised strongly in any publications or examples of best practice which seek to provide guidance to trustees on their role.

204. Chapter 9 of the Bill relates to charity trustees, making provisions concerning their general duties, remuneration and disqualification. In evidence, the comments on this part of the Bill focused on the issues of the remuneration of trustees and the circumstances under which a person would be barred from being a charitable trustee.

205. The SCVO questioned the clarity of section 66, stating: ‘these provisions appear to us to allow an almost limitless flexibility to pay charity trustees for carrying out the duties and functions of being a charity trustee.’ The CVS was concerned that ‘the sections on payment of trustees should be tightened up so that it is clear that trustees cannot be paid to be trustees, but may be paid for specific work which calls upon their expertise.’ In addition, it became clear in evidence that there were some cases which might not fit clearly with this part of the Bill. The Committee questioned the Deputy Minister on whether the payment of a church’s ministers or priests would be acceptable under these provisions. The Deputy Minister indicated that ‘if, in our general commitment on remuneration, we have captured bits that we did not mean to capture, we would have to revisit the matter to give people confidence.’

206. The CVS commented that the Bill did not specify that staff should not be on the board of a charity, arguing that ‘CVS Scotland promotes best practice and it is best
The Committee agrees that there may not be sufficient clarity on the remuneration of trustees and whether staff can be trustees. It therefore recommends that the Executive looks at ways of tightening the provisions concerned.

208. Section 68 details the circumstances in which a person will be barred from being a charity trustee. Mismanagement is now subsumed under the definition of misconduct in section 103. A number of organisations commented that it seemed particularly harsh for a person to be disqualified for being found guilty of simple mismanagement, which will be interpreted as misconduct under the provisions of the Bill.

209. Margaret Wilson of the CVS stated:

‘There is general concern about the distinction between misconduct and mismanagement. What will be most effective? I do not think that criminal proceedings will be helpful. They would reduce the number of people who want to come forward and would not necessarily stop people making mistakes. People make mistakes because they do not know something, are mistaken about something or whatever, and criminal proceedings will not necessarily stop such things. There is a concern about the proposals being too harsh and about there needing to be a distinction between deliberate misconduct involving somebody embezzling funds or using a charity for their own purposes and somebody making a mistake.’

210. Simon Mackintosh of the Charity Law Association expressed a concern that:

‘If a charity trustee slips, perhaps inadvertently, we move quickly to charges of misconduct, the involvement of OSCR and the possibility of criminal sanctions. A number of organisations have expressed concerns about the readiness with which criminal sanctions will be applied in situations where there may just be a mistaken trustee. If someone falls short of the duties of care, we will move straight to misconduct proceedings.’

211. When questioned on the inclusion of mismanagement as an offence, the Deputy Minister explained the approach taken in the Bill:

‘The sanctions are in place to deal with serious breaches of the law relating to charities and will not be used in all cases. OSCR will use its powers of intervention in a proportionate manner and will report cases to the procurator fiscal only when there is evidence of wrongdoing, which is a substantial test. The procurator fiscal will prosecute a case only when they believe that it is in the public interest to do so.’

212. The Committee supports the view expressed in evidence that it would be unfortunate if trustees who may be responsible for some form of

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125 Communities Committee, Official Report, 15 December 2004, column 1542.
126 Communities Committee, Official Report 15 December 2004, column 1523.
127 Communities Committee, Official Report, 2 February 2005, columns 1732.
Communities Committee, 1st Report, 2005 (Session 2)

mismanagement of a charity found themselves subject to misconduct proceedings. The Committee considers that there is a clear distinction between mismanagement and misconduct. Given the concern already expressed by the charitable and voluntary sector, the Committee recommends that the Executive should amend the definition of “misconduct” to reduce the possibility of those trustees who make relatively minor errors without any malicious intent having action taken against them. This would help to reassure existing trustees and ensure that the potential sanctions do not dissuade individuals from becoming charitable trustees.

Appeals

213. Sections 74-77 set up the Scottish Charity Appeals Panel and deal with appeals. Appointments to the Panel will follow Nolan Committee procedures and be overseen by the Scottish Law Commission. The Panel will thus be independent of OSCR and of the charitable and voluntary sector itself. The establishment of a Scottish Charity Appeals Panel was welcomed in evidence. Simon Mackintosh of the Charity Law Association stated:

‘The general principle of providing us with a quick and cheap appeals process is entirely right... It is a matter of ensuring that everybody who ought to get into the appeals process can get into it. First, OSCR has to review its own decisions on request, then there is the Scottish charity appeals panel and then there is the court. That is the right pyramid to go up.’128

214. The Committee welcomed the Deputy Minister’s explanation of the role of the panel:

‘The appeals panel is designed to give those who are directly affected by OSCR's decisions a simple, cheap and accessible way to appeal. Third parties who wish to challenge OSCR's decisions will be able to do so through the existing avenue of judicial review or, if they believe that criminal wrongdoing is involved, they could report the matter to the police. The appeals panel is concerned with the relationship between the charity and OSCR and it provides a way for the charity to appeal. The charity has the right to appeal because OSCR's decision will have an impact on it.’129

215. Anne Swarbrick argued that costs should be paid to any body that successfully challenges a decision by OSCR on the basis that they might need to take legal advice, pointing out that ‘otherwise charities and individuals would have to bear the whole cost of the appeals process.’130 This was supported by Douglas Connell, who emphasised that ‘especially with a new regulator, it is very important that adequate checks and balances are in place, so it must be right to have a general right of appeal.’131

216. The Bill also introduces the right of appeal through the Sheriff Courts. The Institute of Fundraising called for more information on this process:

129 Communities Committee, Official Report, 2 February 2005, column 1736.
‘We are concerned that issues such as the cost and length of the appeals process should be established. It has been suggested that even such a local approach could be onerous and inflexible for small charities and that an additional arbitration process should be considered. We believe that the costs of both appeal and arbitrations will be determined by the nature of the legal advice necessary to support each appeal. The role of OSCR as an experienced and sensitive regulator of charitable activity will be critical in ensuring that disputes are seldom allowed to escalate into legal action.’

217. The Committee believes that the Executive should give consideration to whether costs should be paid in the event of a successful appeal on the basis of the evidence received by the Committee.

Fundraising for Benevolent Bodies
218. The provisions contained within the Bill which relate to fundraising cover not only public charitable collections but also public benevolent collections. There must be a formal agreement between the charity and a professional fundraiser and OSCR is given the power to determine what should be contained in such agreements. Section 80 gives a benevolent body, and OSCR acting on behalf of charities, the right to seek an interdict to prevent a professional fundraiser or commercial fundraiser from fundraising. The Bill promotes self-regulation by charities in terms of fundraising, but also provides for Scottish Ministers to introduce regulations on fundraising should self-regulation not be effective.

219. The Institute of Fundraising expressed strong reservations on the approach to licensing of public benevolent collections, arguing that it did not believe that ‘the current bill will achieve a unified and proportionate scheme for licensing public benevolent collections which is able to be applied consistently by local authorities’. This point was reinforced by Oxfam in Scotland, who stated that ‘it would be unfortunate to miss the opportunity to create consistency in local authority licensing and its enforcement by ensuring that local authorities comply with the guidance that the Parliament or OSCR issues. It would be a pity if this great new bill were undermined by being unenforceable.’

220. When questioned on the differences in how authorities might apply the provisions on public benevolent collections and fundraising, the Deputy Minister reassured the Committee that ‘we are always in favour of consistency, provided that it is matched by not seeking uniformity when that would be inappropriate.’ She explained:

‘After consultation last summer, the Bill was strengthened to include a duty on local authorities to have regard to guidance that OSCR issues on public benevolent collections or goods collections. That is intended to improve the consistency with which such collections are regulated. That in itself will be sufficient. I understand that if an authority has to have regard to guidance, it must explain any departure from guidance. Nevertheless, it is important to have that wee bit of flexibility, because people operate in different environments in different parts of the country.’

132 Written evidence submitted by the Institute of Fundraising Scotland, Annex D.
134 Communities Committee, Official Report, 2 February 2005, column 1737.
221. The Committee is satisfied with the proposed approach of placing a duty on local authorities to have regard to the guidance on public collections in section 91. It suggests that this should be monitored in order to ensure that there is not significant divergence across the country.

222. The Institute of Fundraising welcomed the promotion of self-regulation in relation to fundraising, emphasising that:

‘self-regulation is capable of modernisation and constant updating, as are the codes of practice. Self-regulation will grow out of the codes of practice. The Institute of Fundraising has had discussions with stakeholders north and south of the border to work towards self-regulation, which will lead to much greater public confidence.’135

The only reservation expressed by the Institute of Fundraising was that ‘considerable funding will be needed if we are to ensure that everybody is aware of the scheme.’136

223. The Committee welcomes the fact that the Bill covers fundraising by all benevolent bodies, whether they are charities on the Scottish Charities Register or not. It commends the approach to promote self-regulation as this will be better able to adapt to the development, within the sector, of new methods of fundraising. The Committee recommends that support to the sector should continue in order to encourage the dissemination of codes of best practice.

224. The Committee believes that the measures included in the Bill in relation to fundraising will help to increase public confidence by helping to demonstrate to the public that funds donated will reach and benefit the cause concerned.

225. In taking evidence from the City of Edinburgh Council, the Committee questioned the Council on the accuracy of the estimates in the Financial Memorandum relating to the costs of licensing public benevolent collections. The Financial Memorandum estimates that local authorities will process an average of 100 applications for licences for public benevolent collections annually and that the total labour cost to the local authority for processing that number would be £500 per annum. The City of Edinburgh Council later submitted supplementary written evidence to the Committee indicating that the individual cost of processing each application would be nearer £40.

226. The Committee accepts that ‘the figure in the financial memorandum was based on numbers that several local authorities provided in response to a request that the Executive made to all local authorities,’137 but draws the Executive’s attention to the fact that, in light of the information now provided by the City of Edinburgh Council, the costs to be borne by local authorities may prove to be significantly higher than it has estimated.

135 Communities Committee, Official Report, 15 December 2004, column 1551.
137 Communities Committee, Official Report, 2 February 2005, column 1738.
Designated National Collectors

227. Section 86 requires OSCR to specify criteria in relation to obtaining and retaining designated national collector status. Before specifying these criteria, OSCR is obliged to consult ‘such associations representing local authorities, such persons representing the interests of charities and such other persons as it thinks fit.’

228. The Committee supports this approach and would welcome the opportunity to comment on the criteria proposed by OSCR in due course.

Investment Powers of Trustees

229. Part 3 of the Bill is concerned with the extension of the investment power of trustees (whether they are charitable or not) and the exercise of those powers.

230. The SCVO commented that in general ‘the business of charity investment ought to be left to charity trustees and the state should not intervene with too many regulations.’ It supported a ‘much more creative investment of charitable resources in, for example, cause-related investment—there is significant potential for charities’ assets to be invested to support other charities—so we would prefer to have a completely liberal regime that recognised that charities were best able to manage their own affairs in the way that they see fit.’\textsuperscript{138}

231. In evidence to the Committee, Simon Mackintosh of the Charity Law Association noted that difficulties might arise ‘when a trust deed contains no specific power or a trust deed’s general terms are not wide enough to allow delegation’ of investment management. He elaborated:

‘The risk for trustees is that if they do not have a specific power and the general powers are not wide enough, they commit a breach of trust if they undertake sensible financial management by giving an investment manager a policy to act within and the requirement to report to trustees quarterly or every six months. That is a perfectly sensible way to manage a trust fund’s investments, but the concern is that Scots law prevents trustees from acting in that way. The general principle of extending investment powers—which a joint report of the Law Commission and the Scottish Law Commission suggested and which has been applied in England—is to be supported.’\textsuperscript{139}

232. The Committee supports the general principle of the extension of the investment powers of trustees and recommends that further consideration should be given to ensuring that trustees have the specific power to delegate investment of assets to fund managers.

Equal Opportunities

233. The Committee notes that the Bill as introduced now includes a general equal opportunities duty for OSCR.

\textsuperscript{138} Communities Committee, Official Report, 15 December 2004, column 1552.
\textsuperscript{139} Communities Committee, Official Report, 15 December 2004, columns 1529-30.
234. The Committee believes that the changes proposed to the charitable purposes in paragraphs 96 to 109 above, will further promote the principle of equal opportunities in the Bill and urges the Executive to accept these.

Policy Memorandum

235. Under Rule 9.6.3 the Committee is required at Stage 1 to consider and report on the Policy Memorandum. The Scottish Executive prepared a Policy Memorandum, which accompanied the Bill when introduced.

236. The Committee agrees that the Policy Memorandum provided a comprehensive explanation of the policy objectives for introducing a new regulatory regime for charities in Scotland. It is content that alternative ways of meeting those objectives were considered, that an inclusive and in-depth consultation process took place and that there was an adequate consideration of the effect of the Bill on equal opportunities, human rights, island communities, local government and sustainable development.

Finance Committee Report

237. In reporting to the Committee, the Finance Committee highlighted a number of issues to the Communities Committee and requested that these be raised with the Minister.

238. The Finance Committee expressed concerns about the financial implications for NDPBs of losing their charitable status. The Committee has acknowledged the Deputy Minister’s commitment to bring forward amendments at stage 2 with respect to the National Collections Institutions. The Committee will bear the Finance Committee’s concerns in mind when it considers the Executive’s amendments.

239. The Committee acknowledges the Finance Committee’s reservations on the ‘somewhat incoherent approach to gathering information’ on which to base the estimation of the costs of NDPBs losing their charitable status. The Committee believes that the Deputy Minister’s recognition in her evidence that the ‘annual value of charity status is now estimated to be £20 million’ 140 is a more accurate assessment of the real costs to these bodies of losing charitable status.

240. The Finance Committee questioned whether the cost of establishing OSCR was a proportionate response to the need to reform the charitable sector in terms of cost. The Communities Committee has examined the correspondence from the Minister for Communities and the Executive on this issue. The Committee believes that increases in OSCR’s budget proposed by the Executive are realistic and necessary for OSCR to carry out the requirements placed upon it by the Bill. 141 Nevertheless, it thinks that the OSCR’s budget should be closely monitored by the Executive and expects that the budget will be reduced once OSCR has successfully established the Scottish Charity Register and reconsidered the charitable status of all charities in Scotland based on the new charity test. The Executive has indicated that the annual cost to the public purse of the new

140 Communities Committee, Official Report, 2 February 2005, column 1704.
141 Finance Committee Report on the Financial Memorandum for the Charities and Trustees Investment (Scotland) Bill, Annex A.
regulatory regime will be £4 million. Given the current and future importance of the charitable and voluntary sector to Scotland, not least in economic terms, the Committee believes that this is a reasonable cost. It certainly compares favourably with the £30 million annual cost of the Charity Commission for England and Wales.

241. The Committee recognises the concerns of the Finance Committee that the cost implications of the Bill for the charitable sector are wider than those listed in the Financial Memorandum. When questioned on this subject, the Deputy Minister expressed the conviction that the regulatory framework was proportionate, and ‘it will not work against the interests of the sector.’

Nevertheless, the Committee agrees that there is a need for further dialogue between the Executive, OSCR and key representative bodies in the voluntary and charitable sector on how to roll-out training and provide support on the new legislative framework which will be established on enactment of the Bill.

Subordinate Legislation Committee Report

242. The provisions of the Bill that confer powers to make subordinate legislation were referred to the Subordinate Legislation Committee under Rule 9.6.2. The Subordinate Legislation Committee examined these provisions in detail at its meetings on 1 and 8 February 2005 and raised a number of points with the Executive.

Proposed Amendments

243. The Committee welcomes the Executive’s undertaking in correspondence with the Subordinate Legislation Committee to bring forward an amendment to adjust the circularity in the drafting of section 6(1).

244. The Committee notes the Subordinate Legislation’s Committee agreement to examine amendments relevant to the provisions in section 19(8) at Stage 2.

245. The Committee notes the Subordinate Legislation Committee’s recommendation that the Executive should bring forward appropriate amendments to provisions 82(2)(h) and 83(3) at Stage 2 in order that they should be subject to affirmative procedure, and calls on the Executive to bring forward such amendments that would reframe the offence provision.

246. The Committee notes the Executive’s commitment to remove the reference to section 97 from section 104(2) by amendment at Stage 2.

Outstanding Issues

247. The Subordinate Legislation Committee highlighted its concern over the open-ended nature of the provision in section 97(2). The Committee shares the concern of the Subordinate Legislation Committee that there is no time limit on the transitional arrangements and urges the Executive to consider whether there is scope to set a reasonable timescale for these to be implemented in line with the Committee’s earlier comments in paragraph 86.

142 Communities Committee, Official Report, 2 February 2005, column 1741.
143 Communities Committee, Official Report, 2 February 2005, column 1741.
Conclusions

248. The Committee welcomes the Charities and Trustee Investment (Scotland) Bill as a means of providing a robust, fair and proportionate framework for defining and regulating charities in Scotland. Those giving evidence to the Committee have unanimously welcomed the introduction of a Bill to regulate the charitable sector and have seen it as a crucial contribution to maintaining and promoting public confidence in the work of charities.

249. The Committee has made a number of recommendations in this report in response to the evidence it has heard. It urges the Executive to take these into account with a view to developing what are viewed as positive legislative proposals during the later stages of the Parliamentary process.

250. The Committee recommends that the Parliament should agree the general principles of the Bill.
The Committee reports to the Communities Committee as follows—

Introduction

251. Under Standing Orders, Rule 9.6, the lead committee in relation to a Bill must consider and report on the Bill’s Financial Memorandum at Stage 1. In doing so, it is obliged to take account of any views submitted to it by the Finance Committee.

252. This report sets out the views of the Finance Committee on the Financial Memorandum of the Charities and Trustees Investment (Scotland) Bill, for which the Communities Committee has been designated by the Parliamentary Bureau as the lead committee at Stage 1.

Background

253. At its meeting on 21 December 2004, the Committee took oral evidence from Anne Swarbrick, specialist in charity law and Associate of Anderson Strathern Solicitors.

254. It then took oral evidence from the following witnesses on 18 January 2005: Lucy McTernan, Director of Corporate Affairs and Paul White, Director of Networks, Scottish Council of Voluntary Organisations; Richard Arnott, Head, and Quentin Fisher, Deputy Head, Bill Team, Scottish Executive Development Department; and Jane Ryder, Chief Executive, Office of the Scottish Charities Regulator.

255. The Committee also received written evidence from the Scottish Council for Voluntary Organisations (original and supplementary); Office of the Scottish Charities Register (original and supplementary); National Galleries of Scotland; National Museums of Scotland; Scottish Screen; Scottish Natural Heritage;
National Library of Scotland; Scottish Arts Council; Anne Swarbrick (original and supplementary); Royal Commission On The Ancient and Historical Monuments of Scotland; Royal Botanic Garden Edinburgh; Scottish Federation of Housing Associations; Institute of Chartered Accountants of Scotland; Scottish Executive officials; and received a copy of a letter from the Minister for Communities to the Convener of the Communities Committee. The Committee thanks all those who took the time to comment on the Bill. Written evidence is reproduced as Appendix A to this report.

Objectives and Financial Memorandum

256. The Policy Memorandum states that “This Bill introduces a new regulatory regime for charities in Scotland. It sets up a new charity regulator and public register of charities. The objective of the Bill is to ensure there is a robust, proportionate and transparent regulatory framework that satisfies public interest in the effective regulation of charities in Scotland and meets the needs of the Scottish charity sector.”

257. The Financial Memorandum includes a table setting out the costs associated with the Bill:

| SUMMARY OF ESTIMATED ADDITIONAL COSTS ON THE SCOTTISH ADMINISTRATION |
|---|---|
| **Ref** | **Cost** |
| OSCR para 119 | £1 million pa |
| Net cost of possible additional grant-inaid funding to NDPBs paras 124 and 128 | up to £7 million pa |
| Appeal Tribunal para 159 | set up costs of £160,000 and between £145,000 and £210,000 pa |
| Awareness and training seminars para 139 | up to £150,000 |

| SUMMARY OF ESTIMATED ADDITIONAL COSTS ON LOCAL AUTHORITIES AND OTHERS |
|---|---|
| **Ref** | **Cost** |
| Possible loss of charitable status by local authority managed charities paras 123 and 126 | not known |
| NDPBs paras 124 and 128 | see above under “costs on the Scottish Administration” |
| Administrative costs to charities associated with registration para 130 | mostly minimal but up to £2000 |

258. Executive officials confirmed that the Office of the Scottish Charities Regulator’s (OSCR) budget needs to be increased to £3.6 million per annum from 2006-07 to
take account of the extra work that will probably stem from implementation of the bill.\(^{144}\)

**Status of NDPBs**

259. The issue of greatest concern to the Committee is the question of what will happen to those bodies which currently have the dual status of being both charities and Non-Departmental Public Bodies (NDPBs). At present, there are 13 such bodies and their future status is currently being considered by Scottish Ministers; there is a conflict between NDPBs being bodies that are controlled by ministers through powers of direction and the fact that charities should be independent bodies.

260. The Financial Memorandum (FM) estimated the impact on the affected bodies of the loss of tax relief, non-domestic rates relief and donations flowing from their charitable status. Not including rates relief - which is ultimately funded by the Executive - the total benefit to NDPBs from these sources is estimated at between £6 and 7 million.

261. However, various institutions have warned if they were to lose their charitable status there would be considerably greater financial repercussions, some of which are not actually considered in the FM. For example, the Royal Botanic Garden Edinburgh has said that the FM did not consider accurately, or at all, issues such as charitable tax relief; being able to enhance the value of donations made under Gift Aid; donations from donors who pay higher rate tax; and gifts not being exempted from Inheritance Tax.

262. The submission warns starkly that not only will existing capital projects be jeopardised because “it will be virtually impossible to raise private sector support” but that comparable English bodies will be at a competitive advantage because they do not face the same challenge to their status. Similar concerns were raised by the National Galleries of Scotland who said that the £13 million of private funds raised for the £30 million Playfair Project “would not have happened without a private/public partnership”. The submission also warned that “While they [similar institutions in England and Wales] continue to develop inspirational capital projects and build up revenue streams from philanthropy, our fundraising will be restricted”.

263. Unless this position can be satisfactorily resolved, the Committee would be very concerned about the financial implications of the Bill for those NDPBs. The Committee is aware that the Communities Committee itself has received very detailed financial information from several NDPBs. We are certain that this issue will be raised by the Communities Committee and would urge that our very serious concerns are also conveyed vigorously to the Minister, so that the funding of these vital bodies is not jeopardised.

**Consultation**

264. On a broader note, the Committee highlights the submission from the National Galleries of Scotland, which said that it did not have sufficient time to comment on the Bill, particularly the “independence” issue. While the Committee acknowledges the evidence given by Executive officials that NDPBs and their sponsoring divisions were asked to provide relevant financial information, it is not content with

\(^{144}\) Arnott, Official Report, Col 2201, 18 January 2005.
the somewhat incoherent approach to gathering this information. The Committee is clear that where a Financial Memorandum is presented to the Parliament, particularly one which has potentially major implications, that every effort should be made to secure all the relevant information needed to inform Members’ consideration. It is particularly surprised that this has not been done in this case, where, in effect, different arms of government do not seem to have communicated effectively with each other. The Committee feels that where consultations are not carried out properly and accurate figures not supplied, then this can cause unnecessary anguish to the organisations involved and distract people from actually carrying out their core tasks. Further, it considers that it would have been more helpful for reviews of all the affected NDPBs to have been concluded before consideration of the Financial Memorandum began, and that any outstanding reviews should be concluded as soon as possible.

**The need for legislation**

265. The Committee asked whether the costs of the intended benefits of this legislation outweigh the costs of the problem it is seeking to address. By way of illustration, Jane Ryder, Chief Executive of OSCR, said that in two high profile cases, charities had not expended £14 million of the £17 million which they had raised^145^.

266. The Committee recognises that such sums are not just significant in themselves, but can also have a detrimental impact on public confidence in charities and therefore on donations given. However, it felt it reasonable to question whether OSCR’s budget - which is estimated to rise to £4.75 Million by 2009-10 -is the proportionate response to this problem. The Committee requested from the Executive a breakdown of the global cost to the taxpayer of supporting the charitable sector, which has not been received in time for it to be given full consideration. It therefore requests that this correspondence is examined by the Communities Committee which will then be placed to consider whether the Bill’s cost is proportionate.

267. Given the significant costs of this legislation and the fact that it was inspired to a degree by two cases of impropriety, the Communities Committee may also wish to investigate whether – if any cases of impropriety were to arise in the future – the new regulatory regime would be able to recoup any money lost. Such a guarantee could help to justify the expense of this legislation.

**Training**

268. The main issue raised by SCVO in its evidence was the question of how much it would cost to train voluntary organisations on the new legislation and whether these costs are accurately expressed in the Financial Memorandum.

269. SCVO believes that because the Bill will mean having to train charity trustees on their new responsibilities, it is also an opportune time to roll-out broader training on good governance and good practice in the voluntary sector.

270. The Financial Memorandum states that “It is estimated that training seminars to raise the level of awareness of the new legislation amongst charities would cost about £5,000 for every hundred delegates attending. We estimate that around £150,000 may be required to run the appropriate seminars.”

271. SCVO feels that this sum is insufficient because far more trustees would have to be trained and the training would be ongoing. Instead, it has recommended a budget of £500,000 in the first year of implementation with a tapering budget year on year thereafter\(^{146}\).

272. The Committee agrees that there are wider cost implications for the charitable sector than those detailed in the Financial Memorandum. It welcomes the fact that the Councils for Voluntary Services (CVS) network and OSCR are willing to work together to provide the required information and training to charity trustees.

273. However, the Committee is not convinced that the SCVO’s estimate of £500,000 is entirely accurate either: the CVS already receives £14 million in funding, while SCVO could not specify exactly how much of this is spent on training; it seems reasonable that some of the new training costs could be absorbed from existing training budgets; and, that some bigger charities may be able to meet training costs themselves. Further, it notes the provision in OSCR’s 2006-07 budget of £92,000 for “Information” and £241,000 for “Guidance”.

274. The Committee therefore recommends that SCVO and OSCR look again at the funding required to inform charities and trustees of their new duties and whether this can be done more effectively within existing budgets. The Committee is not content that all the costs associated with voluntary sector training requirements are not expressed fully in the Bill and that SCVO, OSCR and the Scottish Executive have left to an unacceptably late stage the dialogue necessary for working out these costs.

Other issues

275. In providing oral evidence, Anne Swarbrick, specialist in charity law, highlighted the fact that if a charity were to appeal to the Scottish charity appeals panel and wanted to take legal advice, it would have to bear the cost of this appeal itself\(^{147}\). The Executive responded that “some charities will wish to take legal advice and have legal representation present. That would cost them, although there is of course no requirement for them to have that…representatives of the charity can simply write a letter and then turn up on the day and argue their case.”\(^{148}\) The Communities Committee may wish to consider whether this situation would create an imbalance in the law and whether redressing this imbalance in the future would lead to additional budgets being required.

276. The Committee notes a difference of opinion between Ms Swarbrick and SCVO on the differing approaches in Scotland and in England and Wales to charities legislation, specifically the differences in the definitions of charities and the likely impact on Scottish charities. Ms Swarbrick noted that:

> “…there will be significant costs to charities in trying to defend their charitable status in the light of the proposed new definition. There might also be significant costs to beneficiaries of charities. If a charity loses its charitable status and closes its doors, where will those people go for the services that they currently…"
receive from the charity? There might be costs to local authorities in picking up the services that are no longer being provided.149

277. While SCVO felt uncertain that it “can be demonstrated that charities in Scotland will incur additional costs compared to charities in England”150, the Committee is obviously keen that such a possibility is investigated fully with the Minister.

Conclusion

278. The Committee has highlighted a number of issues to the Communities Committee and would be grateful if these could be raised with the Minister. In so doing, it is also forwarding to the Communities Committee further evidence received from OSCR and SCVO which discusses financial implications for those NDPBs with charitable status and which we have not had time to discuss.

279. As noted, the Committee’s primary concern is that the financial viability of those NDPBs which are also charities is not jeopardised by this Bill.

Charities and Trustee Investment (Scotland) Bill - Financial Memorandum
Written Submissions

SUBMISSION FROM SCOTTISH COUNCIL FOR VOLUNTARY ORGANISATIONS

Introduction
SCVO is the representative umbrella body for the voluntary sector in Scotland. Our 1200 members represent a vast constituency covering the majority of charitable activity in Scotland. This submission is endorsed by the elected SCVO Policy Committee, which represents large and small, local, national and international organisations, covering many different fields of activity.

Our lengthy experience of and our close contact with the sector allow us to speak with some authority about the likely impact of the changes upon it as they are laid out in the Charities and Trustees Investment (Scotland) Bill.

Key Issues
We accept that there will be some cost for charities associated with complying with the new provisions of the Bill. We believe that, in general, the benefit to the sector of effective compliance outweighs the impact of any costs. However, we wish to raise the following points:

1) A light-touch monitoring regime and cost effectiveness
The Office of the Scottish Charity Regulator (OSCR) should operate a light-touch monitoring regime in keeping with the grain of the information that the charitable sector already collects. For example, when it comes to accounts the sector is already obliged to produce detailed information and present it in an accessible way. We hope that such a regime is the intention and presumably this is the assumption behind paragraph 149 of the explanatory notes, which suggests there will be no extra costs on the sector in terms of new accounting regulations, which will be generated by an Act.

However the Executive’s intention (paragraph 150 of the notes) is that the Charity Statement of Recommended Practice (SORP) will occupy a much greater position in the presentation of the accounts of Scottish charities than previously. OSCR’s pilot annual return form also uses sections that relate to accounts presented using the SORP. Yet it has been shown by the Dundee University Charity Law Unit in research commissioned by the Scottish Executive that the SORP is scarcely used by all but the largest charities in Scotland. Because the presentation of accounts that follow the SORP can be a complex task it is likely that there will be an increased costs for their preparation for organisations that have not previously required them in this form. It is inaccurate to suggest there will be no cost and we would advocate that the Executive consults with the sector and the accountancy profession to gauge a realistic figure.

SCVO agrees that OSCR must be sufficiently resourced to carry out its appointed tasks. However, the increase in its budget by £1 million per annum does not suggest the provision of the light-touch regime that we believe is both desirable and possible, especially given the general willingness of the sector to cooperate with OSCR.
OSCR has argued that its proposed detailed questionnaire based approach to the collection of data that is included in accounts – rather than the submission of the accounts themselves - is to reduce the burden on OSCR. While SCVO’s experience of similar data collection demonstrates that the burden won’t in fact be reduced, this position also begs the question as to why the burden of regulation should fall so heavily to charities rather than on the regulator.

OSCR should seek at all times to minimise the bureaucracy required of charities of all sizes and types, allowing the maximum time and resources of charities (and those that work for and govern them) to be devoted to charitable endeavours and not diverted to dealing with red tape. If OSCR establishes a mutually beneficial light touch approach to monitoring that does generate an unnecessary overabundance of information being submitted to it surely OSCR itself will be able to operate in a more cost effective way.

As a new body OSCR is ideally placed to bring together those with experience and knowledge of charity reporting, including representatives of the sector, in order to construct a model of reporting for charities that both gathers truly relevant information and is mutually cost effective.

Rather than increasing the money available to OSCR it may be better spent enabling this process to take place and in resourcing training and governance improvement in the sector (as below).

2) The cost of training for compliance
The Financial Memorandum (paragraph 139) includes an estimate that ‘training seminars to raise awareness of the new legislation amongst charities’ would cost £150,000 for the sector based on £5,000 per 100-delegate event. This would appear to be based on holding 30 events reaching 3000 attendees. It is utterly unclear where the 3000 figure comes from.

We consider that considerably more people would require direct training of the kind described. Given that any shortfall between training costs and available funding would impact upon the sector itself we consider the figure of £150,000 to be wholly unrealistic. A figure ought to be arrived at only after proper consultation with the sector.

Incidentally, it is not quite clear how the acknowledgement of this cost squares with paragraph 156 of the Financial Memorandum which states that there should be no additional costs associated with the duties of charity trustees contained in the Bill.

3) Ensuring good governance
SCVO has, in fact, identified that the need for adequate training in all aspects of governance of voluntary and charitable organisations is now a key priority for the sector. We believe that the new Bill provides an opportunity for the Executive to think beyond compliance costs with respect to the Bill alone and work with the sector and OSCR to plan and deliver a comprehensive programme of good governance for the sector. This will strengthen the sector in Scotland in a way that is absolutely crucial in maintaining and improving its current and future capacity and level of volunteer involvement.

The issues of compliance and good governance costs in general were raised by
delegates during both the Executive’s consultation meetings and the Communities Committee pre-legislative meetings with the voluntary sector on the draft Bill.

4) Cost of registration
It is not clear to us how the Executive has arrived at the figure of £2000 used in paragraph 130 of the Financial Memorandum and therefore it is difficult to gauge its accuracy. However, £2000 is a substantial cost by any reckoning and even a charity that might appear to be able to afford it ‘on paper’ might struggle to allocate further resources to administrative requirements, possibly at the expense of delivering on its charitable objectives.

Conclusion
We believe that a more careful and consultative consideration by the Executive of the costs associated with the Bill, taking into account the issues we have raised, will truly help to make this Bill the effective piece of legislation that we all look forward to, one that will ensure a thriving Scottish voluntary sector working for the benefit of Scotland, now and far into the future.

This questionnaire is being sent to those organisations that have an interest in, or which may be affected by, the Financial Memorandum for the Charities and Trustee Investment (Scotland) Bill. In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

SUBMISSION FROM THE OFFICE OF THE SCOTTISH CHARITY REGISTER

Consultation
1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

Response
(i) OSCR representatives (Jane Ryder, Chief Executive and Richard Hellewell, Head of Regulation & Compliance) were part of the Bill Reference Group. In addition, OSCR’s Chief Executive spoke at a number of consultation events organised by the Scottish Executive and participated in others.

(ii) OSCR submitted a full Resource Impact Assessment to the Bill Team, estimating the annual requirements, together with additional “set up costs” to assist in preparation on transition to the new regime. An Executive summary of the RIA is attached.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Response
The Financial Memorandum accompanying the Bill refers to a budget of £2.3m for 2006/07 onwards (i.e. an additional £1m p.a.), based on historic estimates. However, OSCR has since been able to undertake more detailed work, including work on volume assumptions, business process and staffing case loads all reflected in the Resource Impact Assessment. As a result, we estimated that OSCR required a budget of £3.85m from 2006/07 together with set up costs of £545,000 in 2005/06.

Following discussions with the Bill Team, there is scope for some small reduction in
both the ongoing and set up costs. We have therefore agreed with the Bill Team that a figure of £3.6m ongoing costs for 2006/07 (i.e. a further additional £1.3m) and a set up figure of £400,000 in 2005/06 is a realistic allocation at this stage. The Minister has agreed this revised allocation.

3. Did you have sufficient time to contribute to the consultation exercise?

Response
Yes

Costs
4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Response
See question 2

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

Response
On the basis that the Minister has approved the 2006/07 budget figure of £3.6m and additional set up costs of £400,000 in 2005/06 we believe that OSCR can meet the financial costs associated with the Bill as presently drafted. It is possible that further costs may arise and need to be allocated once the Bill has progressed further, and we have a clearer idea of expectation in relation to the key variables (see 6 below).

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Response
(i) Our discussions and the discussions with the Bill Team centred on the margins of uncertainty associated with estimates of volume assumption of all aspects of business, staffing case loads and staff grading.

Overall, the Resource Impact Assessment was structured to reflect a phased introduction (a) set up or transition costs in 2005/06 (b) first year costs in 2006/07 (c) full year costs in 2007/08 allowing for an additional 3% inflation allowance.

(ii) In the Resource Impact Assessment we identified key variables as:

(a) How proactive OSCR is expected to be in the monitoring for the new charity test. This is explicit in the consultation paper, but not in the Bill.

(b) The scope of the new appeal process e.g. a third party right of appeal would add significantly to costs.

(c) The extent of the consent regime introduced by the Bill.

(d) The detail of transition provisions.
We will pay particular attention to the impact on key variables throughout the Parliamentary process.

(iii) The Committee may wish to note that we have so far as possible reflected the recent Efficient Government announcement, by assuming that OSCR can rely on the main Scottish Executive Central Services for some back office services (e.g. HR, payroll, some IT, finance).

Wider Issues
7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Response
In developing the Resource Impact Assessment, OSCR has used the EFQM model. Within the RIA, estimated costs associated with OSCR own compliance with wider policy initiatives are grouped under leadership and governance, and include:

- Equal opportunities
- Best Value
- Efficient Government
- Community Planning
- Scottish Executive Compact with the Voluntary Sector

8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Response
For the initial period, the costs of OSCR developing guidance for the sector are included within the agreed RIA figure.

SUBMISSION FROM THE NATIONAL GALLERIES OF SCOTLAND

Consultation
1. Did you take part in the consultation exercise for the Bill if applicable and did you comment on the financial assumptions made?

Yes, The Trustees of the National Galleries of Scotland sent in a response expressing concern about the independence issue. This did not actually appear in the draft bill, but was mentioned in the accompanying notes. We did not prepare specific figures, but we did say that this would have an adverse impact on the fundraising capability of the National Galleries of Scotland.

2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

No.

The independence test is now a key part of the Bill. As it currently stands the Scottish National Institutions (The National Galleries of Scotland, The National Museums of Scotland, The National Library of Scotland, The Royal Botanic Gardens Edinburgh and the Royal Commission of Ancient and Historic Buildings) will have to chose
between being an NDPB or a charity.

Assuming the heritage assets of the country will remain under public control, the loss of charitable status becomes inevitable for these organisations.

3. Did you have sufficient time to contribute to the consultation exercise?

No – the consultation time was short – particularly when taking into account the issue that concerned NGS did not appear on the face of the bill and it was unclear about how it would be dealt with. Consequently when the independence issue appeared on the face of the bill, on November 15th 2004, bringing the issue of the charitable status of the national institutions/NDPBs to the fore, we felt there had been a significant change in emphasis. Furthermore, there has been little time to discuss the impact on the national institutions.

Costs
4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not please provide details?

This will have a profound impact on the National Galleries of Scotland and the other national institutions responsible for the Nation’s Collections. For example: £13 million of private funds were raised for the £30 million Playfair Project. The project simply would not have happened without this private/public partnership. Trusts and Foundations gave over £8 million – and are usually restricted to giving to charitable bodies. Individual donations would be severely hampered as people are very reluctant to give to non charitable bodies.

We will be at a comparative disadvantage with similar institutions in England and Wales, which have dealt with their national cultural institutions by creating exempt Charities. While they continue to develop inspirational capital projects and build up revenue streams from philanthropy our fundraising will be restricted.

Our long term future to build our philanthropic base through donors and friends will be affected. Currently we have 2500 Friends who gave over £200,000 to Playfair in addition to their annual Friends gift. The rates of the NGS will increase to £500,000 pa from £100,000 pa.

Future capital projects, such as the restoration of the Scottish National Portrait Gallery will be put at risk due to our inability to raise significant private funds without charitable status.

We have used a combination of private/public funds to purchase acquisitions, both large and small. Our approach is to use the purchase grant, recently reinstated by the Scottish Executive to lever funds to add to the Collection. While Heritage funds will still be available to us, the lack of charitable status will reduce our effectiveness in leveraging gifts from third parties.

We will no longer be able to collect gift aid. In the Playfair Campaign, this accounted for some £400,000. We also claim gift aid on revenue fundraising – currently at a more modest level of approximately £20,000 pa – but increasing.

5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

No, we have no ready means to replace the lost income due to loss of our charitable
status.

Meeting the direct costs of the bill (eg business rates) will put severe strain on an organisation that is already under severe financial pressure to maintain the quality of service and to provide greater access to the people of Scotland to their national collections, unless additional funds are made available from the Scottish Executive.

The opportunity costs of restricting our fundraising base will be profound in the longer term. There has been some limited exploration of setting up a charitable body – but this under the terms of the Bill would have to be independent of the National Galleries. This raises profound issues about control and strategic direction when talking about raising millions of pounds to support long term projects. A separate charity may work at the margins to bring in some philanthropic support - but our overall development programme would be severely hampered.

6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No – the costs are an underestimate. No reference is made to fundraising for capital projects. The Playfair project raised the largest private sum of money for a cultural project in Scotland - £13 million

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

We do not believe the costs are accurately reflected.

On wider policy issues we would question why the definition of a charitable institution is being defined to a narrower basis which will act as a restriction on expanding philanthropic funds generated in and coming to Scotland.

We have recently been successful in being awarded a Kresge Challenge Grant of Michigan USA - which required us to have charitable status to apply – and would like to quote from their latest letter:

“We’re delighted here with your progress. I am especially impressed by your success among individuals, both with large and new gifts – and with new donors and old friends. Your individual fundraising since the challenge began is truly breathtaking. As you know, individuals are your most loyal donors, so bringing in this kind of support can really strengthen your capacity in the long run. Indeed given your prominence and success, it is probably safe to say you are not only securing a stronger future for the National Galleries, you are raising the standards for fundraising throughout Scotland.”

William F.L Moses, Senior Program Officer

This kind of success will be lost to the national institutions if the Bill is passed in its current form.

8. Do you believe that there may be future costs associated with the Bill, for example
through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

The overriding concern for the National Galleries of Scotland is the opportunity cost—which is not covered in the legislation.

The National Galleries as a public body (NDPB) is accountable and transparent, affected by such government policy such as Freedom of Information Act. As guardians of the cultural heritage of Scotland, this is something the Trustees welcome. It serves Scotland’s interest that we remain both a charity and a public body. To force the NGS to be either an NDPB or a charity will have costs associated with it—which are very difficult to assess.

We are concerned that legislation is being passed in a tight time frame, without adequate research to assess the full costs or impact on the National Institutions and without adequate consultation with the bodies concerned.

We would strongly recommend that a similar solution to England and Wales for the national institutions be found—so that the heritage/cultural institutions operate on a level playing field across the UK.

SUBMISSION FROM THE NATIONAL MUSEUMS OF SCOTLAND

Consultation
NMS did not take part in the consultation exercise for the Bill. At the time of the consultation our understanding was that the national cultural institutions would not be affected by the Bill.

Costs
4. If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The Financial Memorandum does not accurately reflect the financial implications of the Bill for NMS at all. Under the Bill as drafted NMS will lose charitable status, because as an NDPB it is under the direction of Ministers, and cannot pass the Charities test of independence. Loss of charitable status has very significant financial implications for NMS. These are detailed below (all figures relate to 2003/04 unless otherwise specified):

4.1 Loss of Significant Tax Benefits

4.1.1 Charitable Rate Relief

NMS will lose charity exemption on property rates, being currently £1.2m across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate NMS for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However a mechanism would need to be in place to effect this.
4.1.2 Charitable Tax Relief – Revenue Fundraising/Gift Aid

Charitable tax reliefs are essential to encourage giving outwith capital campaigns. Last year NMS received grants of over £300,000, which was applied to special exhibitions, research programmes and educational activities. Most of this sum may not have been given without charitable status. NMS and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to NMS no longer being a charity. This is likely also to affect support such as sponsorship in kind.

Specific losses are noted below:

NMS would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor. NMS loss estimated at £50,000 in relation to this.

Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

Gifts to NMS (both lifetime gifts and legacies) would not be exempt from Inheritance Tax.

A donor making a gift to NMS in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.

Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However some donors would not wish to see their money routed through even a charitable trust to an organisation which was itself not charitable.

4.1.3 Charitable Tax Relief – Capital/Campaign Fundraising

Charitable tax relief is absolutely essential to capital fundraising within the private sector for visionary capital development projects such as the Museum of Scotland and the Royal Museum Masterplan, most of which are successful public/private partnerships:

The Museum of Scotland Campaign in the 1990s raised approximately £10m from non-government sources (charitable trusts and foundations, business organisations and private individuals) both in the UK and overseas. This figure does not include the award of £6.75m made by the Heritage Lottery Fund. The three major categories of donation (Founders, Guardians and Stewards) totalled just over 300 gifts but contributed more than 90% of the total money raised. The majority of these gifts also involved charitable tax relief and many of the donations may not have been made at all had an attractive tax break not been available to higher rate taxpayers.

The Royal Museum Masterplan is a visionary £45 million project which will transform the Royal Museum with much improved public access, new learning centres, public facilities and new displays. It is envisaged that £12 million will be raised from the private sector, with the balance of funding sought from the
Heritage Lottery Fund and the Scottish Executive. Without charitable status it will be more difficult to raise private sector support, and the project will be at risk. NMS estimates that at least £5 million of the £12 million sought would not be forthcoming:

£6 million would be sought from Charitable Trusts. Most of the larger trusts would not give direct to NMS without charitable status, and would have reservations about routing their donations through the NMS Charitable Trust, because it is independent of NMS. Estimated reduction in giving of £4 million.

£5 million would be sought through personal gifts. Some givers will not be comfortable with giving to NMS without charitable status. Some givers will not be comfortable either with their donations being routed through the NMS Charitable Trust. Estimated reduction in giving of £1 million.

Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However this itself raises significant strategic issues, notably whether the public interest is best served by the private sector funding for the capital development programme of a major cultural institution being in the control of an independent and essentially unaccountable charitable trust which has the power to direct how that funding is applied.

4.2 Philanthropic Support for Major Cultural Projects

In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status by organisations such as NMS and others like it, raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions, because they have the perception that if they do so, they are giving their money to the government. Many of the largest contributions to the Museum of Scotland campaign funds came from bodies which would not have given to a non-charitable organisation. To put this in context, the top 61 contributions accounted for more than £7m of the £10m raised.

4.3 Scottish Institutions in Comparison with Institutions in England and Wales

Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of such support through charitable giving. If NMS loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic support currently enjoyed will be directed elsewhere. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions
- of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.

5 Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think that these costs should be met?

NMS would not be able to meet the financial costs of the Bill, which would result from loss of charitable status. These fall into two categories:

5.1 Loss of tax reliefs and revenue donations.

These relate to relating to rates and revenue donations. These are estimated in 4.1.1 and 4.1.2 as:

Rates £1,200,000

Revenue donations £300,000

NMS would have to seek additional Grant-in-Aid from Scottish Executive in compensation.

5.2.1 Loss of private sector charitable giving on major capital projects,

As estimated in 4.1.3 and 4.1.4 above. It is very unlikely that the Scottish Executive would be able to replace these funds. NMS would have to curtail development of its collections, its public services and its large renewal projects which are the means to ensure continuation of an excellent standard of service to visitors from Scotland and overseas.

6 Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Loss of charitable status would mean a permanent reduction in the level of private sector support for NMS.

Wider Issues

7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

The costs of the Bill to NMS and to other cultural institutions which are NDPBs, comprise the costs consequent upon loss of charitable status. The Explanatory Notes to the Bill estimate these as up to £7 million for tax reliefs and Gift Aid (based on 2002 figures) as the loss for the whole NDPB sector. In our opinion this is a very substantial underestimate. The revenue costs to NMS alone are estimated as £1.5m per annum (See 5.1 above).

The impact on capital projects which involve substantial private sector charitable giving are set out above with examples. For the reasons given above most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation. The opportunity costs to the people of Scotland in terms of lost cultural assets and activity will be enormous.
8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so is it possible to quantify these costs?

The costs associated with the Bill will be the costs outlined above rising from loss of charitable status by the national cultural institutions, as outlined above.

SUBMISSION FROM SCOTTISH SCREEN

Consultation
1 A summarised response was submitted providing the estimated potential financial implications to Scottish Screen if charitable status was lost

2 Comments have only been partly reflected in Financial Memorandum (FM), as no reference to potential future corporation tax liabilities or loss of future funding streams in being unable to access charitable trusts and foundations.

3 At the time, yes, though it would have been helpful to have had ongoing consultation meetings to discuss the progress of the bill and to enable us to agree on an action plan with other NDPBs.

Costs
4 The issue of rates relief has been addressed in the FM. Although this has a near neutral effect for the Scottish Executive, in that the local authority is recompensed by the Scottish Executive up to 95% anyway, Scottish Screen would however need funds to be paid direct to Scottish Screen via an increase in Grant in Aid to cover the direct payment of rates.

Two other significant areas of concern have not been reflected. There is no reference to potential future corporation tax liabilities or the loss of income in being unable to access charitable trusts and foundations. This will have an immediate impact on the projects we can undertake as well as a substantial future impact on our ability to leverage additional income to support our activities by accessing charitable funding streams. In line with this point the benefits gained in being a charity in attracting collaborations and funding will be lost.

5 Based on the estimated costing as specified in the FM, Scottish Screen should be able to meet:
   Registration and administration staff time – approx £1000
   Printing corporate stationery – approx £1000

We do however have a concern over the potential level of reporting which will be required under the new Bill and the resulting implications with regard to staff time/resources, which at present because reporting detail is not specified, cannot be quantified

Rates – although a neutral effect for the Scottish Executive we would require an uplift in our GIA of approx £140,000 per annum for current premises over three sites (estimated figure based on available information)

Corporation tax – not addressed in FM. Although, we are a not for profit organisation and therefore aim to achieve a break even position, by losing charitable status we would become liable to corporation tax, thereby diverting funds from delivery of
objectives to payment of tax.

Loss of access to charitable trusts and foundations – eligibility for funding from some charitable trusts and foundations, is based on the charitable status of the applicant. As has been raised already above, this represents a huge lost opportunity as opposed to an additional cost in that it would substantially limit the additional potential benefit Scottish Screen could bring to areas within which we operate, in that projects would simply not be undertaken as they would be dependent on the receipt of external partnership funding.

6 With the exception of the loss of current and future income from charitable trusts and foundations and potential costs associated with corporation tax, as outlined in our response to 4, above, then it seems the cost margins are reasonably accurate in terms of Scottish Screen’s situation

7 Not Applicable

8 Hard to accurately predict if there would be future costs, but would generally expect that to be the case. eg, would be legal costs if NDPBs decide to pursue advice on potential other organisational structures to enable continued benefits from charitable status –

SUBMISSION FROM SCOTTISH NATURAL HERITAGE

Consultation

Question 1. Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?

SNH did not take part in the consultation exercise for the Bill.

Question 2. Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?

Not applicable. SNH did not take part in the consultation exercise for the Bill.

Question 3. Did you have sufficient time to contribute to the consultation exercise?

Not applicable. SNH did not take part in the consultation exercise for the Bill.

Costs

Question 4. If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Issues relating to the loss of tax reliefs, non-domestic rates relief and the prohibition of the transfer of funds to a non-charity in certain circumstances are accurately reflected in the Financial Memorandum.

In addition, we note that the loss of rates relief will be exacerbated by the current rates review, which comes into effect on 1 April 2005. We are unclear whether the current tax relief on interest from funds on deposit would also be lost because of the loss of charitable status.
We note that the equivalent legislation for England and Wales does not propose the loss of charitable status for our sister Country Agencies, English Nature and Countryside Council for Wales. This could potentially place us on an unequal financial footing and complicate partnership working arrangements.

Linked to this, there could be legal difficulties in the administration of bequests between the three Country Agencies if two remained charities and one did not. Again, this could place us at a funding disadvantage.

We assume, but have not researched, that the potential loss of charitable status would not lead to any retrospective claims to pay back some of the partial VAT relief that we have claimed in the past on the construction of new buildings.

Question 5. Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

SNH could not absorb the financial costs associated with the Bill, if it meant a loss of charitable status, without adverse impact on its operational activities.

Our working assumption is that the financial impact for SNH would be fully funded by the Scottish Executive. Our reasoning is that the net impact of any changes to tax revenues would be cost neutral in public sector terms.

Question 6. Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

Although it is not currently a significant proportion of SNH’s funding, there is concern that the loss of charitable status would create uncertainty and practical difficulties over SNH receiving funds from organisations whose constitution prohibited funding a “non-charity”.

Wider Issues
Question 7. If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Subject to the points above, we have no further comment.

Question 8. Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Subject to the points above, we have no further comment.

SUBMISSION FROM THE NATIONAL LIBRARY OF SCOTLAND

Consultation
1 The National Library of Scotland did take part in the consultation exercise for the Bill. A letter was submitted by Martyn Wade, National Librarian dated 12 August 2004, noting our concern at the possibility that the legislation could result in the ending of charitable status for the NLS as an NDPB. Our reading of the draft Bill led us to the conclusion that the NLS could retain charitable status whilst remaining an
NDPB. We further commented on the importance of charitable status in assisting the Library develop fundraising approaches to deliver our new strategy. Mention was also made of tax reliefs amounting to £497,000 per annum.

2 We do not believe that our comments on the financial assumptions have been accurately reflected in the Financial Memorandum.

3 We had no problems with the time given to respond to the consultation.

Costs

4. As noted at 2 above, we do not believe that the financial implications for NLS have been accurately reflected in the Financial Memorandum. Loss of charitable status would have a significant financial impact on the NLS.

Our estimate of rate and other tax (VAT) relief 2003/4 is £500,000 using 2003/4 figures. This of course would increase as the Library develops its £28m capital building programme in line with our Strategy.

More significantly would be the threat to our capacity to develop our fundraising campaign. The NLS is currently pursuing the purchase of the John Murray Archive. The success of this project requires that we raise £6.5m of the £32m total from a fundraising campaign, with the balance funded from the Heritage Lottery Fund and the Scottish Executive. Charitable tax relief is an essential element in raising funds from the private sector and individuals and loss of the associated tax reliefs would seriously jeopardise this project.

The Library is also committed to implementing a sustainable fundraising campaign to raise funds for ongoing programmes, exhibitions and educational activities. It is not possible at this stage to identify a value for this activity but it is reasonable to assume that this element of our strategy would not be deliverable without charitable tax relief. This is due to the fact that donors will be less inclined to contribute if they are unable to claim tax relief on the donation, and equally, lifetime gifts and legacies, if not exempt from Inheritance Tax would be likely to go elsewhere.

This is particularly problematic given that under the proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status whilst continuing to be regulated by the Department of Culture, Media and Sport. It is not difficult to envisage that funds that may have been directed to Scottish Cultural Institutions would be redirected to our counterparts in England and Wales, seriously affecting our capacity to participate as equals on the world cultural stage.

5 The National Library of Scotland could not meet the costs associated with the Bill and would need to seek additional Grant –in –Aid funding from the Scottish Executive to compensate.

6 The Financial memorandum does not address the margins of uncertainty associated with the estimates. The inability to progress sustainable fundraising could have a significantly detrimental impact on the ability of the NLS to deliver its current strategic commitments to the standards and quality intended.

Wider Issues

7 As above.
8 As above.

SUBMISSION FROM SCOTTISH ARTS COUNCIL

In addition to the questions below, please add any other comments you may have which would assist the Committee’s scrutiny.

Consultation

Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?
The Scottish Arts Council did not take part in the consultation exercise in its own right however the Head of Funding and Resources made comments as part of the Scottish Finance Directors Group Submission.

Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?
See Above

9. Did you have sufficient time to contribute to the consultation exercise?
   Yes

Costs

If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

The obvious costs – loss of rates relief etc. have been covered. Currently the Scottish Arts Council is able to achieve discounts on many of its purchases due to its charitable status. Software costs are significantly discounted to organisations with charitable status. In our negotiations with suppliers we always place emphasis on our charitable status together with inability to reclaim VAT. Our banking costs are currently significantly reduced due to charitable status and given the volume of transactions the Council undertakes we would expect the changes should we lose charitable status to run to tens of thousands of pounds.

More importantly the loss of charitable status will impinge on the Councils plans to lever in funds from trusts and sponsorship. The Council is increasingly looking to partnership support and sponsorship for many of its projects this will become difficult if charitable status is removed.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?
Whilst the Scottish Arts Council is constantly reviewing its cost base and will work to the targets set by the Efficient Government Initiative the additional costs incurred as a result of a change in status we would expect be borne by the Scottish Executive.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
Wider Issues

If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

N/A

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

Future costs are hard to predict without guidance. If the Scottish Arts Council looses its charitable status as a result of this bill, it is unlikely that there will be further direct financial costs. However, as the majority of our client group, the 100 + arts organizations which we fund, are registered charities future costs introduced through subordinate legislation or guidance notes may be borne by them which in turn may have an effect on the demand for funding from the Scottish Arts Council.

SUBMISSION FROM ANNE SWARBRICK

Anne Swarbrick is accredited by the Law Society of Scotland as a specialist in Charity Law. She is an Associate of Anderson Strathern, Solicitors. She was, for more than ten years, a legal adviser to the Scottish Charities Office (SCO), which was a division of Crown Office responsible for the supervision of charities in Scotland before that function was transferred to the new Office of the Scottish Charity Regulator (OSCR). Thereafter she was Head of Investigation at OSCR.

Anne has over many years, conducted or supervised the majority of SCO investigations, including all of their major enquiries. She has also provided advice to many charities which were under investigation but where it was appropriate, to address any shortcomings by offering the charity advice and assistance to improve its governance and practices.

Anne is also an experienced litigation lawyer.

1. Part 1, Chapter 1 (Office of the Scottish Charity Regulator (OSCR)) and chapter 4 (Enquiries and Supervision.) Financial Memorandum paragraphs 119 to 121.

1.1 One of the most crucial aspects of this Bill from a financial point of view is that OSCR must be provided with the financial resources necessary to carry out its functions effectively. This certainly applies to the new functions. OSCR will also have increased powers in relation to the investigation of charities, their trading companies, associated companies and certain individuals. This represents an increased investigation role which will also require to be adequately resourced. There may be a temptation to believe that the creation of the Scottish Charity Register will reduce the requirement for investigations, but I do not believe that this will in fact be the case. Experience in England where the Charity Register has existed since 1960 strongly suggests that whilst the Register is a useful tool for investigation purposes and may also be of considerable assistance in detecting wrongdoing at an early stage, it does
not replace properly conducted investigations. It is indeed quite possible that there will be an increased need for investigations because of increased vigilance owing to the presence of the Register itself.

2

Part 1 Chapter 2 (Scottish Charity Register) Paragraphs 122 to 130.

2.1 Paragraph 122 indicates that “as the new definition is largely in keeping with the existing definition, we do not however anticipate any significant change to either the size or growth of the charity sector as a result of this.”

2.2 I do not accept that the proposed new definition is largely in keeping with the existing definition. It is narrower than the existing definition. It is clear from a comparison of the existing definition and the proposed new definition that this problem exists. In view of the fact that the problem will show itself most severely in relation to the fourth head of charity under the present law, ie “other purposes beneficial to the community” (see SPICE briefing, page 6) and also the fact that this has been the head of charity which has expanded most over the years through case by case decisions, I would anticipate that there will be quite a number of charities which will experience these difficulties. I do not accept the premise that the proposed new definition will have a neutral effect on either the number of charities in Scotland nor their income.

2.3 Paragraph 129 narrates the potential effects upon some independent schools of losing their charitable status. This paragraph should also narrate that in the event that any charitable independent school closes, the local authority for the area in question may be required to educate a substantial number of additional pupils.

2.4 This section does not address the potential costs to beneficiaries of charities which lose their charitable status and which close as a result. These may well be people who are far from wealthy and, depending upon the nature of the charity, they may also be vulnerable. They may experience serious difficulties in obtaining the services from another source. There may also be a knock-on effect on the public purse, perhaps particularly for local authorities.

2.5 This section also does not take account of the costs which charities will incur in attempting to maintain their charitable status. For many charities this would entail obtaining legal advice as to whether their existing purposes will fall within the proposed new definition or whether these will require alteration. For some others there may be a lengthy legal battle through the Scottish Charity Appeals Panel, the Court of Session and possibly further. This will be a drain on the funds of these charities.

3. Part 1, Chapter 5 (Reorganisation of charities) Paragraphs 144 to 146

3.1 Section 44 relates to educational endowments which are trust funds held by many educational institutions, such as universities, which exist to further their educational purposes.

3.1.1 There has been a historic difficulty with the provisions of sections 10 and 11 of The Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which provided small trusts with simplified procedures by which they may reorganise. Educational
endowments are, however, excluded from those provisions which prevents small educational endowments from reorganising under procedures which might be ideal to address their financial difficulties. They can, of course, reorganise under the Education (Scotland) 1980, but this procedure involves an application to the Court of Session and is too costly to address the problems of small endowments. The strength of the 1980 Act is, however, that an educational establishment such as a university can reorganise large numbers of educational endowments in one exercise.

3.1.2 The effect of section 44 will be to deny this in future, because such an exercise could not include any endowment which is a charity. This will have a cost implication.

3.1.3 It would be more cost effective to allow educational endowments access to both the procedures under the 1980 Act and the procedures applicable to small trusts under the 1990 Act. This would ensure that the procedures are sufficiently flexible to allow the most helpful procedure to be used and make it easier for such educational establishments to adapt to changing circumstances.

3.2 Sections 40 and 41 of the Bill apply to charities only. Sections 10 and 11 of the 1990 Act would continue to apply to public trusts. Public trusts often have outdated purposes and wish to wind up and transfer their funds to a charity with similar purposes.

3.2.1 One of the main difficulties with the provisions of section 10 and 11 has been that they prohibit the transfer of funds from public trusts to charities which are incorporated. The effectiveness of the provisions of section 10 and 11 of the 1990 Act could be greatly improved if its provisions were amended to allow this to happen. This would make it possible for public trusts with outdated provisions to transfer their assets to an incorporated charity which is doing similar work.

4. Part 1, Chapter 9 (Charity Trustees)
Paragraphs 154 to 157

4.1 Paragraph 142 refers to the additional duties imposed on charity trustees by section 65 of the Bill. Charity trustees are largely unpaid volunteers who run charities in their spare time. It is already difficult for charities to attract people willing to undertake the increasingly onerous role of charity trustee. Such people already face heavy civil sanctions and unwelcome front page publicity as a result of possible action by OSCR. The requirements of clause 65 and the criminal provisions imposed by this clause are much too demanding of volunteer charity trustees and are likely to deter people from volunteering for this role. There may also be resignations of existing charity trustees because of these provisions.

4.2 In view of potential difficulties with recruitment and possible resignations, it is unlikely that charities will view the potential cost of these provisions as marginal.

5 Part 1, Chapter 10 (decisions, notices, reviews and appeals)
Paragraphs 158 to 161

5.1 Paragraph 161 indicates that charities wishing to dispute OSCR’s decisions will be able to do so without incurring the costs associated with a court action. The Scottish Charity Appeal Panel is prohibited from awarding expenses to either OSCR
or to an appellant. The result of this is that if a charity or an individual wishes to take legal advice in connection with a potential appeal, they must bear that cost themselves, even where OSCR’s decision is found to be wrong. The costs of going to the tribunal properly advised may therefore be prohibitive for both charities and individuals. At the same time it would be inadvisable for charities to forego legal advice in such circumstances as this would result in a gross inequality of arms between the appellant and OSCR. In order to equalise the power of an appellant and OSCR the Scottish Charity Appeals Panel should have power to award expenses to successful appellants. It should also have power to award expenses to OSCR but only where the tribunal decides that an appeal amounted to an abuse of process. That is what the Joint Committee of the House of Commons and House of Lords has proposed for England and Wales. The arguments in favour of this approach apply equally in Scotland.

5.2 Those who have a right of appeal to the Scottish Charity Appeals Panel are limited to either (a) the charity or (b) the person in respect of whom the decision was made, depending upon the type of order. Any other person who wished to challenge a decision of OSCR would require to raise a Petition in the Court of Session seeking Judicial Review of the decision. This is a very costly exercise. This cost could be avoided by widening the potential appellants to the Scottish Charity Appeals Panel to include “any person who is or may be affected by” OSCR’s decisions. That would mean that the tribunal could hear the arguments of all parties.

6. Part 3, (Trustee investment powers) Paragraphs 169 to 171

6.1 Paragraph 171 narrates that the purpose of the proposed reform is to produce a better return than present investments. The proposals miss an opportunity to give to Scottish trustees important powers which could result in significant improvements in both investment performance and income for some charities and trusts.

6.2 Part IV of the Trustee Act 2000 gave trustees in England and Wales power to delegate certain functions, including investment of assets to agents or nominees. This power should also be given to Scottish trustees in order to increase the possibilities of improving investment returns.

SUBMISSION FROM ROYAL COMMISSION ON THE ANCIENT AND HISTORICAL MONUMENTS OF SCOTLAND

Costs
If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.

Under the bill as drafted, RCAHMS might lose charitable status. As a Royal Commission operating under Royal Warrant, our Commissioners are appointed by the Queen with the approval of Ministers. Therefore, it appears we could fail the test of independence required to retain charitable status, as interpreted under the current draft Bill. Loss of Charitable status would have a significant impact on our work and serious financial implications for RCAHMS.

The financial impact on RCAHMS would be a loss of revenue of approaching £0.5
Million a year (over 15% of turnover) and it would seriously curtail both our current activities and our ability to develop our fundraising potential in the future, thus greatly increasing our dependence on Scottish Executive Funding.

RCAHMS would lose exemption on: property rates, VAT eg. on fuel and power, and the climate change levy. Currently, this saving is in the region of £150,000. However, during 2006-2008, RCAHMS will be building a new archive store with £12m from the Scottish Executive. Conservative estimates suggest that we would make in the region of £700,000 savings due to exemptions on the cost of building and a further annual £150,000 on the new building. Although still very much in the initial stages, it is our intention to embark on a major fundraising campaign to add to the £12m already promised for the new building. This is comparable to the capital fund raising schemes that have been undertaken by the National Galleries and the National Museum of Scotland, which similarly benefit from charitable status in these major building ventures.

RCAHMS also benefits from manufacturers discounts, eg. on camera and scanning equipment, and, in particular, on ICT hardware and software, in some cases attracting up to 100% discount on software licences. There is no question that highlighting charitable status at the negotiating stage for software and other ICT services is effective in reducing costs, either with an official 'charitable reduction scheme', or in assisting the case for other reductions or simply for gaining small advantages such as assistance in kind. The amount saved varies from year to year depending on our ICT refresh strategy, but is in the region of £100,000 in the current year.

RCAHMS believes that there would be a major detrimental effect on our ability to maintain our status as one of the world’s leading centres of excellence for the heritage, particularly in the field of the online delivery of information through Canmore, Pastmap and our joint venture (SWISH) with our sister body in Wales, RCAHMW. These initiatives are dependent on our charitable status not only for discounts on capital equipment and software licensing but because our charitable status allows us to share best practice and provide shared services for others in the delivery of similar information (eg. Historic Scotland, Local Government Sites and Monuments Records) where their own status would seriously inhibit their own cost-effective services.

Although the actual cost is difficult to calculate, partnerships with other charitable and non-governmental bodies, ‘in kind’ services, educational and other discounts, and gifts of archive to our National Collection are among the many activities that could be seriously affected by loss of charitable status. A recent example is the outright gift of the Basil Spence Archive to RCAHMS by an individual donor. This archive, comprising 38,000 items is of considerable value to Scotland and has attracted a grant of £975,000 from the HLF to catalogue and conserve it and make it available to the public through exhibitions, and over the internet.

**Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?**

RCAHMS would be unable to meet the financial costs of the Bill and would have to seek increased funding from the Scottish Executive. Loss of charitable status, however, would not only make the organisation ineligible for the cost savings outlined above, but also changes the way in which the organisation is perceived. The goodwill
and intangible benefits received currently are impossible to replace with finance.

**Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?**

The financial memorandum does not take into account the amount of financial support received by RCAHMS from the commercial and business sector nor the potential for raising funding from charitable donations. It does not reflect the margins of uncertainty and seriously limits RCAHMS potential development of its future vision, which includes, amongst other things, the major building project. The £12m funding allocated will provide a much needed store for RCAHMS, but the intention is to use the funds from the Scottish Executive to lever considerable additional funding – only possible if RCAHMS retains charitable status. This will allow the construction of a better facility for the national collection held by RCAHMS and the expansion of our educational and outreach capability.

RCAHMS is embarking on a new vision for which includes a much more customer-centred approach and concentrates on Education and Outreach to the citizen. Reduction in funding caused by the loss of charitable discounts, will make this vision even harder to realise, but the perception of the organisation as one which is no longer eligible for charitable status, will, I believe, send a negative message to those partners and the public with whom we wish to engage more fully.

**SUBMISSION FROM ROYAL BOTANIC GARDEN EDINBURGH**

**Consultation**

RBGE did take part in the Scottish Executive Forum, post McFadden. At the time of that process our understanding was that the national cultural institutions would not be affected by the Bill. There has been very little consultation since then.

**Costs**

*If the Bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.*

The Financial Memorandum does not accurately reflect the financial implications of the Bill for RBGE at all. Under the Bill as drafted RBGE will lose charitable status, because as an NDPB it is under the direction of Ministers, and cannot pass the Charities test of independence. Loss of charitable status has very significant financial implications for Royal Botanic Garden Edinburgh, and this is certainly **not cost neutral to the RBGE**. The costs are detailed below (all figures relate to 2003/04 unless otherwise specified):

**Loss of Significant Tax Benefits**

*Charitable Rate Relief*

RBGE will lose charity exemption on property rates, being currently £0.2M across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate RBGE for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget
neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However a mechanism would need to be in place to effect this.

**Charitable Tax Relief – Revenue Fundraising/Gift Aid**

Charitable tax reliefs are essential to encourage giving outwith capital campaigns. Last year RBGE received grants of over £500,000, which would not have been given without charitable status. RBGE and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to RBGE no longer being a charity. This is likely also to affect support such as sponsorship in kind.

Specific losses are noted below:

RBGE would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor. RBGE loss estimated at £80,000 in relation to this.

Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

Gifts to RBGE (both lifetime gifts and legacies) would not be exempt from Inheritance Tax. Could cost on average around £200,000/year+.

A donor making a gift to RBGE in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.

**Charitable Tax Relief – Capital/Campaign Fundraising**

Charitable tax relief is absolutely essential to capital fundraising within the private sector for visionary capital development projects such as the Museum of Scotland and the Royal Museum Masterplan, most of which are successful public/private partnerships:

The RBGE Gateway Project is a visionary £13 million project which will transform the West Gate into the centre for biodiversity communication in Scotland, with much improved public access, new learning centres, public facilities and new displays. It is envisaged that the largest proportion of funds will be raised from the private sector, with the balance of funding sought from the Scottish Executive. Without charitable status it will be virtually impossible to raise private sector support, and the project will be at risk, despite having raised £1 million already through private donations. For example:

At least £3 million would be sought from Charitable Trusts. Most of the larger trusts would not give direct to RBGE without charitable status.

At least £2 million would be sought through personal gifts. Some givers will not be comfortable with giving to RBGE without charitable status. Some givers will prefer to give via their Charitable Trusts – a route which would be closed to them without charity status.

**Philanthropic Support for Major Cultural Projects**

In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status
by organisations such as RBGE and others like it, raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions and many give through charitable trusts.

Scottish Institutions in Comparison with Institutions in England and Wales
Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport or DEFRA. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the Royal Botanic Garden Kew, the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of such support through charitable giving. If RBGE loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic support currently enjoyed will be directed elsewhere. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think that these costs should be met?
RBGE would not be able to meet the financial costs of the Bill, which would result from loss of charitable status. These fall into two categories:

Loss of tax reliefs and revenue donations.
These relate to relating to rates and revenue donations. These are estimated in 4.1.1 and 4.1.2 as:

Rates £ 200,000
Revenue donations + other income £ 400,000

RBGE would have to seek additional Grant-in-Aid from Scottish Executive in compensation.

Loss of private sector charitable giving on major capital projects
As estimated in 4.1.3 and 4.1.4 above. It is very unlikely that the Scottish Executive would be able to replace these funds. RBGE would have to curtail development of its collections, its public services and its large capital projects which are the means to ensure continuation of an excellent standard of service to visitors from Scotland and overseas.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?
Loss of charitable status would mean a permanent reduction in the level of private sector support for RBGE.

**Wider Issues**

*If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?*

The costs of the Bill to RBGE and to other cultural institutions which are NDPBs, comprise the costs consequent upon loss of charitable status. The Explanatory Notes to the Bill estimate these as up to £7 million for tax reliefs and Gift Aid (based on 2002 figures) as the loss for the whole NDPB sector. In our opinion this is a very substantial underestimate. The revenue costs to RBGE alone are estimated as £0.6m per annum (See 5.1 above).

The impact on capital projects which involve substantial private sector charitable giving are set out above with examples. For the reasons given above most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation. The opportunity costs to the people of Scotland in terms of lost cultural assets and activity will be enormous.

11. *Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so is it possible to quantify these costs?*

The costs associated with the Bill will be the costs outlined above rising from loss of charitable status by the national cultural institutions, as outlined above.

**SUBMISSION FROM SCOTTISH FEDERATION OF HOUSING ASSOCIATIONS**

**Consultation**

*Did you take part in the consultation exercise for the Bill, if applicable, and if so did you comment on the financial assumptions made?*

The Scottish Federation of Housing Associations did take part in the Bill consultation process and made a submission. We did not however make any comment on the financial assumptions made in the memorandum.

*Do you believe your comments on the financial assumptions have been accurately reflected in the Financial Memorandum?*

N/a

*Did you have sufficient time to contribute to the consultation exercise?*

Yes

**Costs**

*If the bill has any financial implications for your organisation, do you believe that these have been accurately reflected in the Financial Memorandum? If not, please provide details.*

The SFHA is a representative organisation for housing associations and cooperatives in Scotland and therefore the impacts will be felt by our members and not this organisation itself. However, these costs should be relatively minimal in terms of
hospitals, as they are already subject to the regulation of Community Scotland, and under the current Bill proposals, the day to day regulation of charitable Registered Social Landlords would continue to be carried out by Community Scotland. There may be costs implications if the issue of trading activity is not dealt with, but as this is a reserved matter and currently under discussion as part of the Westminster Bill, it is not relevant here.

Are you content that your organisation can meet the financial costs associated with the Bill? If not, how do you think these costs should be met?

The Federation is confident that any associated costs can be met by housing associations and co-operatives as these should be relatively minor, but note that our members’ income is from tenants’ rents and therefore any cost in terms of compliance could have an impact on service provision.

Does the Financial Memorandum accurately reflect the margins of uncertainty associated with the estimates and the timescales over which such costs would be expected to arise?

No comments are offered on this.

Wider Issues
If the Bill is part of a wider policy initiative, do you believe that these associated costs are accurately reflected in the Financial Memorandum?

Yes.

Do you believe that there may be future costs associated with the Bill, for example through subordinate legislation or more developed guidance? If so, is it possible to quantify these costs?

There may well be further costs for some organisations, but these should be relatively minor, associated with changes to constitutions, registration with OSCR, changes to letterheads and so on. Such costs may amount to a few hundreds of pounds and appear to be reflected in the figure estimated in para 130.

SUPPLEMENTARY SUBMISSION FROM ANNE SWARBRICK

At their meeting of 21st December 2004, the committee requested that I let them have some additional information in relation to two matters.

1. What were the origins of the OSCR model of charity regulation?

1.1 The Commission on the future of the Voluntary Sector in Scotland (the Kemp Commission) was set up in 1995 by CVO and reported in 1997. In relation to future regulation of the sector this Commission recommended the creation of a Scottish Charity Registrar with responsibility for maintaining a Register of Scottish Charities and also for offering advice to Scottish Charities: the Scottish Charities Office (SCO) should retain their existing role in relation to the investigation of charities and the taking of regulatory action.
1.2 The Scottish Charity Law Review Commission (the McFadden Commission) was established in 2000 and reported in the Summer of 2001. In relation to the supervision and regulation of charities this Commission recommended the establishment of a body to be called “CharityScotland”. The intention was that this body would take on the role of charity registrar, regulator and also provide support for charities in Scotland. On the basis of this proposal, the functions of the SCO in relation to the investigation of charities would have been transferred to CharityScotland, but the SCO would have remained responsible for taking regulatory action against charities.

1.3 The Scottish Charity Law Advisory Forum was established by the Scottish Executive in early 2002. No formal report was published. Its purpose was to act as a forum for discussion and to inform legislative proposals post McFadden Commission.

1.4 On 29 May, 2003 the then Minister for Communities, Margaret Curran, made a Ministerial statement to the Scottish Parliament announcing the creation of OSCR as an Executive Agency, to take over the work of SCO, with enhanced resources to allow it to carry out monitoring, to gather intelligence and to provide a central authority to receive and monitor charities’ annual accounts. The statement envisaged the possibility of putting OSCR on a statutory footing at a later date, and made a commitment to further consultation on the content of the legislation and a further statement to the Parliament later in the year.

1.5 On 24 September, 2003 Ms. Curran made a further statement indicating that legislation would be introduced which would transform OSCR into an independent statutory regulator with an enhanced range of powers and an obligation to maintain a publicly accessible charity register.

1.6 In December, 2003 the functions of the Scottish Charities office were transferred to OSCR.

2. In relation to the second part of the Charity test, namely the “Public Benefit” test, what are the differences between the proposed Scottish approach and the proposed Westminster approach?

2.1 Section 7(1) of the Scottish Bill proposes to repeal the whole of the existing law and to replace it with a new two part charity test for Scotland. A body will meet the charity test if its purposes consist only of one or more of the charitable purposes which are set out in Section 7(2) and if, in addition, it provides public benefit in Scotland or elsewhere. Section 8 of the Bill goes on to set out certain criteria which the Office of the Scottish Charity Regulator (OSCR) and the Court should take into account in determining whether a potential Charity provides sufficient public benefit. These criteria are

(i) A comparison of any benefit gained by members of the body as a result of its activities with the benefits gained by the public at large; and
(ii) If the benefit is provided only to a section of the public, whether any condition for obtaining the benefit is unduly restricted.

2.2 The Scottish Bill proposes to repeal the entire existing body of case law. This case law provides, amongst other things, the tests which are currently applied in both Scotland and in England and Wales to establish what constitutes “public benefit”.

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Only two of these criteria are repeated in Section 8 of the Scottish Bill. It is unclear whether the remaining tests have any applicability in Scotland.

2.3 The Westminster Charities Bill also adopts a superficially similar two part test, with “public benefit” the second part of the test. But there the resemblance ends. The English Bill retains the existing law as a starting point, rather than repealing it. In the context of the second part of the revised charity test this means that it retains all of the existing tests of what is meant by “public benefit” and applies all of them to all charities across the board.

2.4 The joint Committee of the House of Lords and the House of Commons which is considering the Westminster Bill has now recommended that the English Bill should either include non exclusive criteria in a similar way to Section 8 of the Scottish Bill or provide for non binding statutory guidance to be issued by the Home Secretary to the Charity Commission. This does not really reduce the gulf between the “public benefit” tests in the two jurisdictions, because there remains the differences in the way that the two Bills treat the existing case law.

2.5 The Charity Commission for England and Wales have already indicated that in applying the public benefit test within their jurisdiction they will apply the principles already established by certain cases. All of these principles would be repealed in Scotland by the proposals of the Scottish Bill and would therefore form no part of Scots Law. It is therefore questionable to what extent OSCR could use these cases as the basis for issuing guidance in Scotland, and until OSCR’s guidance is tested in court, no-one (including OSCR) will know whether that guidance is in fact authoritative or whether it will require to be entirely rewritten.

2.6 The first part of the Scottish charity test is also narrower in its scope than is the first part of the Westminster charity test. The cumulative affect of all this is that both parts of the Scottish definition are much more restrictive than both its English equivalent and also the present UK wide definition and so the charitable status of many Scottish Charities may be endangered. It remains my view, as expressed before the Committee, that there will be quite a number of charities which will experience these difficulties. These charities will be working in many areas of charitable endeavour.

2.7 I have covered the question of the Scottish Charity test fully in my submission to the Communities Committee in relation to the principles of the Bill.

SUPPLEMENTARY SUBMISSION FROM OFFICE OF THE SCOTTISH CHARITY REGULATOR

1.0 INTRODUCTION

1.1 Introduction

The Office of the Scottish Charity Regulator (OSCR) is an Agency of the Scottish Executive and the new regulator of charities in Scotland. The successor to the former Scottish Charities Office, OSCR was formally launched on 16 December 2003. The Agency model enables OSCR to work independently of Ministers in our day-to-day tasks, but within Scottish Ministers’ strategy for Scottish Charity Law
Reform and Regulation.

OSCR has a dual role.

- To develop a Regulatory Framework, operating within the existing legislation.
- To manage the transition to OSCR’s statutory successor.

In addition to the pre-legislative discussions and the seminars organised by the Scottish Executive/SCVO, OSCR senior staff have discussed the Bill in detail with other Regulators, intermediaries and individual charities. The views, options and costs we offer are therefore those of the current Regulator, based on the extensive historic experience of the Scottish Charities Office combined with recent OSCR experience in developing a Regulatory Framework.

1.2 Resource Assumptions

The resource assumptions are based on the consultation draft of the Bill. In some areas the Bill is explicit in terms of procedure as well as function e.g. specifying that OSCR, after consultation, will issue guidance on the new charity test. In other areas there is greater discretion.

In preparing the Impact Assessment we have taken into account:

(a) The need for absolute transparency. In debating the Bill, Parliament will need to be aware of the full costs of what is proposed together with a full range of options.

(b) Ministers in allocating resources must be alive to the requirements to adequately resource any Regulator to enable them to undertake their statutory responsibilities.

(c) The remit of the Bill is to increase public confidence. It will be counter productive to develop a regime which is under-resourced at the outset, and to create a credibility gap between legitimate expectations based on the Bill, and available resources.

1.3 Key Variables

In terms of function, there are a number of variables which will impact on resource requirements. Key variables include:

(a) How proactive OSCR is expected to be in monitoring for the new charity test. This is explicit in the consultation paper, but not in the Bill.

(b) The scope of the new appeal process e.g. a third party right of appeal would add significantly to costs.

(c) The extent of the consent regime introduced by the Bill.

(d) The detail of transition provisions, which is related to (a).

1.4 Current Resources

Resources currently available to OSCR are set out in the Corporate Plan 2004-06. OSCR’s current annual budget is £2.16 million together with start up costs of £690,000.
TABLE 1.1

OSCR BUDGET BREAKDOWN 2004/05 SET-UP COSTS

<table>
<thead>
<tr>
<th>OPERATIONAL COSTS</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rental and services</td>
<td>210,000</td>
</tr>
<tr>
<td>Salaries, training and recruitment</td>
<td>775,000</td>
</tr>
<tr>
<td>Specialist support legal and agency</td>
<td>190,000</td>
</tr>
<tr>
<td>Operating costs</td>
<td>295,000</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SET-UP COSTS</th>
<th>£</th>
</tr>
</thead>
<tbody>
<tr>
<td>Initial costs, including updating index and research</td>
<td>150,000</td>
</tr>
<tr>
<td>Monitoring set-up including consultation</td>
<td>240,000</td>
</tr>
<tr>
<td>Database design and implementation</td>
<td>300,000</td>
</tr>
</tbody>
</table>

TOTAL 2,160,000

The Inland Revenue are currently responsible for recognising charitable status. The Inland Revenue has a staffing complement, based in Edinburgh, of 5. It is not currently envisaged that IR resources will transfer to OSCR, although the function will transfer.

2.0 The Business Model

2.1 Introduction

In developing the options and costing analysis, we have adopted as a business model, the European Framework Quality Management allowing an objective assessment of resource requirements.

Not only is this a well recognised model in business terms but it is recommended by the Scottish Executive.\(^{151}\) for public bodies\(^{152}\). The model allows us to take into account all internal Scottish Executive requirements as well as the specific functions described in the Bill.

2.2 Structuring the options and costing analyses

OSCR operations are described under each of the following headings:

1. **Leadership and governance** – comprising options and costs for the overall management and corporate governance of OSCR. This includes Board requirements and expenses, development of policy and strategy, consultation production and response handling, developing stakeholder participation structures, co-operation with other regulators, compliance arrangements, and resourcing of the new appeals process.

2. **People management** - comprising recruitment, relocation, induction, training and people development options and costs, and costs associated with accessing

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\(^{151}\) Promoting excellence in Scotland: A guide to quality schemes and delivery of public services (this model is also recommended by the Scottish Executive for public bodies).

\(^{152}\) On Board: A guide for board members of public bodies in Scotland by Scottish Executive 2003
additional skills and capacity from the marketplace

3 **Information management** – comprising records management, freedom of information publications and enquiries, data protection, research and evaluation etc

4 **Resources** – comprising the options and costs for the resource levels (people, accommodation, corporate ICT, vehicles, utilities, consumables), procurement processes and financial controls needed to ensure OSCR maximises the efficiency and effectiveness of its processes and can fully comply with requirements of financial accountability

5 **Functions** - comprising options and costs for OSCR’s six key areas of operational responsibility – charitable status, the charities register, monitoring, investigation, information provision and guidance.

**FIGURE 2.1 OSCR MODEL**
3. The options and costs

Each activity and function is considered in turn to identify the necessary resources, the associated costs and the proposed organisational structure.

We have described and costed three options:

1. A significant and extensive proactive option.
2. A minimum and reactive option, in many cases a backward step.
3. A pragmatic option, which in all cases is our preferred option as being realistic in relation to statutory requirements and anticipated resources.

The following table summarises the outcome of the three options described in the full text.

<table>
<thead>
<tr>
<th>TABLE 4.1 COMPARISON OF OPTIONS 2006/07</th>
<th>Extensive Proactive</th>
<th>Pragmatic</th>
<th>Minimal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Element</td>
<td>£</td>
<td>£</td>
<td>£</td>
</tr>
<tr>
<td>Leadership and governance</td>
<td>1,260,000</td>
<td>946,000</td>
<td>440,000</td>
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<tr>
<td>People management</td>
<td>299,000</td>
<td>220,000</td>
<td>68,000</td>
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<tr>
<td>Information management</td>
<td>483,000</td>
<td>349,000</td>
<td>154,000</td>
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<tr>
<td>Resources</td>
<td>606,000</td>
<td>520,000</td>
<td>378,000</td>
</tr>
<tr>
<td>Charitable status</td>
<td>556,000</td>
<td>453,000</td>
<td>177,000</td>
</tr>
<tr>
<td>Charities Register</td>
<td>322,000</td>
<td>245,000</td>
<td>118,000</td>
</tr>
</tbody>
</table>
The pragmatic option allows OSCR to be:

- pro-active in applying the Charity test
- resourced to deal with the new appeals process
- able to provide a consent regime as set out in the draft Bill
- capable of dealing with SCIOs which may be subject to a more detailed monitoring regime

To the extent that these requirements are removed or reduced, OSCR would be in a position to reduce certain operating costs.

### 4.3 Five year projection (based on the Pragmatic option)

Based on the set-up costs and subsequent running costs of OSCR 2, the envisaged indicative allocation for the period from 2005-06 until 2009-10 is set out in Table 4.3.

The indicative projection is based on the following assumptions:

- **Inflation** is assumed to be 3% per annum
- **Salary settlements** assumed to be 3% per annum in real terms
- **IT replacement**: assumed significant capital spend in new generation ICT by 2009-2010

Projections have allowed for a 3% inflation allowance.

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
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<td>Leadership and governance</td>
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<td>974,380</td>
<td>1,003,611</td>
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<td>233,398</td>
<td>240,400</td>
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<tr>
<td>Information management</td>
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<td>381,362</td>
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<tr>
<td>Resources</td>
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<td>551,668</td>
<td>568,218</td>
<td></td>
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<tr>
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<td>0</td>
<td>0</td>
<td>0</td>
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<td>Charitable status</td>
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<td>480,588</td>
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<tr>
<td>Charities Register</td>
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<td>259,921</td>
<td>267,718</td>
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<tr>
<td>Monitoring</td>
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<td>One-off costs</td>
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Communities Committee, 1st Report, 2005 (Session 2) – ANNEX A

<table>
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<td>Relocation Costs</td>
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<td><strong>Total</strong></td>
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<td><strong>SUBMISSION FROM INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND</strong></td>
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</table>

The existing audit requirement depends on whether or not a charity is a limited company.

**Charitable Companies**
If a charity is a limited company then the Companies Act 1985 applies. Only charitable companies with an income of more than £250,000 per annum require an audit. Please note that Charitable companies with an income of more than £90,000 but not more than £250,000 per annum although audit exempt, do require an accountants’ report. There are further rules in relation to audit exemption for charitable companies which are parent or subsidiary undertakings. The recently introduced Charities Bill for England and Wales proposes increases to the above audit exemption thresholds. The Bill will amend the Companies Act 1985 and thus will impact on charitable companies registered in Scotland.

**Charities that are not Companies**
The Charities Accounts (Scotland) Regulations 1992 currently apply to such charities. These require that charities with an income or expenditure greater than £100,000 per annum require an audit. Those charities which have an income or expenditure less than £100,000 are required to have an independent examination. These regulations will be superseded by the regulations to be issued under the Charities and Trustees Investment (Scotland) Bill. It is likely that regulations issued under this Bill will amend the thresholds in relation to charities which are not companies. It is also possible that these regulations may also place additional requirements on charitable companies registered in Scotland.

**Audit**
All statutory audits of charities are required to be undertaken by registered auditors. The audits should be undertaken in accordance with UK Auditing standards issued by the Auditing Practices Board (APB). The APB has recently announced that it will be introducing International Standards on Auditing for the audits of entities with accounting periods commencing on or after 15 December 2004. The change in the standards will require the auditor to spend a greater amount of time assessing the entity’s control environment at the outset of the audit. There will therefore be a slight change in the emphasis of the audit but in general (in particular smaller charities) there will be no significant change to the way in which an audit is carried out.

It should be noted that an audit is carried out to enable an auditor to express a view on the truth and fairness (or otherwise) of the charity’s financial statements.
Right and Duty of Auditors and Independent Examiners to Report to OSCR

In our view the Bill as currently drafted gives auditors and independent examiners the right to disclose information about a charity to OSCR for the purposes of enabling OSCR or assisting OSCR to exercise its functions. We are lobbying for further amendments to this section of the Bill, for example, we would like to see the introduction of an explicit duty to disclose. The right to disclose as currently drafted has the potential to impact on the cost of an audit if work on preparing disclosures is charged directly to the charity.

It is possible that OSCR may require some sort of assurance statement from a charity's auditor on information included in a charity's annual return. The annual return will include financial information based on a charity's financial year. There is also a possibility that auditor's may be required to provide a statement commenting on how charity trustees have discharged their responsibilities in relation to their investment powers.

However, at the moment I do not know how likely it is that these additional duties will be placed on auditors or how OSCR may seek assurances regarding the above issues in relation to charities which do not require an audit.

CORRESPONDENCE FROM MINISTER FOR COMMUNITIES TO CONVENER, COMMUNITIES COMMITTEE, DATED 20 DECEMBER 2004

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL: SUPPLEMENT TO FINANCIAL MEMORANDUM

The Financial Memorandum to the above Bill was introduced to Parliament on 15 December as part of the accompanying documents (Ref SP Bill 32-EN). I am writing to provide additional information on the estimated costs to the Scottish Administration of the Office of the Scottish Charity Regulator (OSCR) in implementing the provisions in the Bill.

When the Memorandum was prepared, the information available on the expected costs to the Scottish Administration for OSCR to implement the Bill's provisions (paragraph 119 of the Financial Memorandum) was that an additional £1m per annum would be required (in addition to the current budget baseline of £1.3m). This was based on earlier estimates before the detail of the Bill was developed and is what was allocated for OSCR in the 2004 spending review.

However, OSCR has now carried out further analysis of the expected workload and costs based on more detailed assumptions of volume, business process and staffing caseloads. The Executive has therefore allocated a further £1.3m pa for OSCR from 2006-07 (giving a total of £3.6m). In addition, £400,000 extra is to be allocated for 2005-06 to allow OSCR to carry out further work in preparation for implementing the Bill. I understand that OSCR will provide more detail of its resource assessment to the Finance Committee in support of its written evidence in relation to the Bill.
SUPPLEMENTARY SUBMISSION FROM SCOTTISH COUNCIL FOR VOLUNTARY ORGANISATIONS ON SECTION 7 (3) (B) OF THE CHARITIES AND TRUSTEES INVESTMENT (SCOTLAND) BILL AS IT PERTAINS TO THE NATIONAL COLLECTIONS OF SCOTLAND

SCVO understand that under the Charities and Trustee Investments (Scotland) Bill as drafted¹⁵³ the National Collections, as Non-Departmental Public Bodies (NDPBs), would be able to choose to remain as NDPBs or as charities but not as both. This is for two reasons:

a) For several of these NDPBs their constitutions or other founding documents do expressly permit Ministers to direct their actions¹⁵⁴

b) Even when Ministerial involvement is limited to the appointment of trustees there is a legal argument that this in itself is a form of direction and is certainly a way of otherwise controlling the body¹⁵⁵

SCVO acknowledges that the bodies concerned are adamant that both NDPB and charitable status are fundamental to their effective operation and to lose either would be hugely damaging for a number of reasons, which they have set out in their evidence to both the Finance and the Communities Committees of the Scottish Parliament.

In its response to the Scottish Executive consultation and its written submission to the Communities Committee SCVO advocated dealing with the question of NDPBs by adopting Recommendation 5 of the Scottish Charity Law Review Commission 2001 (the McFadden Commission):

‘We recommend that where an organisation has been established by local or central government, such an organisation should not be accorded the status of Scottish Charity if the constitution of that organisation allows more than one third of the trustees to be directly or indirectly appointed by the establishing organisation.’

SCVO suggests that adopting the McFadden approach may provide a resolution for the National Collection NDPBs. SCVO does not have access to all the detail of the relationship between the Scottish Executive and these NDPBs but based on what we do understand of their status we submit that:

- Both charitable status and a meaningful link to government could be maintained while ensuring the degree of independence of governance crucial to the integrity of charitable status and the ‘charity brand’.
- As charities the constitutions of these bodies could contain whatever relevant

¹⁵³ ‘A body… does not… meet the charity test if its constitution expressly permits a third party to direct or otherwise control its activities’ Charities and Trustee Investments (Scotland) Bill, Section 7 (3) (b)
¹⁵⁴ ‘The legislation (that founded NMS) also provides that NMS may be subject to Ministerial direction.’ Written Evidence to the Communities Committee of the Scottish Parliament from National Museums of Scotland 19 January 2005
¹⁵⁵ ‘…under the Bill as I read it, it could be stated that an organisation such as the National Galleries of Scotland, whose trustees are appointed by the First Minister, is under Government control.’ Oral evidence to the Communities Committee of the Scottish Parliament from Douglas Connell of Turcan Connell 15 December 2004
provisions were required to retain public and donor confidence such as restrictions on powers of acquisition and disposal.

- They would continue to be eligible for government indemnity insurance, as we understand this to rely on the existence of a substantial dependence on government funding rather than the proportion of government appointees on the board.
- Appropriate conditions of grant or contract funding arrangements would allow a high level of accountability to Ministers with respect to the expenditure of public funds.
- The Executive could commit under TUPE to transferring and protecting identical staff conditions and benefits (including pension schemes).

For example, the board of the National Library of Scotland currently has a minority of board members appointed by central or local government\(^{156}\) and this does not appear to compromise the ability of the body to enjoy the major advantages of NDPB status.

SCVO commends this approach to the Finance and the Communities Committees as a means of not only resolving these few cases but of doing so without excepting organisations from the sound principles of independence and public benefit contained in the ‘charity test.’

SUPPLEMENTARY SUBMISSION FROM OFFICE OF THE SCOTTISH CHARITY REGULATOR

1. The Committee requested clarification of the position regarding Acceptance in Lieu, and how a possible change to their status might impact on the National Institutions ability to receive gifts and loans.

2. The Acceptance in Lieu scheme applies to works of art, manuscripts, inherited objects and historic documents which are “pre eminent”. The objects must be of particular historical, artistic or local significance, either individually or collectively. This would include objects which are of interest to both the National Institutions and to local organisations.

3. Offers in lieu are made to the Inland Revenue. They must be approved by the Secretary of State for Culture Media & Sport, or the appropriate Minister in the devolved Government in Scotland. The Minister is advised by the Acceptance in Lieu panel, operated by MLA (Museums Libraries and Archives Council). The panel consists of independent experts, who seek specialist advice on the object offered. The panel recommends whether or not the object in question is pre eminent and advises on market value. The Minister decides whether or not the object should be accepted.

4. Objects accepted under the scheme can be allocated to any organisation, as defined in section 16 of the National Heritage Act 1980. This includes “any museum, art gallery, library, or other similar institution having as its purpose or one of its purposes the preservation for the public benefit of a collection of historic, artistic or

\(^{156}\)‘NLS is governed by a Board of up to 32 Trustees appointed as follows: 5 are appointed by the Scottish Executive… 2 by COSLA…’ Written Evidence to the Communities Committee of the Scottish Parliament from National Museums of Scotland 19 January 2005
scientific interest. Eligible organisations are therefore not restricted to the National Institutions, but can include any organisations with a relevant purpose. This would include local authority museums and galleries and independent museums and galleries.

5 Often items offered which have a strong link with a historic building of particular ownership, such as the National Trust or National Trust for Scotland property. AIL guidelines are that these items will be transferred to the owner of the building, so that they can remain in or return to their historic setting, provided there is sufficient public access.

6 In principle, therefore, the status of the current National Institutions such as the National Museums of Scotland and National Galleries of Scotland would not be affected by a loss of charitable status or alternatively loss of status as an NDPB. However, an offerer can make an offer conditional upon allocation to a specific institution and the AIL panel takes into account any wishes which have been expressed before offering advice to Ministers on appropriate locations. The status of the institution, as well as the importance of the recipient collection, might be a factor which potential donors would take into account. At this stage, this can only be a matter of speculation.

7 In terms of importance, the AIL report 2003-04 details the items offered in the year ending 31 March 2004. Twenty-four items, valued at £21.7m were accepted under the scheme and are available for public benefit. Of those, the allocation of 6 had yet to be decided. Of those listed as having been allocated, the single Scottish item was allocated jointly to the National Trust for Scotland and Paisley Art Museum and Galleries. Since the publication of the report, the Scottish Minister has agreed to one other item being allocated to a Scottish institution, although, for the moment, this remains confidential.

8 One area of the AIL Scheme where Scottish national institutions might be adversely affected if they were to lose charitable status is in the case where the item offered in lieu can settle a larger amount of tax than is actually payable by the offering estate. If a painting by Rubens can settle £5m of tax but the actual liability on the estate is only £2m, the Scottish gallery would have to raise the £3m to make good the difference to the offering estate. In attempting to find this funding, an organisation which did not have charitable status could not take advantage of the Gift Aid provisions to help raise the sum.

SUPPLEMENTARY CORRESPONDENCE FROM THE SCOTTISH EXECUTIVE ON THE FINANCIAL MEMORANDUM FOR THE CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL:

Development Department
Voluntary Issues Unit

Thank you for your e-mail of 19 January 2005 highlighting the information requested by the Committee. I have set out this information below using the report references as headings.
The charities that have ceased to be NDPBs are:

The Macaulay Land Use Research Institute
The Hannah Research Institute
The Rowett Research Institute
The Moredun Research Institute
The Scottish Crop Research Institute
The Scottish Hospital Endowments Research Trust.

A copy of the letter sent to the sponsor divisions of the NDPBs in August 2002 is attached as are the responses from the sponsor divisions. The figures deriving from this were included in the regulatory impact assessment and published for comment along with the draft Bill in June 2004.

Charities enjoy financial support from the public in three principal ways. In the time available we have been unable to obtain any comparative data other than that for England and Wales included below.

The first is in the form of donations and funding. It is estimated by SCVO that in Scotland this amounted to some £258m from the general public, £54m from the private sector and £62m from charitable trusts in 2001. NCVO estimate that for the UK this figure came to almost £10 billion.

Secondly charities, along with other voluntary sector bodies also receive grants from government. In 2003-04 the Executive provided, both directly and indirectly some £374m to the voluntary sector in Scotland.

Together the two sources above account for about half of the income of Scottish charities, most of the remainder being self generated by for example trading.

The third way in which charities are supported is through government – primarily using tax reliefs and non domestic rates relief. Provisional Inland Revenue figures for the cost of all reliefs to charities in the UK during 200304 totalled some £2,360m. Of this some £760m was through non domestic rates relief. Non domestic rates relief to charities in Scotland during the same year came to between £78m to £85m. While we do not have a separate figure for the other tax reliefs for Scotland, as there are about 7 times as many charities in England in Wales as there are in Scotland, a very rough estimate of about £200m may be derived by apportioning this cost. This means that an estimate of the total cost of tax and rates reliefs for charities in Scotland appears to be about £280m. The actual figure is likely to be less rather than more than this as the profile of the charity sector in England and Wales differs from that in Scotland in that there are a higher proportion of large charities.

The estimated annual cost to the public purse of the regulatory regime set out in the Charities and Trustee Investments (Scotland) Bill will be some £4m per annum. The budget of the Charity Commission for England and Wales for next year is some £30m. The figure above does not include the possible cost of charitable status being lost by NDPBs.
Subordinate Legislation Committee

Remit and membership

Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-

      (i) subordinate legislation laid before the Parliament;

      (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

   and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

   (b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

   (c) general questions relating to powers to make subordinate legislation; and

   (d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

   *(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Dr Sylvia Jackson (Convener)
Mr Adam Ingram
Gordon Jackson (Deputy Convener)
Mr Stewart Maxwell
Christine May
Mike Pringle
Murray Tosh
Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Assistant Clerk
Bruce Adamson

Support Manager
Catherine Fergusson
Introduction

280. At its meetings on 1 and 8 February 2005, the Subordinate Legislation Committee considered the delegated powers provisions in the Charities and Trustee Investment (Scotland) Bill at Stage 1. The Committee submits this report to the Communities Committee, as the lead committee for the Bill, under Rule 9.6.2 of Standing Orders.

281 The Executive provided the Committee with a memorandum on the delegated powers provisions in the Bill, which is reproduced at Annex 1.

282 The Executive’s response to points which the Committee raised during its consideration is reproduced at Annex 2.

Delegated powers provisions

283. The Committee considered each of the delegated powers provisions in the bill. Having considered the following delegated powers with the assistance of the Executive’s memorandum, the Committee approves them without further comment: sections 3(3)(f), 9, 15(1), 23(2), 25(3), 35(1), 40(2), 45(4), 48(1), 50(3), 52(1), 63(33), 89(1), 90(1), 94(1), 100, paragraph 1(3)(e) of schedule 1 and paragraphs 1(3)(d) and 4(1) of schedule 2.

Section 6(1) Applications: further procedure

284. Section 6(1) confers power on Scottish Ministers to make regulations in relation to the procedure for applying and determining applications for entry on the Scottish Charity Register. The Committee noted that 6(2)(a) provides that 6(1) may make provision in relation to information and documents which must be specified in or accompany an application. The Committee sought clarification on the drafting of 6(2)(a) as it inter-related to 4(d)(i) and 54(2)(d)(i), as the provisions appeared to overlap. The Executive in its response accepted that section 6(2)(a) may require
adjustment and undertook to bring forward an appropriate amendment at Stage 2.

285. The Committee accepted the Executive’s undertaking and draws it to the attention of the lead Committee.

Section 19(8) Removal from Register: protection of assets

286. This provision allows Scottish Ministers to disapply subsections (1) to (7) of section 19, including the Court of Session’s approval of transfer schemes. The Committee considered that this power could be seen to allow Ministers by order to oust the jurisdiction of the court and questioned the Executive on this point. The Executive in response explained that the powers at 19(4) and (5) were required for the court to approve a scheme for the transfer of the assets of a charity removed from the register, where it is necessary to protect property and income or where the charitable purposes would be better achieved by transferring the property and income to another charity. However, the Executive explained that this may not be appropriate in all cases, for example where a body holding property of national importance ceased to be a charity. The Executive also outlined difficulties in relation to certain cultural NDPBs with national collections which it hoped to address by amendment at Stage 2.

287. The Committee accepted the explanation of the Executive in relation to this provision and agreed to examine relevant amended provisions at stage 2.

Section 82(1) Regulations about fundraising

288. This subsection confers a power on the Scottish Ministers to make regulations about benevolent fundraising, including the solicitation of money and promises of money by professional fundraisers, representations made by commercial participators in relation to benevolent contributions and generally in connection with regulating benevolent fundraising.

289. The Committee noted that all of the provisions at subsection 2, which provide for the detail that may be included in any regulations, are subject to negative procedure. The Committee raised with the Executive whether the provisions at 82(2)(h) and (3) should in fact be subject to affirmative procedure.

290. In response to the Committee, the Executive indicated that it is considering whether sections 82(2)(h) and (3) should be separated out rather than being contained in one provision and accepted that they may be of sufficiently significant importance to be subject to affirmative procedure.

291. The Committee also raised concerns in relation to the power to create offences at subsection 5, as it questioned whether it was acceptable for sanctions for breaches of the regulations to be contained in regulations rather than on the face of the bill. The Executive’s suggestion, in its response, that this offence provision could be included on the face of the bill in the process of rewording to address the other matters raised was therefore encouraged by the Committee.

292. The Committee notes the Executive’s acceptance that the provisions at 82(2)(h) and 83(3) may be significant enough to be subject to affirmative procedure. The Committee draws this issue, together with the Executive’s
suggestion that the offence provision be reframed, to the attention of the lead Committee and recommends that the Executive should bring forward appropriate amendments at stage 2.

Section 85(5)(d) and 85(10) Local Authority consents

293. These powers make provision for the procedure and timings whereby applications are made to the Local Authority for authority to hold a collection. The Committee considered that the powers at 85(5)(d) and 85(10) could perhaps have been left to guidance rather than specified in subordinate legislation and raised this point with the Executive. The Committee accepted the points made by the Executive in its response and draws the matter to the attention of the lead Committee for information only.

Section 97(2) Transitional arrangements

294. This power is conferred on Scottish Ministers to make further transitional, transitory or savings provisions by order. The Committee noted that subsection (3) appeared to allow Ministers to disapply any provision of the Act to any body or charity without limit of time. The Committee was concerned that there was not a cut-off date for the use of this power but the Executive in its response considered it impractical to insert one at this stage.

295. The Committee highlights to the lead Committee its remaining concerns in relation to the open ended nature of this provision and the potential for it to become a long-standing power.

Section 104(2) Short title and commencement

296. The Committee suggested that if, as the bill provides, section 97 is to be commenced on Royal Assent, section 103 should also be commenced on that date, given that terms referred to in section 97 are defined in section 103. The Executive has responded by undertaking to remove the commencement on Royal Assent of section 97 via stage 2 amendment.

297. The Committee is content that this has addressed the inconsistency and draws the attention of the lead Committee to the Executive’s undertaking to amend the provision at stage 2.
ANNEX 1

Charities and Trustee Investment (Scotland) Bill
Memorandum to the Subordinate Legislation Committee

Purpose

This memorandum has been prepared by the Scottish Executive to assist consideration by the Subordinate Legislation Committee, in accordance with Rule 9.6.2 of the Parliament’s Standing Orders, of the Charities and Trustee Investment (Scotland) Bill (the Bill). It describes the purpose of each provision conferring power to make subordinate legislation and explains why the matter is to be left to subordinate legislation rather than being included in the Bill. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

Policy Context

The Charities and Trustee Investment (Scotland) Bill introduces a new regulatory regime for charities in Scotland. It sets up a new charity regulator and public register of charities. The overall objective of this Bill is to ensure there is a robust, proportionate and transparent regulatory framework that satisfies public interest in the effective regulation of charities in Scotland and meets the needs of the Scottish charity sector.

Parts of the Bill

The Bill is divided into 4 Parts which deal with proposed measures in the following categories:

- Part 1 Charities
- Part 2 Fundraising for benevolent bodies
- Part 3 Investment powers of Trustees
- Part 4 General and supplemental provisions

Direction Making Powers

In addition to the delegated powers set out below, the Bill confers direction and rule making powers on the Scottish Ministers and direction making powers on the Office of the Scottish Charity Regulator (OSCR) which are not subject to parliamentary procedure. The Executive considers that the conferral of such powers is essential to allow sufficient flexibility in the exercise of regulatory and supervisory functions. These powers are listed for information purposes in Annex A.

Delegated Powers

The Bill confers powers on the Scottish Ministers to make orders and regulations in relation to a range of matters dealt with in the Bill. Whilst a number of powers contained within the Bill are new, others emulate or update powers which already exist within the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and Civic Government (Scotland) Act 1982. The powers conferred in the Bill are for the most
part, either of a technical and procedural nature or because of their nature require a
flexible procedure and thus it is felt appropriate that they might be dealt with by
subordinate legislation.

Part 1 Charities

Section 3(3) (f) - Scottish Charity Register

Power conferred on: The Scottish Ministers Power exercisable by: Regulations
made by statutory instrument Parliamentary procedure: Negative resolution of
the Scottish Parliament

Section 3 provides for the maintenance of the Scottish Charity Register (the Register)
by OSCR. Subsections (3) (a) to (e) set out what each charity entry on the register
must contain. Subsection (3) (g) allows OSCR to set out additional information that it
considers appropriate. Subsection (3) (f) confers a power on the Scottish Ministers
to set out in Regulations additional information that they require to be included in the
Register.

Reason for taking power

It is expected that the information required by subsections (3) (a) to (e) will be
sufficient to provide the public with a complete picture of the charity. Paragraph (g)
will allow OSCR to add further detail that it considers relevant on either a general or
case by case basis. It is intended that the regulation-making power in paragraph (f)
will be exercised by the Scottish Ministers when it becomes apparent that certain
additional information is required for most or all charities. For example, it is currently
considered uneconomic to require OSCR to include copies of every charity’s
accounts on the Register. In time however it may be considered important to include
these. The regulation making power would provide the flexibility to make this change.

Section 6(1) - Applications: further procedure

Power conferred on: The Scottish Ministers Power exercisable by: Regulations
made by statutory instrument Parliamentary procedure: Negative resolution of
the Scottish Parliament

Section 6 (1) confers on the Scottish Ministers the power to make regulations in
relation to the procedure for applying and determining applications for entry on the
Register. Section 6 (2) provides that in particular, regulations may make provision for
information or documents that must accompany any application, the form and manner
of the application, the period within which OSCR must make a decision on the
application and further circumstances where OSCR must refuse to enter a body on
the Register.

Reason for taking power

Such detailed operational matters are more appropriately dealt with in regulations
rather than in primary legislation. A broad power is required as the Register of
charities is a new register. Processes may change over time and provisions may
need adjustment to deal with unpredictable eventualities.
Section 15(1) - References in documents

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 15(1)(a) confers a power on the Scottish Ministers to require a charity on the Register to state it is a charity on such documents as the Scottish Ministers may specify in regulations. Such regulations may also, by subsection (b), require a charity to state other information on such documents. The regulations may also provide that any statement required by regulations appears in a language other than English.

Reason for taking power

The power relates to a matter of detail most appropriately dealt with in secondary legislation. The regulations will specify documents such as letters, cheques, facsimiles, e-mails etc. Where such documents are normally in a language other than English, then the declaration of status can appear in that other language e.g. Gaelic. This type of detail may require frequent revision to take account of developments and changes in the forms of communication.

Section 19(4) and (8) – Removal from the Register: Protection of assets

Power conferred on: The Scottish Ministers
Power exercisable by: 19(4) Regulations and 19(8) Order made by statutory instrument
Parliamentary procedure: Negative resolution by Scottish Parliament

Section 19 (1) provides that where a body is removed from the Register, its property at the time of removal and income from such property must continue to be applied for the charitable purposes they were intended for. Subsections (2) and (3) provide for the continuation of OSCR’s supervisory power over such a body so far as it relates to this property and income. Section 19(4) allows the Court of Session to approve a scheme prepared by OSCR, in accordance with regulations made by the Scottish Ministers, for the transfer of such property or income to a charity but only where the court is satisfied in relation to the matters set out in section 19(5). Section 19(6) allows the court to approve a scheme subject to modifications and section 19 (7) provides that a charity receiving property or assets in pursuance of a scheme may apply that property as it sees fit. Section 19(8) confers a power on the Scottish Ministers to disapply subsections (1) to (7) by order in relation to property they consider to be of national importance. Subsection 19(9) provides that the order may make provision in relation to particular items, types of property or property owned by particular persons and subsection 19(10 ) provides that an order is only competent where the charity owns the property when the order takes effect.

Reason for taking power

The regulation making power under section 19(4) will allow Scottish Ministers to set out requirements for a transfer scheme proposed by OSCR under these provisions. This will consist of detailed matters appropriately covered in secondary legislation

The order making power in section 19(8) is necessary to enable Scottish Ministers to disapply the provisions. It will allow particular items or types of property that are of
sufficient national importance to be provided for to ensure that they continue to be subject to their existing protection and access arrangements. We consider the power to make future arrangements for particular items of property to be an appropriate use of secondary legislation.

Section 23(2) and (3) - Entitlement to information about charities

Power conferred on: The Scottish Ministers
Power exercisable by: Orders made by statutory instrument Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 23(1) obliges a charity to provide copies of its constitution and accounts when a member of the public makes a reasonable request for such. Section 23(2) allows the charity to charge a fee not exceeding the cost of complying with this request or, if less, any maximum fee that the Scottish Ministers may by order prescribe. Section 23(3) confers a power on the Scottish Ministers to exempt charities by order from the duty to provide copies of their constitution and accounts if certain criteria are met.

Reason for taking the power

The power in section 23(2) is required so that the maximum level of fee can be set and changed as required without recourse to primary legislation. The power to exempt charities by order in section 23(2) is required so that certain charities, particularly smaller charities, may be exempted should the administrative burden of providing accounts prove to be unduly onerous or inappropriate. It is likely that such an order will require to be amended from time to time.

Section 25(3) – removal of restrictions on disclosure of certain information

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 25 (3) confers a power on the Scottish Ministers to designate bodies to which OSCR may disclose information. The Scottish Ministers may by order designate any public body or officeholder to which OSCR may disclose information free from restrictions of secrecy. They may also designate a body where the purpose is for that body to disclose information to OSCR where that body is a Scottish public authority with no mixed functions or reserved functions.

Reason for taking power

Information will be available under the Freedom of Information (Scotland) 2002 Act on request to be disclosed voluntarily by OSCR and other public bodies. However, information that is subject to other restrictions such as confidentiality could not otherwise be shared. Section 25 lifts obligations of secrecy imposed under Scots law on bodies which are designated for that purpose. Until OSCR is fully operational, it is not possible to accurately determine which bodies should be designated and, even once bodies are designated, they may eventually have that designation removed if circumstances no longer require that information is shared with them. The list will also need to be updated as new public bodies are formed. Power to designate bodies in secondary legislation gives the necessary flexibility to allow information sharing
procedures with appropriate bodies to evolve without recourse to primary legislation.

Section 35(1) - Transfer schemes

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 35(1) provides that OSCR can prepare a transfer scheme for approval by the Court of Session for the transfer to a charity of any assets of another charity, body controlled by a charity or body representing itself as a charity where the Court is satisfied that there has been misconduct, it is necessary to protect the property of the charity or where the purposes of the charity would be better served. Section 35 (1) provides that such a scheme prepared by OSCR must be in accordance with regulations by Scottish Ministers.

Reason for taking power

As with the regulations applying to a transfer scheme for the transfer of assets where a body is removed from the Register in section 19(4), the subject matter of these regulations will cover detailed matters that we believe are most appropriately dealt with by secondary legislation.

Section 40(2) – Reorganisation of charities: applications by charity

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedures: Negative resolution of the Scottish Parliament

Section 40 allows OSCR on the application of the charity to approve a reorganisation scheme proposed by the charity. The Scottish Ministers are empowered by section 40(2) to make provision in regulations as they think fit in relation to the form and manner in which the applications are made, the period within which OSCR must make a decision, publication of the proposed scheme and may make different provision in relation to different types of charity.

Reason for taking power

Section 40 is broadly intended to replace provisions relating to the reorganisation of public trusts under section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (the 1990 Act). Under these provisions a public trust can only reorganise on application to the Court of Session. There is power under section 9(5) of that Act for Scottish Ministers to prescribe by order an annual income, below which a public trust must apply to the Sheriff Court but that power has not been exercised.

The policy behind this provision is to prevent burdening charities with the expense of applying to the courts for reorganisation. Without court procedures, detailed procedures are required to allow OSCR to consider reorganisations appropriately. The regulations will contain technical procedural detail which we consider to most appropriately set out in secondary legislation.

Section 45 (4) - Accounts
Section 45 imposes general obligations on all charities to keep proper accounting records, produce an annual statement of accounts that has been audited or examined independently and to forward that statement of account to OSCR. Section 45(4) confers power on the Scottish Ministers to make regulations to detail how those obligations are to be carried out. Further, subsection (5) allows the Scottish Ministers to have different requirements for different types of charities including the making of exemptions.

Reason for taking power

The 1990 Act also contained a power for the Scottish Ministers to make regulations in relation to accounts. However, the sections on accounts in that Act (sections 4 and 5) contained significantly more detail as to what the accounts must contain. As a consequence of this, it was found to be difficult to keep up with changes in accounting practices or changes in the size of charities.

The regulation-making power is broadly drawn to allow charity accounts to follow standard accounting practices as they change. If this level of detail were to appear on the face of the Bill, significant amendments to the Act might be required in due course. Small charities or designated religious charities may be given exemption from certain of the regulations.

Section 48(1) - Dormant accounts of charities: procedure and interpretation

This regulation-making power allows the Scottish Ministers to set down the procedure that OSCR must follow when dealing with an account that has been dormant for a period of 5 years or more in terms of section 47, where the account holder appears to have been a charity under the Bill or the 1990 Act. Further, the Scottish Ministers can regulate the expenses that OSCR may claim as a result of exercising its functions relating to dormant charity accounts. This partially restates the powers the Scottish Ministers currently have under section 12(10) of the 1990 Act.

Reason for taking power

This is a detailed procedural matter that we consider to be most appropriately covered in regulations rather than primary legislation.
Chapter 7 makes provision for a new incorporated form of body specifically for charities. Section 50 sets out general provisions regarding the constitution and powers of SCIOs. Section 50 (3) provides that a SCIO’s constitution must provide for such matters and comply with requirements as are specified in regulations made by Scottish Ministers.

**Reason for taking power**

The basic requirements for a constitution are set out in section 50. Because SCIOs are a new legal form, without the historical detail of trusts and companies, it is likely that experience will dictate the need to develop additional requirements. The regulation-making power will allow for this. Once again this will require detailed technical requirements to be specified and we consider regulations to be appropriate for this purpose.

**Section 52(1) – Name and status (SCIOs)**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament

This provision confers a power on the Scottish Ministers similar to that provided for under section 15(1). It allows Scottish Ministers to require a SCIO to state it is a SCIO on such documents as the Scottish Ministers may specify in regulations.

**Reason for taking power**

The regulations will contain details as to the type of documents that should declare the status of the SCIO. This may include letters, cheques, facsimiles, e-mails etc. We consider the type of detail required to be better placed in regulations rather than on the face of the Bill because it may require frequent revision to take account of developments and changes in forms of communication.

**Section 63 – Regulations relating to SCIOs**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument  
**Parliamentary procedure:** Negative resolution of the Scottish Parliament except 63(d) which is subject to affirmative resolution procedure

This section confers a general power on the Scottish Ministers to make further provision for SCIOs by regulations, particularly in relation to applications to become a SCIO, the administration of a SCIO, the amalgamation of SCIOs and the winding up and dissolution of SCIOs and such matters as they see fit.

**Reason for taking power**

Again because SCIOs are a new legal form, it is likely that experience will dictate the need to develop additional requirements and practices. Setting out administrative details in regulations will allow for greater flexibility for the development of the SCIO as a legal form for charities. Regulations in respect of winding up and dissolution may not be made unless a draft is laid before and approved by the Scottish Parliament.
Part 2 Fundraising for benevolent bodies

Section 82(1) – Regulations about fundraising

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

The regulation making power in section 82(1) confers a power on the Scottish Ministers to make regulations about benevolent fundraising including the solicitation of money and promises of money by professional fundraisers, representations made by commercial participators in relation to benevolent contributions and generally in connection with benevolent fundraising by benevolent fundraisers. Subsection (2) sets out a list of specific issues the regulations may make provision for. There is a requirement to consult such persons as the Scottish Ministers see fit prior to making regulations. Regulations under this section may also provide for a level 5 fine for breach of specified regulations.

Reason for taking power

The Scottish Ministers have agreed that plans for the self-regulation of fundraising should be given an opportunity to prove themselves. If this approach fails, the Scottish Ministers require to have the power to intervene and provide for the regulation of fundraisers and fundraising. Regulations will be required to cover some aspects of fundraising irrespective of the outcome of self-regulation but it is anticipated that specific regulations in relation to section 82(h) and section 82(3) will only be made if self-regulation failed. A power to regulate these activities using subordinate legislation would allow Ministers to act promptly without having to introduce primary legislation. Fundraising for charities and other benevolent purposes is an area that has been the focus of much concern and led to a decline in public confidence in this sector. An appropriate power to regulate a wide range of fundraising issues is therefore an important part of this Bill. The regulations will again have a largely administrative procedural content.

Sections 85(5)(d) and (10) – Local Authority Consents

Power conferred on: The Scottish Ministers
Power exercisable by: Regulation made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

Sections 83 to 91 make provision for public benevolent collections. They replace the provisions under section 119 of the Civic Government (Scotland) Act 1982. Section 85 makes provision for the procedure and timings whereby applications are made to the Local Authority for authority to hold a collection. Subsection (5) sets out the conditions, such as when and where the collection may take place and the form of collection boxes that may be used, which may be imposed by the local authority when giving consent to collect. The regulation-making power in subsection 5(d) enables the Scottish Ministers to specify the type of badges and certificates of authority that should be used by collectors. Subsection (10) confers a power on the Scottish Ministers to disapply, for certain types of applications, the subsection (2) duty on Local Authorities to consult the local chief constable before determining an application to collect. Applications by charities, for example, could be exempted as
charities are regulated by OSCR.

**Reason for taking power**

Giving the power in subsection (5) to the Scottish Ministers instead of Local Authorities will allow the development of a standard that cuts across all Local Authorities, making it easier for the public to develop an awareness of what identification and authority benevolent collectors should have. The power in subsection (10) will allow Ministers to disapply the duty to local authorities to consult with the local chief constable where the Scottish Ministers feel that it is not necessary, possibly because they are already regulated by a statutory regulator. Regulations under this subsection (5) deal primarily with administrative and technical detail and subsection (10) with operational matters which can be suitably provided for in regulations without recourse to primary legislation.

**Section 89(1) - Regulations relating to public benevolent collections**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulation made by statutory instrument Parliamentary procedure: Negative resolution of the Scottish Parliament

As noted above, the provisions relating to public benevolent collections in sections 83 to 91 are based on those concerning public charitable collections in the Civic Government (Scotland) Act 1982. Section 89(1) gives the Scottish Ministers the power to make further provision for the purpose of regulating public benevolent collections, and may make particular provision in relation to the keeping and publishing of accounts, preventing public inconvenience and specifying which provisions it is an offence to breach.

**Reason for taking power**

This regulation making power is similar to that in s119 (13) of the Civic Government (Scotland) Act 1982. It is necessary to allow the Scottish Ministers to respond to changes in collecting practice that gives rise to concern or abuse. We consider that the technical and procedural nature of these matters is appropriate for secondary legislation.

**Section 90(1) – Collection of goods**

**Power conferred on:** The Scottish Ministers  
**Power exercisable by:** Regulations made by statutory instrument Parliamentary procedure: Negative resolution of the Scottish Parliament

Section 90(1) allows the Scottish Ministers to make regulations about the collection of goods from the public for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes. In terms of Subsection (2) regulations may in particular make provision about certain matters. This includes a requirement to notify Local Authorities of the intention to collect. These regulations will also allow Ministers make it an offence to breach certain regulations.

**Reason for taking power**

The collection of goods is not currently included in the public charitable collection
legislation and is not be included as a public benevolent collection in this Bill. While there is currently no apparent difficulty in relation to this type of fundraising in Scotland, concern has been expressed by the sector that the lack of legislation dealing with it may lead to it being abused in the future. Were this to happen, this regulation-making power would allow the Scottish Ministers to introduce the necessary controls without recourse to primary legislation.

Part 3 Investment power of trustees

Section 94(1) – Power to amend enactments

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament (Affirmative if adds to or omits part of an Act)

Part 3 of this Bill amends the investment powers of trustees in line with the recommendations by the Scottish Law Commission. Schedule 3 to the Bill sets out consequential amendments in light of the changes made to the investment powers. Section 94(1) confers on the Scottish Ministers an order-making power to make amendments to any local, personal or private Act of Parliament and any other Act of Parliament of the Scottish Parliament as a consequence of sections 92 and 93. There is a duty to consult any person who may be affected by the proposed amendment.

Reason for taking power

As noted above, Schedule 3 of the Bill is intended to list any consequential amendments. The order-making power is a necessary precaution to cover any other amendments that may have been overlooked. There is a duty to consult to ensure that there is no unfairness as a result of the exercise of that power. An order under this section deals with a specific legislative amendment. Any order that adds to, replaces or omits any part of the text of an Act is subject to affirmative resolution procedure.

Part 4 General and supplementary

Section 97(2) – Transitional arrangements

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

There are already established bodies of law and regulation relating to charities in Scotland. It is in the interests of charities, the regulators concerned and the public that the transition from one legal regime to the next is a smooth one. To this end it is necessary to make transitional arrangements that will allow the move from one regulatory regime to that provided for in this Bill. A power is conferred on the Scottish Ministers to make further transitional, transitory or savings provisions by order. The order-making power will be used in particular to provide appropriate arrangements for English and Welsh charities who can currently operate as charities in Scotland by virtue of their being charities in England and Wales.
Reason for taking power

The nature of these provisions means that they are time-limited. We therefore consider it unnecessary to put them on the face of the Bill. It also allows a degree of flexibility in dealing with unforeseen practical difficulties.

Section 100 - Ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative and affirmative resolution of the Scottish Parliament

Section 100 confers a power on the Scottish Ministers to modify any enactment that prevents a body becoming an charity by virtue of the fact that it is controlled or directed by a third party in terms of section 7(3)(b). The Scottish Ministers may also make by order incidental, supplemental, consequential, transitional, transitory or saving provisions as they consider necessary or expedient for the purposes of or in consequence of the Bill when enacted. Where such an order adds to, replaces or omits any part of the text of an Act, that order will be subject to affirmative resolution procedure. In all other cases it is negative procedure.

Reason for taking power

The first part of the power confers a particular type of supplemental power which may be needed. It will, if required, principally enable bodies such as NDPBs set up under existing legislation to continue to have charitable status by permitting modification of the enactments establishing them. The second part of the power has been conferred on the Scottish Ministers to allow flexibility if further changes are found to be necessary as a result of the Bill establishing a new body of law on charities and repealing the existing law. This provision does not confer a carte blanche power to make further provision in relation to charities. Any provision made under this power must be considered to be a necessary or desirable consequence of the Bill's provisions. Its extent is therefore constrained by the scope of the Bill's provisions. Any changes to primary legislation will require to be approved by an affirmative resolution of the Scottish Parliament.

Section 104(2) - Short title and commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

Section 104(2) provides that the Bill with the exception of sections 97, 100 and 101 shall come into force on such day as the Scottish Ministers may by order appoint. Sections 97, 100 and 101 will come into force when the Bill receives Royal Assent.

Reason for taking the power

The order making power is required to ensure effective commencement of the Bill.

Schedule 1, paragraph 1(3)(e) – Membership of OSCR
Paragraph 1 of Schedule 1 makes provision for the membership of OSCR. Subparagraph (3) lists the individuals that are disqualified from membership. The order making power in (3) (e) will allow the Scottish Ministers to prescribe by order further persons who are disqualified from membership of OSCR.

Reason for taking power

It is possible that in time additional persons other than those set out in the Bill will need to be disqualified. To protect public confidence in the integrity of regulator, the Scottish Ministers require an order making power to deal with that eventuality.

Schedule 2, paragraph 1(3)(d) – Scottish Charity Appeals Panel

Paragraph 1 of Schedule 3 makes provision for the panel members of the Scottish Charity Appeals Panel (SCAP). Subparagraph (3) lists the individuals that are disqualified from membership. The order making power in subparagraph (3) (d) will allow the Scottish Ministers to prescribe further persons from membership of SCAP.

Reason for taking power

The reason is the same as that specified for the order-making power in Schedule 1.

Schedule 2, paragraph 4(1)

The Scottish Ministers may make rules as to the practice and procedure of the Scottish Charity Appeal Panel.

Reason for taking power

These are detailed administrative provisions and will need to be reviewed regularly to ensure they remain efficient and comply with developments in judicial standards.

The Scottish Executive
November 2004
Annex A

DIRECTION MAKING POWERS

The Scottish Ministers

Section 2(4) – Direction about form etc of Annual Reports (the Scottish Ministers to OSCR)

OSCR

Section 11(3) – Direction not to change name (OSCR to charity)
Section 12 (2) and (3) - Direction to require charity to change name (OSCR to charity)
Section 16(6) (b) – Direction not to take action for 6 months (OSCR to charity)
Section 28(2) – Direction not to undertake activities for 6 months (OSCR to charity) body or person
Section 30(1) - Direction to take steps to meet charity test (OSCR to charity)
Section 31(5) to (9) Direction to stop representation as a charity (OSCR to body)
Direction not to part with property (OSCR to financial institution or person)
Direction to cease acting for a charity or body in any activity.
Direction for payment to charity or body (OSCR to person)
Direction not to part with sums collected for charity or body (OSCR to financial institution or person).

Reason for conferral of Direction making powers not subject to parliamentary scrutiny

These direction making powers are to be used for individual cases in connection with registration and inquiries relating to particular charities and bodies

The Scottish Executive
November 2004
CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL AT STAGE 1

On the 1st February 2005 the Committee asked the Executive for an explanation of the following matters –

Section 6(1) Applications: further procedure

The Committee asks for clarification of the drafting of 6(2) (a) as it interrelates to 4(d) (i). Similarly the Committee would be grateful for clarification of 54(2) (d) (i).

The Scottish Executive responds as follows:

The Executive accepts that the words in brackets in section 6(2)(a) may require adjustment. The information and documents mentioned in section 4 and section 54(2) includes specific information and documentation for these two sections but also includes information and documents required in regulations under section 6 (1). We accept that there is circularity in the drafting of this section and will make an appropriate amendment at Stage 2.

Section 19(8) – Removal from the Register: Protection of Assets

The Committee was concerned that this power could be seen to allow Ministers by order to oust the jurisdiction of the court and that it would perhaps be better for this matter not to be left to subordinate legislation. The Committee therefore asks the Executive to comment as to whether it would be given consideration to drafting this section differently to address this concern.

The Scottish Executive responds as follows:

The general purpose of section 19 is to ensure that once a charity is removed from the register, its charitable assets will continue to be applied for charitable purposes. Subsections 4 and 5 allow application to the Court of Session by OSCR to approve a scheme for the transfer of the assets of a charity removed from the register where it is necessary to protect property and income or where the charitable purposes would be better achieved by transferring the property and income to another charity. It was considered on policy terms that this may not be appropriate in all cases. Certain circumstances could be envisaged where it would be inappropriate for OSCR to have such a power to apply to the court where a body holding property of national importance ceased to be a charity.

The effect of the Bill provisions as currently drafted prohibits a body subject to third party control from being a charity. This would have prevented all NDPBs from retaining their charitable status (including cultural NDPBs) unless Ministers’ powers of direction were removed. It has now been agreed, however, that certain cultural NDPBs which have national collections will retain their status as charities despite Ministers continuing to exercise powers of direction and amendments will be brought forward at Stage 2 of the Bill to that effect.
It is not yet known exactly what form the amendment will take. However, irrespective of the form of this amendment, there may be other cases where NDPBs or other bodies opt to have a non charitable status in future where some of their property, especially buildings, is of national importance. Ministers may regard the transfer of that property to another charity as inappropriate for a variety of practical reasons including the provision of adequate maintenance. In addition, any mainstream charity could have one piece of property which is considered to be of national importance. Maintenance arrangements for that property may be best served by remaining with the body even if it stops being a charity. For the reasons outlined, we wish to retain this power as currently drafted as a provision allowing Scottish Ministers to make an order disapplying this section in certain circumstances.

Section 82(1) – Regulations about fundraising

The Committee reached the view that, in the light of comments in the memorandum on the subordinate powers in the bill, regulations under section 82(2)(h) and 82(3) may be of sufficient importance that consideration should be given to them being subject to affirmative procedure rather than negative procedure and asks the Executive for comment.

With regard to the power to create criminal offences in subsection (5), the Committee considered that sanctions for breaches of the regulations should appear as a substantive provision on the fact of the bill, rather than provided for in the regulations. The Committee therefore asks for comment from the Executive on this matter.

The Scottish Executive responds as follows –

We are considering whether this provision needs further amendment at stage two. The Executive intends to put in place regulations in a relation to all matters covered under section 85(2) (a) to (g). However, the Executive has stated that regulations in relation to the matters covered in section 82(2) (h) and section 82(3) would only be introduced where proposed self regulation on the part of the fundraising industry failed. We are considering whether these provisions should be separated out rather than being contained in one provision. We would wish regulations concerning the first provisions in (a) to (g) to be subject to negative procedure and on that basis will reconsider whether the offence should be in the bill itself. If the provisions in 2(h) and (3) are to be in separate regulations, we accept that they may be of significant importance to be subject to affirmative procedure particularly if the offence is to be imposed in regulations. We disagree, however, that the power specifically creates a criminal offence. The regulations may provide for an offence but that can only be as set out in section 82(5) namely the sanction of a fine not exceeding level 5 on the standard scale.
Section 85(5) (d) and 85(10) – Local Authority consents

The Committee wished to highlight, purely for information purposes, the fact that these matters could perhaps have been left to guidance or a circular rather than requiring subordinate legislation.

The Scottish Executive responds as follows –

We agree that the first of these matters could be left to guidance or a circular but felt that there is merit in developing common standards for badges and certificates. These may be most appropriately specified in subordinate regulation rather than in terms of guidance. The duty to consult the Chief Constable before determining applications for consent in terms of section 85(2) is, as is currently the case in the relevant regulations under the Civic Government (Scotland) Act 1982, expressed as an absolute duty. We will probably wish, in the future, to disapply this requirement for certain specific types of application or for certain types of body. The current provision in section 85 (10) will require to be adjusted slightly at Stage two to achieve that. Given the terms of section 85(2) we consider that this can only be achieved in subordinate legislation.

Section 97(2) – Transitional arrangements

The Committee noted that subsection (3) appeared to allow Ministers to disapply any provision of the Act to any body or charity without limit of time and asks for the Executive’s view on a cut-off date governing the use of this power.

The Scottish Executive responds as follows –

We note the Committee’s comments in relation to this provision. The new Charity regulator, OSCR, has to set up the register from scratch. In terms of subsection (1) OSCR will be entering on the register all existing charities but all of these will require to provide information and documents. OSCR will require to determine in each case whether each charity remains on the register. Similarly, there may be transitional provisions required to deal with for example a foreign charity that will not have made an application and will only be able to refer to itself in specific terms when carrying out any activity in Scotland. Existing charities going on to the register will require to provide OSCR with new documentation so that OSCR may assess whether they should continue to be charities. Transitional arrangements will need to cover particular cases such as the transition from designated religious bodies under the 1990 Act to designated religious charities and exempt promoters to designated national collectors. We believe that it will be impractical to insert a cut off date at this stage.

Section 104(2) – Short title and commencement The Committee asks for the Executive’s view in relation to commencing section 103 on Royal Assent, given the reference in section 97 to terms defined in that section.

The Scottish Executive responds as follows –


Communities Committee, 1st Report, 2005 (Session 2) – ANNEX A

We note the Committee’s observations. The Executive have looked at this section again and have decided that there is no need for section 97 to be commenced on Royal Assent as section 101 allows commencement dates to contain transitional provisions. A Stage 2 amendment will be brought forward removing the reference to section 97 from section 104(2).

Date: 4th February 2005
Scottish Executive
Communities Committee

Draft Charities and Trustee Investments (Scotland) Bill

Report on the Pre-Legislative Meetings with the Charitable and Voluntary Sector held by the Communities Committee of the Scottish Parliament
Glasgow 26 October 2004

Committee Members Present:

Donald Gorrie MSP (Deputy Convener)
Linda Fabiani MSP
Patrick Harvie MSP
John Home Robertson MSP
Mary Scanlon MSP

Clerking Team:

Steve Farrell (Clerk)
Katy Orr (Senior Assistant Clerk)
Jenny Goldsmith (Assistant Clerk)

Gerry McInally (Senior Research Specialist, SPICe)

Scottish Council for Voluntary Organisations:

Russell Gunson
Andrew Jackson
Lucy McTernan

Voluntary Sector Representatives Present:

Iain Lowis
British Heart Foundation
Jim Clinton
Bute Advice Centre
Claire Brady
Co-operation and Mutuality Scotland
Jim Lee
Co-operation and Mutuality Scotland
Mr R Burton
Donaldson’s College
Jane Feeney
Enable – Glasgow Branch
Bobby Sturgeon
Fullarton Health House
R. Robertson
Glasgow Playschemes Association
Michael Bird
Guide Dogs for the Blind
Anna Hendrix
Helensburgh and Lomond Carers Project
Alan Rees
International Play Centre
Janette English
One Plus
Mairi Rosko
Scottish Environment Link
Vanessa Taylor
Scottish Interfaith Council
Sandra Martin
West of Scotland Seniors Group
Karin Douglas
Whitehill Action Group

Charitable Purposes and Public Benefit

The participants made the following comments on the ‘charity test’ included in the draft Bill:
• Recreation is not listed as a charitable purpose in the draft Bill. Although amateur sport is included as a charitable purpose it was emphasised that not all recreation is sport and vice versa. There is greater recognition of recreation in England and Wales through the 1958 Recreational Charities Act and it is explicitly contained with the UN Convention on the Rights of the Child, so further consideration should be given to including it as a charitable purpose in the Bill.

• Potential difficulties might be faced by housing cooperatives and other cooperatives such as credit unions in terms of their future capacity to either attain or retain charitable status. It would be difficult for mutuals and cooperatives to demonstrate public benefit when the benefits of such bodies are, in the main, restricted to members of the mutual or cooperative, even though they do benefit the wider community. The Bute Credit Union was given as an example. It is a small credit union, restricted by geography to the inhabitants of the Isle of Bute, and without charitable status the Credit Union would not be sustainable.

• Some of those present indicated that they did not believe that a definition of public benefit should be left to OSCR and that any definition on the face of the Bill should be flexible.

• Some independent schools might no longer be eligible for charitable status, which would effect their financial situation. Some independent schools provided special needs care which is unavailable in the public sector.

OSCR, Regulation and Compliance Costs

In relation to OSCR, regulation and compliance costs, the participants made the following comments on the draft Bill:

OSCR
• A view was expressed that the OSCR board should be non-political and although it should perhaps have some representatives from Government there should also be representatives from the charity sector. The question of whether OSCR would have the ‘teeth’ to enforce its framework was also raised.

• There were a number of comments indicating that OSCR should not only oversee where a charity’s money is going but also who benefits from it.

Regulation
• Concerns were raised over the extent of regulation imposed by the Bill, especially in terms of the administrative and financial impact in that this would have on smaller charities. Some also questioned the need for a threshold approach given that large charities already carry a heavier administrative burden than small ones. It was stressed that duplication of regulation should be avoided entirely.

• Concern was expressed over the level of funding for OSCR. It was felt that if
OSCR was adequately funded, less of the administrative burden would be transferred to individual charities. The participants were generally keen to avoid an onerous regulation regime.

- It was generally agreed that advice would be required for charities to navigate the new regulatory system. Concerns were expressed as to whether OSCR could carry out this role while at the same time being ombudsman.
- It was felt that the new regulatory framework should be more robust and transparent than the current one in order to restore trust in charities.

**Independence and Governance**

- The proposal in the draft Bill to use the term ‘charity steward’ was generally viewed as unnecessary and misleading, it was felt that ‘charity trustee’ would be preferable.
- Some participants believed that Non-Departmental Public Bodies (NDPBs) should not have charitable status as they were not perceived as being independent from Government. It was also stressed that Trustees should represent the interests of the charity and reflect the objectives of the charity rather than outside interests.
- It was pointed out that independence could be ensured by following the McFadden report recommendation of having no more than one third of Trustees appointed by public authorities.
- A concern was expressed with the way in which charities were sometimes obliged to adapt their priorities in order to meet funding criteria.

**Fundraising**

- Some participants thought that it would be too simplistic to set minimum percentages of funds to be spent on charity services and fundraising. It would be sufficient to track the proportion of funds raised going to services through OSCR’s annual review of a charity’s accounts.
- Some participants welcomed the power given to OSCR in the draft Bill to define the content of contracts between charities and professional fundraisers. Others thought that the application of a one size fits all approach to the details of a contract was inappropriate and that OSCR approval and review was sufficient to judge contracts appropriately.
- The problem of organisations fundraising in Scotland without undertaking activities in Scotland was raised. There was a general feeling that fundraisers should be transparent in all ways and in particular in this respect.
- It was suggested that permits for fundraising should not be required in privately owned areas such as shops or shopping centres. Rules should be relaxed to require charities to gain consent from the owner of the property/space to raise funds as long as that charity was registered with OSCR, rather than requiring additional permission from the local authority as is currently the case.
Other Issues

The participants also raised the following issues:

- The proposal for a Scottish Charitable Incorporated Organisation was broadly welcomed at this stage, although participants were reserving judgement until they saw details of the proposal.

- Participants indicated that a VAT reduction or rebate would be very welcome to charities. A view was also expressed about the financial difficulties that charities faced in meeting parental leave obligations and long-term sick pay and that support to charities would also be welcome in this respect.
Perth 2 November 2004

Committee Members Present:

Karen Whitefield MSP (Convener)
Donald Gorrie MSP (Deputy Convener)
Cathie Craigie MSP
John Home Robertson MSP
Mary Scanlon MSP

Clerking Team:

Katy Orr (Senior Assistant Clerk)
Sam Currie (Committee Assistant)
Gerry McInally (Senior Research Specialist, SPICe)

Scottish Council for Voluntary Organisations:

Russell Gunson
Andrew Jackson
Lucy McTernan

Voluntary Sector Representatives Present:

Ian McAlpine    Coal Industry Social Welfare Organisations
Penny Brodie    CVS Perth & Kinross
Marina McGuire  CVS Stirling
Alison Priestly Fife Shop Mobility Ltd.
Murdoch McKenzie Gannochy Trust
Julie Procter    Greenspace Scotland
Andrew Muirhead Lloyds TSB Foundation for Scotland
Richard Mazur   Perth and Kinross Society for the Blind
Patricia Aniello Scottish Association for Mental Health
Chris Robison   Scottish Sports Association
Alan Grosset    Scottish Sports Association
Colin Scott     The Scouts Association

Charitable Purposes and Public Benefit

The participants made the following comments on the ‘charity test’ included in the draft Bill:

Charitable Purpose

- The definition of amateur sport contained within the draft Bill was not perceived as being sufficiently robust or inclusive. It was pointed out that under the Inland Revenue’s rules for Community Amateur Sports Clubs, an organisation could still be amateur despite having a number of professional members (e.g. an amateur tennis club with a number of professional tennis players). This
situation should not prevent it from claiming charitable status through the amateur sport charitable purpose criteria as this would be more logical than other criteria such as health promotion. In order not to be too prescriptive perhaps it would be desirable for there to be an expert group to advise OSCR as to whether a particular sports club should be defined as a charity or not.

Public Benefit

- One participant expressed the view that public benefit had two elements. Firstly, a public benefit should be a benefit accessible to all who want to use the service. Secondly, activities undertaken by an exclusive or a membership group must benefit the wider community to qualify as public benefit.

- A concern was expressed that public benefit should not be defined as being open to all of the public as this is not possible because charities generally run in localised areas and do not have capacity to serve all.

- It was generally agreed that public benefit should be considered as including all activities that were not for private benefit.

- It was questioned whether membership organisations might still be deemed to provide public benefit as long as membership was not too restricted. A concern was expressed that some charities would lose charitable status under the terms of the draft Bill by failing to display public benefit.

- Some participants believed that the draft Bill should not be prescriptive in defining public benefit, although some delegates were in favour of OSCR being given full discretion in judging public benefit with no definition laid down in legislation. However, most delegates argued strongly that, at the very least, legislation should contain principles or criteria of public benefit which left sufficient flexibility for OSCR.

- One participant argued that there should be a common framework of charity regulation across the whole of the UK. It was suggested that it could be difficult for UK-wide grant makers to work across the border and consequently this could have an effect on funding in Scotland.

- It was pointed out that the framework in England and Wales surrounding the Charities Commission has many flaws that Scotland should not adopt. It was emphasised that the proposed Bill provided an opportunity for Scotland to use the good points from the system in England and Wales and build on them.

- It was vital that the Inland Revenue accepted the Scottish definition of a charity.
OSCR, Regulation and Compliance Costs

In relation to OSCR, regulation and compliance costs, the participants made the following comments on the draft Bill:

OSCR

- There was general consensus that OSCR should have some kind of advisory role around compliance with the law, although consideration should be given as to how this could be done in a way that reduced any conflict of interest.

- Some participants expressed the view that the OSCR board should contain a number of charity representatives as any potential conflicts of interest could be easily managed and it would be valuable to have representatives of the charitable and voluntary sector on the board.

Regulation

- One participant stated that the regulation regime needed to be proportional to the size of the organisation as it would be too burdensome to regulate small charities heavily. It was stated that many small charities would not have the resources to provide a high level of detailed information and a threshold approach might be more appropriate.

- It was expected that there would initially be an additional burden on umbrella bodies in the charitable and voluntary sector to provide support to charities in order to comply with the regulatory regime.

Compliance Costs

- Some participants raised concerns about how OSCR would be funded. They were of the view that the charity sector would not wish or be able to pay for regulation by OSCR or to in any way fund OSCR's work through a system of charges.

Independence and Governance

Independence

- One participant expressed the view that there was nothing in the Bill that would cause further erosion of the independence of charities. Charities might, on occasion, have to adapt their aims in order to secure funding, however, the Bill will not effect this situation.

- Some participants expressed agreement with the McFadden report recommendation that no more than one third of a charity’s trustees should be appointed by a public authority.

- There was some concern that the draft Bill allocates greater levels of
responsibility to trustees with special knowledge or expertise. It was thought that this was unfair and could lead to recruitment problems.

**Governance**

- There was general agreement that the term ‘charity trustee’ should be used as opposed to the term ‘charity steward’ proposed in the draft Bill. It was thought that the term ‘steward’ would create confusion.

- Some participants were of the view that charity trustees should be remunerated for expert services provided to the charity. In this respect, the provisions of the English and Welsh draft Bill were viewed as useful.

**Fundraising**

- One participant expressed a concern as to whether the Bill adequately defined a professional fundraiser.

- In a discussion on whether OSCR should determine a minimum proportion of funds raised that should go on service delivery, it was pointed out that the proportion of funds allocated to service delivery often depends on how easy it is to attract donation to the cause concerned. This would make a minimum difficult to impose. The spending of charities also varies according to the relative proportion of paid and voluntary staff.

- One participant stated the opinion that extensive regulation of fundraising was not required as the proposals in the draft, Bill together with ongoing review, would be sufficient to ensure a successful regulatory regime.

- There was a discussion on fundraising in Scotland and where the funds raised should be spent. There was general agreement that money raised in Scotland should be spent to benefit Scotland but that this did not necessarily mean spending the money in Scotland. An example was made in relation to Cancer Research, where money raised in Scotland might be spent on researchers based abroad, but that the research would still benefit cancer sufferers in Scotland.

- One participant expressed a concern about any need to register with both the Charities Commission in England & Wales and with OSCR as this could potentially dissuade UK-wide grant makers from giving funds to Scottish charities.

**Other Issues**

- A concern was expressed about OSCR not having the powers to investigate charities’ trading companies. To ensure full transparency the trading element of charity activities should be regulated too.
Aberdeen 16 November 2004

Committee Members Present:

Karen Whitefield MSP (Convener)
Donald Gorrie MSP (Deputy Convener)
Scott Barrie MSP
Mary Scanlon MSP

Clerking Team:

Katy Orr (Senior Assistant Clerk)
Gerry McInally (Senior Research Specialist, SPICe)

Scottish Council for Voluntary Organisations:

Russell Gunson
Andrew Jackson
Lucy McTernan

Voluntary Sector Representatives Present:

Rhonda Kelly  Aberdeen Council of Voluntary Organisations
Jim Duncan  Aberdeen Play Forum
Nigel Fairhead  Aberlour Child Care Trust
Peter Cattanch  Birchwood Highland
Alan Moat  Grampian Housing Association Ltd
Fabio Villiani  Highland Community Care Forum
Fran Shepherd  Institute of Fundraising
Andrew Watt  Institute of Fundraising
Sue Robinson  Lloyds TSB
Debra Ritchie  Parent to Parent Tayside
Agnes Stewart  Scottish Disability Equality Forum

Charitable Purposes and Public Benefit

The participants made the following comments on the ‘charity test’ included in the draft Bill:

Charitable Purposes

- One participant raised a concern that Housing Associations do not meet with any of the 13 charitable purpose criteria very well. Many Housing Associations across Scotland have diversified into a number of areas of work, some of which would and some of which would not meet the charity test in the draft Bill. As some forms of tax relief for Housing Associations have been withdrawn over the last few years, many had sought to register as a charity for financial reasons, although this might restrict the diversity of activities carried out by Housing Associations. It might be necessary for Housing Associations to split-
up their organisation in order that parts could apply for charitable status.

- It was stated that it would be more appropriate to refer to the ‘provision of support’ rather than the ‘provision of care’ in the list of charitable purposes as this was the generally accepted terminology and also the terms that organisations were encouraged to use by funding bodies.

- A concern was expressed over commonality between charity law in England and Wales. If there was significant divergence between Scotland and the rest of the UK it could prove unworkable for cross-border charities – including grant givers.

Public Benefit

- One participant stated that public benefit should be defined in the legislation. It would also be useful to ensure that mutuals could be eligible for charitable status.

- There could be a difficulty for Housing Associations in demonstrating public benefit.

OSCR, Regulation and Compliance Costs

In relation to OSCR, regulation and compliance costs, the participants made the following comments on the draft Bill:

OSCR and Regulation

- A concern was expressed about the potentially long delay built into the regulatory system that might result in malpractice being spotted some time after it had occurred. Part of the reason for this was that OSCR would only see accounts up to ten months after the end of the financial year.

- One participant expressed the view that the OSCR board should be independent and other participants commented that the OSCR board should include members with a good knowledge of the charity sector.

- Some of the participants thought that OSCR should only give advice on compliance with the law, leaving more general good practice advice to the sector itself. A concern was raised about the costs of regulation both in financial and human resource terms.

- Attention was drawn to the potential conflict between OSCR’s role as ombudsman and adviser to the charity sector.

- One participant believed that giving OSCR an advisory role might inspire confidence amongst the public and perhaps the voluntary sector if OSCR was seen to be an authoritative voice. OSCR could only fulfil such a role if it worked in partnership with the voluntary sector itself to deliver advice and support.

- The possibility for Housing Association’s that were registered as Charities to
be regulated by both OSCR and Communities Scotland was raised.

- Various views were expressed on the possibility of charities being asked to keep separate accounts for Scotland. One participant was of the opinion that this could be useful for grant makers working across the UK. Another participant felt that separate accounting would be burdensome and unworkable for most charities. A third participant suggested that knowing what is raised and spent in Scotland was not a matter for regulation but for best practice and cooperation between funders and charities. Although information of this kind could be useful at times it could also impose a heavy burden on charities.

- It was pointed out that information on fundraising and spending in different parts of the UK could prevent examples of bad practice such as charities that fundraise in geographical areas in which they do not actually do any charitable work. Previous examples of bad practice fundraising of this type have been resolved by the sector itself through negotiation. Regulation in this area might be too inflexible and onerous, but if the intention was to regulate in this area, further consultation would be required to ensure the best possible balance.

- One participant recommended that accounting practices should be determined for Scotland by OSCR, not by the Charity Commission through the Statement of Recommended Practice (SORP). This highlighted the need for a protocol between OSCR and the Charity Commission to clarify work in this area. It was seen as particularly important that the burden of regulation should not be placed upon charities. While there was an obligation on OSCR to cooperate with regulatory bodies elsewhere in the UK, a similar clause should also be contained in Westminster legislation in order to make the regulatory regime work.

**Compliance Costs**

- The accounting procedures required by the Bill could bring extra work for bodies like the CVS and SCVO to support smaller charities under the new regulatory framework. In general, the accounting procedures could lead to a greater strain on resources of all kinds. Regulation should therefore be proportional and light.

**Independence and Governance**

**Independence**

- It was stated that the independence of charities is often potentially at risk due to funders’ criteria, although the Bill does not specifically address this issue. Compromise is therefore often required between both funder and charity.
- In reference to the Bill (which had just been published) the fact that an organisation will not be a charity if its constitution expressly permits third parties to direct its activities was generally welcomed. However, some thought that this didn’t go far enough to ensure the independence of charities.

**Governance**

- One participant expressed an interest in seeing the guidance issued by OSCR
on the payment of charity trustees and on the terms of appointment of charity trustees.

- There was a need for a definition of a charity trustee.

- It was stated that it would be desirable to see all charity trustee positions publicly advertised. This should be best practice rather than something that should be statutory.

- A concern was expresses that many people might leave their role as trustees if they were forced to stand down after a certain number of years.

**Fundraising**

- The increased transparency in fundraising introduced by the Bill was welcomed, as was the facility to appeal to local authorities over rejected fundraising applications.

- Disappointment was expressed that there was no provision in the Bill for local authorities to obtain information easily from OSCR and Companies House. Although local authorities should keep track of fundraising activities taking place in their area, it does not necessarily follow that a licensing system is required. Self-regulation has worked and, within the proposed regulatory framework, would continue to work.

- A distinction was made between a volunteer, an employee fundraiser and a sub-contracted fundraiser. It was suggested that fundraisers should indicate into which category they fitted when collecting donations.
COMMUNITIES COMMITTEE

Report on the Meeting with Independent Schools on the Draft Charities and Trustee Investment (Scotland) Bill
Perth, 2 November 2004

In Attendance:
Karen Whitefield MSP (Convener), Donald Gorrie MSP, Cathie Craigie MSP, Mr John Home Robertson MSP, Mary Scanlon MSP.

Katy Orr and Sam Currie (Clerking Team), Gerry McInally (Research Specialist, SPICe)

Committee members met with the following representatives of independent schools:

Gareth Edwards, George Watson’s College
Shirley Noakes, Glasgow Steiner School
John Stoer, St. Aloysius College
David Gray, Erskine Stewart Melville College
Gordon Woods, Glenalmond College
Ivor Moore, Glenalmond College
Bill Colley, The New School at Butterstone
Judith Sischy, Scottish Council of Independent Schools (observer)

The Charity Test in the Draft Bill

The following comments were made by the representatives of independent schools in relation to the ‘charity test’ in the draft Bill:

- The high quality of the education provided by independent schools and the wide range of activities that they were involved with in the community, including their involvement in teacher training, their activities to raise money for charities, the provision of facilities on their premises for other purposes and organisations.

- Schools such as Montessori or Steiner-Waldorf education represented the only alternative to the state system in Scotland for children who do not flourish in a one-size-fits-all model.

- Independent schools do not exist in a vacuum. Why should it be necessary to question the public benefit of a school that happens to be private when this is not done for public schools?

- Independent schools would meet at least one of the charitable purposes outlined in the draft Bill.

- By satisfying the charity test, schools would receive a sign of approval.
• Independent schools educate a significant number of pupils at no cost to the state. For some of them it is part of the ethos of the school to promote wider access and have pupils from a variety of socio-economic backgrounds. Schools found a variety of ways of funding places completely or partially through parental contributions, fundraising and former pupils.

• Some special needs schools within the independent sector are niche service providers and provide an education that local authorities do not have the economies of scale to provide. The majority of the places in these schools are funded by local authorities.

• A definitive statement of public benefit might not be as effective as consideration on a case-by-case basis. A tight definition could not be matched by some independent schools due to the diversity of the sector. A concern was expressed about the platitudinous nature of public benefit and that it would not be a useful vehicle for the regulator.

The Benefits of Charitable Status

The independent schools made the following comments concerning the benefits of charitable status:

• The main financial benefit for independent schools of having charitable status was relief from paying non-domestic rates. This generally represented less than the amount given out by individual schools in bursaries. For smaller schools in particular, any change in charitable status which resulted in them losing their non-domestic rates rebate would be missed.

• If schools did not have charitable status they would be subject to capital gains tax and would have to pay corporation tax on profits. The result would be that the financial situation would become more difficult for the schools and they might have to reassess how many bursaries they were able to make.

• As schools had charitable status all the income generated by a school as a charity must be used for the purposes of the school. Thus all surpluses are currently reinvested into schools in the form of facilities and resources.

• Independent schools cannot recover VAT on purchases in the same way that state schools can. This can represent a significant expenditure annually.

• Many schools were more concerned about charitable status as a trademark of approval for their role in and contribution to society.

• Independent schools contributed to the local economy through employment. Boarding schools brought money into Scotland by educating pupils resident in other countries.

Other issues

• A concern was expressed by one of the independent schools about the
capacity of the OSCR to freeze bank accounts in the context of complaints. The schools would welcome a guarantee that OSCR would have to have substantiated evidence before taking such action as it was absolutely vital that schools would be able to continue operating as schools.

- The term 'charity steward' was recognised as not being the most appropriate. Independent schools infrequently had parents per se on their governing councils, but the possibility remained that parents might be on governing council in light of professional roles and he therefore would not like to exclude parents from being governors. It was also emphasised that schools generally encouraged parents to be active in the life of the school and participation in governing structures would be compatible with this.
ANNEX C

COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

24th Meeting, 2004 (Session 2)

Wednesday 15 September 2004

Present:

Scott Barrie
Donald Gorrie (Deputy Convener)
John Home Robertson
Mary Scanlon

Cathie Craigie
Patrick Harvie
Johann Lamont (Convener)
Sandra White

Apologies were received from Stewart Stevenson.

Declaration of interests: The new member of the Committee was invited to declare any relevant interests. John Home Robertson declared interests as a dormant partner in a family farming business, a trustee of the East Lothian Community Development Trust and a trustee of the Paxton Trust.

Item in private: The Committee agreed to take items 4 and 5 in private.

The draft Charities and Trustee Investment (Scotland) Bill (in private): The Committee considered its approach in relation to pre-legislative work on the draft Bill.
Present:

Scott Barrie          Cathie Craigie
Donald Gorrie (Deputy Convener)  Linda Fabiani
Christine Grahame    Patrick Harvie
John Home Robertson  Mary Scanlon
Karen Whitefield (Convener)

Also present: Maureen Macmillan.

**Item in private:** The Committee agreed to discuss item 3 in private.

**Charities and Trustee Investment (Scotland) Bill (in private):** The Committee considered its approach to the Bill at Stage 1, and agreed to take oral evidence from various organisations and to issue a call for written evidence.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

30th Meeting, 2004 (Session 2)

Wednesday 8 December 2004

Present:

Scott Barrie                  Cathie Craigie
Donald Gorrie (Deputy Convener) Linda Fabiani
Patrick Harvie                John Home Robertson
Mary Scanlon                  Karen Whitefield (Convener)

Apologies: Christine Grahame.

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

Richard Arnott, Quentin Fisher and Laura Bailie, Bill team, Scottish Executive; and

Catriona Hardman, Office of the Solicitor to the Scottish Executive (OSSE), Scottish Executive.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

31st Meeting, 2004 (Session 2)

Wednesday 15 December 2004

Present:
Scott Barrie      Cathie Craigie
Linda Fabiani     Donald Gorrie (Deputy Convener)
Christine Grahame.    Patrick Harvie
John Home Robertson    Mary Scanlon
Karen Whitefield (Convener)

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1
Simon Mackintosh, Charity Law Association;
Douglas Connell, Joint Senior Partner, Turcan Connell;
Anne Swarbrick, Anderson Strathern;
Stephen Phillips, Member of the Charity Law Sub-Committee, Law Society of Scotland;
Dr Patrick Ford, Lecturer in Law, Charity Law Research Unit, University of Dundee;

Panel 2
Maureen Harrison, Chair of the Public Affairs Committee and Vice Chair of the Institute, Institute of Fundraising Scotland;
Martin Sime, Chief Executive, Scottish Council of Voluntary Organisations (SCVO);
Margaret Wilson, Development Officer, Councils of Voluntary Services Scotland; and
Norrie Murray, Head of the Policy and Strategy Unit, Volunteer Development Scotland.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

1st Meeting, 2005 (Session 2)

Wednesday 12 January 2005

Present:
Scott Barrie      Cathie Craigie
Donald Gorrie (Deputy Convener)  Linda Fabiani
Christine Grahame.    Patrick Harvie
John Home Robertson    Mary Scanlon
Karen Whitefield (Convener)

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1
Judith Sischy, Director, Scottish Council of Independent Schools (SCIS);
Janet Allan, Principal, Donaldson’s College for the Deaf;
John Stoer, Headmaster, St Aloysius College;
Margaret Fowler, Bursar, Edinburgh Rudolf Steiner School;
David Mobbs, Chief Executive, Nuffield Hospitals;

Panel 2
Vanessa Taylor, Policy and Equalities Officer, Scottish Inter Faith Council;
Jeanette Wilson, Secretary, Scottish Churches Committee;
Ivan Middleton, Secretary, Humanist Society of Scotland.

The meeting was suspended from 11.43 to 11.52 am.
Present:
Scott Barrie  Cathie Craigie
Donald Gorrie (Deputy Convener)  Christine Grahame
Patrick Harvie  John Home Robertson
Mary Scanlon  Karen Whitefield (Convener)

Apologies: Linda Fabiani.

Charities and Trustee Investment (Scotland) Bill: The Committee considered a paper on witness expenses and agreed that the responsibility for deciding witness expenses should be delegated to the Committee Convener.

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1
Martin Meteyard, Chair, Co-operation and Mutuality Scotland;
Mark Ewing, Voluntary board member, Link Group Limited;

Panel 2 – National Collections Institutions
Dr Gordon Rintoul, Director, National Museums of Scotland;
Martyn Wade, National Librarian, National Library of Scotland;
Michael Clarke, Director of the National Gallery of Scotland, National Galleries of Scotland;

Panel 3
David Caldwell, Director, Universities Scotland;
Tom Kelly, Chief Executive, Association of Scottish Colleges;

Panel 4
Mike Gilbert, Chairman of Charities Working Party, Institute of Chartered Accountants of Scotland;
Fraser Falconer, Chair of Committee on Charity Law Reform, Scottish Grant Making Trust Group.
Donald Gorrie declared an interest as a trustee of the Nancy Ovens Trust and Christine Grahame declared an interest as a credit union member.

The meeting was suspended from 10.03 to 10.09 am, from 10.52 to 11.01 am and from 11.27 to 11.29 am.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

3rd Meeting, 2005 (Session 2)

Wednesday 26 January 2005

Present:
Scott Barrie  Cathie Craigie
Donald Gorrie (Deputy Convener)  Linda Fabiani
Patrick Harvie  John Home Robertson
Mary Scanlon  Karen Whitefield (Convener)

Apologies: Christine Grahame.

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

Panel 1
David Jack, Head of Strategic Support, the City of Edinburgh Council;
Keith Jackson, Chief Executive, Edinburgh Leisure;
Robert Livingston, Director, Highlands and Islands Arts Limited (Hi-Arts);

Panel 2
Eilidh Whiteford, Policy & Public Affairs Co-ordinator, Oxfam in Scotland;
Kate Higgins, Policy and Parliamentary Affairs Manager, Capability Scotland;
Colin Armstrong, Head of Regeneration Services, the Wise Group;

Panel 3
Jane Ryder, Chief Executive and Richard Hellewell, Head of Regulation and Compliance, Office of the Scottish Charity Regulator (OSCR).

Donald Gorrie declared an interest as being a councillor on the City of Edinburgh Council when Edinburgh Leisure was established and John Home Robertson declared an interest as a trustee of East Lothian Community Development Trust

Apologies: Donald Gorrie (Deputy Convener).
Present:

Scott Barrie Cathie Craigie
Linda Fabiani Christine Grahame.
Patrick Harvie John Home Robertson
Mary Scanlon Karen Whitefield (Convener)

Apologies: Donald Gorrie (Deputy Convener)

Item in private: The Committee agreed to take item 3 in private, and also agreed to take items at future meetings on its draft report on the Charities and Trustee Investment (Scotland) Bill at Stage 1 in private.

Charities and Trustee Investment (Scotland) Bill: The Committee took evidence at Stage 1 from—

   Johann Lamont MSP, Deputy Minister for Communities.

Charities and Trustee Investment (Scotland) Bill (in private): The Committee agreed its approach to its report on the Bill at Stage 1.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

5th Meeting, 2005 (Session 2)

Wednesday 9 February 2005

Present:

Scott Barrie
Donald Gorrie (Deputy Convener)
Patrick Harvie
Mary Scanlon

Cathie Craigie
Christine Grahame
John Home Robertson
Karen Whitefield (Convener)

Apologies: Linda Fabiani.

Charities and Trustee Investment (Scotland) Bill (in private): The Committee considered its draft report on the Bill at Stage 1.
COMMUNITIES COMMITTEE

EXTRACT FROM MINUTES

6th Meeting, 2005 (Session 2)

Wednesday 23 February 2005

Present:

Scott Barrie  Cathie Craigie
Donald Gorrie (Deputy Convener)  Linda Fabiani
Christine Grahame  Patrick Harvie
John Home Robertson  Mary Scanlon
Karen Whitefield (Convener)

Charities and Trustee Investment (Scotland) Bill (in private): The Committee considered its Stage 1 report and agreed to finalise its terms by correspondence.
Scottish Parliament
Communities Committee
Wednesday 8 December 2004

[The Convener opened the meeting at 09:32]

Charities and Trustee Investment (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning. I welcome committee members and visitors to the 30th meeting this year of the Communities Committee. We are joined this morning by a number of Scottish Executive representatives. I welcome Richard Arnott, Quentin Fisher and Laura Bailie, who are all members of the bill team, and Catriona Hardman, who is from the office of the solicitor to the Scottish Executive.

I ask the bill team to give a short introduction to the bill.

Richard Arnott (Scottish Executive Development Department): We thank the committee for inviting us to give evidence today. I am Richard Arnott, the head of the bill team, and I am joined by my deputy Quentin Fisher, Laura Bailie and our solicitor, Catriona Hardman.

This is not the first time that the bill team has appeared before the committee. In June, we had the opportunity to set out the background to the bill and our thinking about the provisions in the consultation paper and the draft bill. I do not intend to summarise again the background to the bill and the discussion in recent years of charity law reform in Scotland.

The consultation has ended and, furthering the Executive’s commitment to legislation on charity law reform, we introduced the bill on 15 November. Members will have recognised the bill because its purpose and provisions remain the same as those of the draft bill. The bill seeks to ensure that there is a robust, proportionate and transparent regulatory framework that protects the public interest and meets the needs of the Scottish charity sector. In particular, the bill sets out a Scottish definition of a charity that is based on the principle of public benefit and is compatible with the definition that the United Kingdom Government is proposing.

The bill will turn the Office of the Scottish Charity Regulator from an executive agency into an independent statutory organisation with an enhanced range of powers. The bill will empower OSCR to maintain a publicly accessible statutory register of all charities operating in Scotland and sets out improvements in the regulation of fundraising, including improved transparency. The bill also sets out a number of other measures that are designed to assist charities’ operations.

The bill has changed in a number of ways since the consultation. The Executive received more than 260 responses to the formal consultation, the vast majority of which strongly supported most of the draft bill’s proposals. However, several useful suggestions were made and many of those were incorporated into the bill as introduced. In accordance with the Executive’s normal consultation procedures, the responses to the consultation and a summary of them will be made available on our website and in the Executive’s library.

It might be helpful if I outline briefly some of the main changes to the bill, many of which are a response to points that were made during the consultation. A general equal opportunities duty for OSCR has been added. Those who control charities are to be termed charity trustees rather than stewards and are to be allowed to be appointed as members of OSCR. OSCR’s jurisdiction in relation to the registration and regulation of charities has been clarified: any organisation that wishes to call itself a charity in Scotland must register with OSCR, unless it is already registered elsewhere and does not occupy land or premises or carry out activities in an office or shop in Scotland. Hence, any charity with a significant presence in Scotland will have to register here.

The charitable purposes have been changed to bring them more into line with those proposed by the Home Office for the rest of the UK. Criteria have been added to guide the interpretation of “public benefit”. Powers have been added to ensure that property that is of national importance but is owned by charities that are removed from the register cannot be transferred to other charities. We have clarified that charity trustees should not normally be paid for trustee duties. The appeals system has been simplified, as have the provisions on charity reorganisations, and provisions on the reorganisation of public trusts have been removed from the bill.

Powers have been added to make regulations to ensure that all fundraisers, including volunteers, professionals and employees, make clear statements to the public when fundraising. Powers have also been added to require the public collection of goods, clothes and so on to be notified to local authorities. Mandatory rate relief for registered amateur sports clubs, which local authorities already give voluntarily, has been added to the bill.

That is not an exhaustive list of the changes, but it is worth noting that much of the structure and
many of the main principles of the bill remain similar to those in the draft bill.

We look forward to attempting to answer the committee’s detailed questions on the bill.

The Convener: I am sure that, like me, committee members found that useful, particularly the highlighting of the changes to the bill due to the consultation.

I will start by asking a few questions about OSCR. Will you explain the Executive’s reasoning for OSCR’s organisation, in particular the decision that OSCR should be a non-ministerial department, which will be regarded as independent although ministers will appoint its members?

Richard Arnott: Yes. It is probably best to summarise what happened. Before the consultation, the bill team formed the bill reference group, which involved representatives of the charity sector in helping us to come up with the bill’s format.

We consulted the bill reference group on the different options for forming an independent regulator and then set out in the consultation the different options, which came down to an agency as it is at the moment, a non-ministerial department or a parliamentary commission. The responses to the consultation confirmed our view that the most appropriate form would be a non-ministerial department, which is a tried and tested structure for this kind of regulator and is the form that the Charity Commission in England and Wales takes. It allows more independence from ministers in the operational aspects of the organisation than does a non-departmental public body, for example. In such a public body, it is normal practice for ministers to follow the Nolan public appointments procedures for appointing members, which we feel is the most appropriate and transparent way of choosing the members of OSCR.

The Convener: Some people have suggested that the remit and objectives of OSCR should be included in the bill, which is not the case at the moment. Will you explain why the Executive chose not to respond to those concerns and to include OSCR’s objectives in the bill?

Richard Arnott: The general functions and statutory duties of OSCR are set out in the bill. They are:

(a) to determine whether bodies are charities,
(b) to keep a public register of charities,
(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act, and
(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct.”

We thought that that set out the functions of the organisation, which should be in the bill.

The Convener: Although the functions of OSCR are outlined, the objectives are not, although that has been done in comparable legislation at Westminster. Some people have suggested that such an omission will weaken our legislation. How do you respond to that?

Richard Arnott: It is important to realise the different starting position of the legislation in England and Wales. There, the Charity Commission has existed for a number of years, whereas OSCR is only just starting and this bill sets it up in a new form. It seemed important to us to set out the statutory objectives; the other objectives are possibly more flexible. OSCR will need to set out in its annual reports how it carries out its investigations and its other operational work, and that will be reported to Parliament. We did not feel that it was necessary to include more in the bill.

Mary Scanlon (Highlands and Islands) (Con): I ask for clarification of a particular word that you used. You said that any charity with a “significant” presence in Scotland must register here. Throughout our pre-legislative consultation, we found that there is concern about UK and international charities and about where the money is raised and spent. How do you interpret “significant”?

Richard Arnott: You are right that there was a little confusion about what we are proposing in the responses to the consultation, and perhaps that was not made clear in the draft. We have attempted to address that by taking on board the views of a number of UK charities, many of which said that they had a minimal presence in Scotland. The examples given were of organisations that might have a few members in Scotland and merely send letters to them. Some of the grant-giving charities asked whether giving a grant to a Scottish body would mean that they operated as a charity in Scotland.

We considered the matter further and decided that the important issue is how much of a presence the charity has in Scotland. We thought that if a body is already registered in another territory—with the Charity Commission for England and Wales, for example—does not occupy any land or premises in Scotland and does not carry out activities in an office, shop or similar premises in Scotland, it does not have a significant presence here. Therefore, a charity that is registered in England and Wales and that does not have an office in Scotland would not have to register with OSCR.
Mary Scanlon: So the basis for determining whether the presence is “significant” is whether a body has office premises here. Are you saying that, in the age of the internet and so on, a body could raise significant amounts of money and carry out significant business in Scotland, but could be excluded from regulation because it does not have an office here?

Quentin Fisher (Scottish Executive Development Department): The organisation would not be required to register with OSCR, but the fundraising provisions later in the bill apply much more widely than just to charities that are registered with OSCR; they include any fundraising by benevolent bodies, and any body that is registered as a charity elsewhere would be considered to be a benevolent body, so the fundraising provisions would cover it.

Mary Scanlon: The issue is important. I wonder whether there is a potential loophole and whether charities could avoid being regulated and inspected by OSCR on the basis that they do not have premises. That was certainly a concern at the three consultation meetings. If an office is required, is there a worry that some bodies could fall through a loophole?

Quentin Fisher: It became clear to us that it was necessary to reach a compromise on the matter because of the examples that Richard Arnott mentioned. Let us consider the example of an existing grant-giving body that operates south of the border, has an office south of the border and sends a cheque once a year to another existing grant-giving body that operates south of the border, which is registered as a charity in Scotland. How can we ensure that that charity could be regulated or investigated by OSCR?

Mary Scanlon: With respect, the issue is about fundraising in Scotland. I agree that such a body would not need to register, but I am concerned about bodies fundraising in Scotland without being accountable to the Scottish public, albeit that they do not have offices here.

The Convener: I think that the committee is most concerned about the fact that, using your test, it would be quite reasonable and acceptable for charities that do not have office premises here to function in Scotland without needing either to register with or be regulated by OSCR. I think that most of us have initial concerns about that based on the evidence that we heard in our pre-legislative scrutiny.

Richard Arnott: Perhaps I can clarify matters. OSCR’s powers of investigation and powers to take action relate not only to charities. If OSCR considered that a body that was not registered with it was operating as a charity, it could still take investigative and other action against it.

Mary Scanlon: I am sorry, but the body would not be registered, so OSCR would not even know about it. If the body did not have a significant presence here, it would not be registered. Therefore, unless someone brought that body to OSCR’s attention, OSCR would not be involved. That is my understanding of the situation.

Richard Arnott: If somebody brought to OSCR’s attention any body that pretended to be a charity but was not registered with OSCR, OSCR could investigate it.

Mary Scanlon: So we would have to wait until there were problems before OSCR would get involved.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I will give an example and perhaps the witnesses can advise me whether or how the body in question would be covered by the legislation. A national children’s charity regularly advertises on television. Anybody who watches the advert will think that the charity operates in Scotland, as the advert appears on televisions in people’s homes in Scotland. A small note flashes across the screen to say that the charity operates for the benefit of children in England, Wales and Northern Ireland.

I imagine that when people in Scotland see adverts asking them to make a regular monthly donation to the charity, they assume that it operates for children in Scotland. How can we ensure that that charity could be regulated or investigated by OSCR?

Richard Arnott: The charity could certainly be investigated by OSCR. The important point to make is that we are trying to improve the transparency to the public, so it is important that a body explains to the public what it is doing. The fact that no children in Scotland are beneficiaries of the charity does not mean that it cannot raise money in Scotland, as long as it makes it clear to the public and to donors what the money is being used for.

The Convener: The point is that the matter would be brought to the attention of OSCR only if members of the public were concerned enough to bring the organisation to its attention. OSCR would not necessarily know about an organisation that is not registered, unless it had occasion to come across it.

We have no reason to think that the organisation to which Cathie Craige refers is behaving in an inappropriate fashion. The issue is that there would be a lack of transparency in Scotland because the organisation would be registered in England and Wales but there would be no need for it to register in Scotland. Any fundraising activity would be covered by the Charities and Trustee Investment (Scotland) Bill but, because the organisation has no shop premises or other
Richard Arnott: The short answer is yes. From the discussions that we have had, we are reasonably confident about that. However, we cannot predict the exact wording of the final legislation, which is in the hands of the two Parliaments.

Mary Scanlon: Under the bill, the advancement of education, the advancement of religion and the prevention and relief of poverty have been removed as criteria that in themselves are sufficient for a body to qualify as a charity. All organisations, regardless of whether they were previously registered as a charity, will be required to satisfy the new public benefit test. However, any appellant of a decision to refuse charitable status will, as a final step, be able to appeal to the Court of Session, which can refer to case law in making its decision on the appeal. Will that mean that an organisation or type of organisation that has previously received a positive decision from the courts will retain its charitable status? Therefore, will the removal of the presumption of public benefit have no practical impact in such cases?

Quentin Fisher: Any Scottish court that considered such a case would look first at the legislation, which will be the new legislation that we are putting in place under the bill. Where that legislation was in any way unclear, the court would consider the common law and precedent. By precedent, we mean decisions on the same point that have been made by courts higher up the hierarchy. Where no such precedent existed, the court would look to decisions by courts lower down the hierarchy, to general discussion in other cases, to obiter dicta and to decisions in courts other than Scottish courts, which is to say English courts. The Scottish courts may consider decisions in English courts, but they will not necessarily be bound by them. The starting point will be the new legislation that we are considering.

Mary Scanlon: I appreciate that. However, precedent could be used to strengthen an appellant’s case.

Quentin Fisher: Yes.

Mary Scanlon: I want to restrict my next question to the charity test, as my colleague will deal with the regulation of religious charities later. Having had discussions with religious communities and faith communities, I want to ask how a religious charity would prove that it provides a public benefit. Under chapter 8, a religious charity may be designated as such if it appears that it has “the regular holding of public worship as its principal activity” and has “been established in Scotland for at least 10 years”.

However, as it was put to me yesterday, how would a monastery in which the monks pray and

Scott Barrie: During pre-legislative scrutiny, a common theme was the fear that we would end up with two different systems. That was a particular concern of charities that operate on both sides of the border. From the discussions that you have had, are you reasonably confident that, as far as possible, that situation will be avoided?

Richard Arnott: Yes. That could be considered further with the minister.

Scott Barrie (Dunfermline West) (Lab): You indicated that there have been discussions with the Home Office. What discussions did you have with it prior to the inclusion of a set of public benefit criteria in the bill and the slightly different charitable purposes? What discussions do you expect might be on-going between the Scottish Executive and the Home Office, given that two roughly similar bills are going through the two Parliaments at the same time?

Richard Arnott: I will set out the discussions that we had when we were preparing the bill. As you point out, the two bills are being prepared in parallel. We have had regular meetings with Home Office officials and we discussed the policy proposals that we put to our draftsmen and the drafts of the bill that we received from them. We also discussed the impact of the different wordings and what the intentions of the two bills were. We discussed whether there would be differences in practice in what was produced. The Home Office bill has not been introduced to Parliament, so we are not yet in a position to see the final version. However, we are confident from the discussions that we have had with the Home Office that either any differences will be insignificant or we will be able to make progress on the final wording as the bill is developed and in further discussions with the Home Office. Nevertheless, we probably need to accept that a difference between the two definitions could arise because two different parliamentary processes will be involved.

The public benefit criteria that are set out in the bill were discussed with people from the Charity Commission for England and Wales and the Home Office. They were content that the criteria in the bill merely encapsulate existing charity case law in England and Wales and will not create a difference between Scottish charity law and what will be proposed for the rest of the United Kingdom.

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worship all day prove that it provides a public benefit to meet the charity test under section 8?

Quentin Fisher: This may not be a helpful answer, but in some ways we will need to wait for OSCR’s guidance. The bill sets out that the provision of a public benefit is a criterion that a charity must satisfy, but it does not provide a definition of “public benefit”, which has a common meaning. It will be for OSCR, based on its understanding of that common meaning and of the criteria that are laid out in the bill, to set out guidance on how that criterion should be applied. In the event of a disagreement, a decision will be able to be appealed first to the appeal panel and then to the courts, which will need to come to a decision on whether OSCR’s interpretation is correct. Frankly, I do not know enough about monasteries to say how they prove public benefit.

10:00

Mary Scanlon: I do not know much about them either. Can you say how public worship is a public benefit?

Richard Arnott: I think that you are referring to the section on designated religious charities.

Mary Scanlon: Yes—I am talking about section 64, which is in chapter 8.

Richard Arnott: That section does not say that they must have public benefit; it lays out criteria that groups must meet to be designated as a religious charity.

Mary Scanlon: The charity test is not clear as to how religious bodies will prove public benefit.

Richard Arnott: I can only reiterate what Quentin Fisher said: it is for the regulator and the courts to interpret that.

Mary Scanlon: The Westminster Joint Committee on the Draft Charities Bill recommended that the draft Charities Bill should include

“a definition of religion … making it clear that non-deity and multi-deity groups can satisfy the definition of ‘religion’”.

The committee continued:

“Any organisation would still be subject to the requirement of showing public benefit before it could attain charitable status.”

I am not clear how deity or non-deity groups will prove public benefit. I seek the witnesses’ guidance on the issue, because I truly do not know the answer. I have been asked that question as I go round the country and I seek a clear steer from you on the issue.

Quentin Fisher: Such groups will have to demonstrate public benefit in the same way that other charities will have to.

Richard Arnott: The benefit will obviously take different forms.

Mary Scanlon: What sort of forms?

Richard Arnott: That is for the charity to demonstrate.

The Convener: You have made your point, Mary, and the Executive officials have made theirs. It is not their job to justify individual charities; their job is to ensure that the charity test in the bill is transparent and can be operated.

Cathie Craigie: To reduce the burden of regulation on charities, section 20 will require OSCR to seek to co-operate with “other relevant regulators” on, among other issues, the sharing of information. Which regulators does that phrase refer to? Will there be a reciprocal arrangement under which regulators will have to share information with OSCR? Will the measures cover UK-wide regulators?

Richard Arnott: It is worth emphasising that OSCR already works closely with other regulators. We aim to ensure that that system continues in order to improve effectiveness and reduce the burden on charities. The Scottish bill will not place duties on UK regulators to co-operate because that would be outside the competence of a Scottish bill. We have had discussions with colleagues in Westminster and with regulators, particularly the Charity Commission—which is an important body from OSCR’s point of view—about how to ensure co-operation. We are reassured that the commission is keen to continue the co-operation and that it acknowledges its importance. We are discussing how that system can be ensured.

Cathie Craigie: Will you give some examples of the regulators?

Richard Arnott: The Charity Commission is one obvious UK regulator. Other bodies might be the Inland Revenue, Companies House, the Financial Services Authority, Communities Scotland and the Scottish Commission for the Regulation of Care.

Cathie Craigie: If a reciprocal duty is not placed on UK regulators to co-operate and share information, will that not leave OSCR at a disadvantage?

Richard Arnott: I did not say that a duty would not be placed on the other regulators, but it will not be placed on them by the Scottish bill.

Cathie Craigie: Could you repeat that?

Richard Arnott: No obligation will be placed on UK regulators by the Scottish bill. We are in discussions with Home Office colleagues as to how that can be achieved by other means.
The Convener: On those who are exempted because they are regulated by other bodies, I can understand why somebody might qualify for an exemption because the Charity Commission regulates them, but I am not sure that Communities Scotland is in the same position to be able to regulate with regard to charitable status, because that is not its job. Communities Scotland’s job is to inspect and register registered social landlords. Exemptions have been made where they are not necessarily appropriate. I understand the desire not to duplicate but, in our haste to ensure that there is no duplication, I am not sure that some charitable organisations will not fall through the net.

Richard Arnott: The only bodies that are exempt from OSCR’s regulation are the RSLs that you talked about. The regulatory powers will be held by Scottish ministers or Communities Scotland. The RSLs will not be exempt from charity regulation. That will be carried out by a different body.

Quentin Fisher: OSCR retains its ability to determine a body’s charitableity, and charitable status remains with OSCR. That is not being delegated. It is governance and annual monitoring that are being delegated.

Linda Fabiani (Central Scotland) (SNP): I understand the convener’s point, because more and more RSLs are registering as charities, and it would be sensible not to have duplication.

I would appreciate your comments on section 38, which refers not only to RSLs but to bodies controlled by them, either singly or jointly, in cooperation with other RSLs. That might be a more difficult situation for Communities Scotland to properly assess.

Richard Arnott: Bodies connected to RSLs are covered for the same reason that OSCR has powers to investigate bodies that are connected to charities. Charities often set up arm’s-length bodies with various relationships. We felt that if those bodies are connected to and controlled by a charity, they should be covered by the same regulatory regime. Hence, if an RSL has similarly related connected bodies, they should be investigated in the same way.

Linda Fabiani: I can see that argument, but sometimes—as has happened in the past in particular communities—a housing association or a co-op sets up another body, such as a charity, for something very different from its primary function, for example for youth work or community development. I am willing to be persuaded, but I am not convinced that Communities Scotland or the regulator for RSLs—whoever it may be—should be the same people who monitor, take note of and inspect everything that RSLs set up.

Richard Arnott: We hope that the duty on Communities Scotland and OSCR to co-operate on the regulations covers the point that you raise, but perhaps we could look again at the issue.

Linda Fabiani: Section 38 also applies to “persons acting for or on behalf of any such charity or body.”

That takes things a step further—it almost appears to be arm’s length from arm’s length.

Richard Arnott: As I said, the intention is to ensure that anyone who is connected with a charity is covered by charity regulation.

Linda Fabiani: Okay. Perhaps I came at the question from the wrong angle.

Donald Gorrie (Central Scotland) (LD): I apologise for being late. I do not have a very charitable excuse—I was at my dentist. Some organisations have expressed concern that the bill might lead to the duplication of audit. I will take the example of universities and colleges, all of which are properly audited by their own umbrella organisations and systems. Under the bill, can OSCR accept the audit that has taken place, while still running a check on whether the university or college is providing the charitable function that it says that it is providing? Can OSCR found its work on the work that is done under the university or college’s existing audit obligations?

Laura Bailie (Scottish Executive Development Department): The intention is for the accounts procedures to be based on the statement of recommended practice—the SORP—that is used by accountants. Therefore, other audited accounts will meet the requirements of the bill.

Donald Gorrie: So, we can write to the organisations that have expressed their concerns to us to say that they will not have double auditing.

Laura Bailie: Yes. That is the intention.

Donald Gorrie: I will move to a question on another area of the bill, in which, if I understand the matter correctly—which is a big if—the wording of the bill differs from current practice. Previously, a court that heard a case involving a charity used the test of whether it “appeared” that something was wrong whereas the bill refers to cases where the court “is satisfied” that there has been misconduct. The point has been made to us that that will make it harder for OSCR to take on charities whose conduct is causing concern.

Quentin Fisher: The point is one that has been raised with us before. We have taken advice on it and we are not convinced that that is the case. The “Oxford English Dictionary” was quoted to us to argue that because “appearing” means “clear” or “evident” and “satisfied” means “furnished with
sufficient proof or information” or “convinced”, the use of the word “satisfied” implies some sort of deduction from evidence. It is hard to imagine a court—or, indeed, OSCR, as the same standards apply to any supervisory action that it takes—taking action without first considering the evidence before it.

Donald Gorrie: Right. You have introduced me to a new concept, which is that the law can have anything to do with the “Oxford English Dictionary”; I thought that the law had its own language, which nobody else could understand. This has been a very informative morning. Thank you.

The Convener: I call Linda Fabiani.

Linda Fabiani: Convener, you have covered the issue that I was going to raise—if I do that, you give me a row.

The Convener: Sorry. I call Patrick Harvie.

Patrick Harvie (Glasgow) (Green): I have a question on chapter 6 about the power that ministers are given to establish separate regimes for different types of charities. It has been said that that could be useful for the smaller charities that may have difficulty in complying with some of the provisions. Is any other type of charity being considered for those separate arrangements?

Richard Arnott: Are you talking about section 45, on accounts?

Patrick Harvie: That is right.

Richard Arnott: As Laura Bailie said, it is intended that the detail of our provisions on accounts will be set out in secondary legislation, because experience tells us that it is not always appropriate to set out such detail in a bill. If we included the detail on accounts in the bill, that would make it difficult to move with the times. It is intended that we will consider different thresholds for the different types of accounts that charities might have to produce or for the level of auditing that might be needed. That would be similar to the present arrangements.

10:15

Patrick Harvie: Would the thresholds be based purely on the size of the charity or would certain types of charity be considered for different arrangements?

Richard Arnott: One of our considerations was that we might wish to duplicate the arrangement whereby designated religious bodies are exempt from some of the accounting provisions; they have to provide a different form of accounts. We might well want that to continue. There might be other small differences in the way in which that would be established—for example, the universities would be covered by a university SORP rather than by a charity SORP.

Patrick Harvie: It has been suggested that the size threshold in Scotland might be different from that in the UK. Will you comment on that?

Richard Arnott: It is possible that the thresholds could be different in Scotland. Some people have argued that the make-up of the sector is very different in Scotland. We would need to consider that and the risk that would be attached to different auditing, for example. We are preparing a consultation paper on the proposals for thresholds and accounting, so we will consult on them.

Patrick Harvie: Do you know what the timescale for the consultation will be?

Richard Arnott: I guess that we would be aiming for spring.

Patrick Harvie: Thank you.
prompt them to establish a scheme. If they fail to do that, OSCR could initiate a scheme of its own accord.

We are told—and we believe—that the reorganisation provisions in the bill are a vast improvement on the existing provisions. We expect that there will be a lot of reorganisation in the wake of the bill, especially with regard to smaller charities such as the one you mentioned that effectively have defunct purposes.

Donald Gorrie: So you think that the new system is simple enough to induce lawyers to bring forward schemes.

Quentin Fisher: Yes.

Linda Fabiani: If a charity that has already registered as a limited company were to convert to an SCIO, would the form of accounts—for example, the method of filing annual returns—remain the same?

Laura Bailie: Such a charity would file its accounts with OSCR instead of with Companies House.

Linda Fabiani: Yes, but would it be the same form of accounts? After all, the form of accounts for a limited company can differ from that for a charity. Under these new arrangements, would the form of accounts remain the same?

Laura Bailie: The accounting provision will depend on the consultation but, if it follows the SORP, it should be broadly similar.

Linda Fabiani: So there will be no big changeover.

Laura Bailie: I would not have thought so.

Linda Fabiani: Good.

Patrick Harvie: I have some more questions about religious charities. As far as public benefit is concerned, I accept your point that a religious charity with upwards of zero deities could demonstrate public benefit, depending on its work in a community. However, from my reading of the bill, designating religious organisations removes OSCR’s powers to conduct inquiries or to intervene in cases of apparent misconduct and removes some of the Court of Session’s powers. If those organisations are receiving the same benefits as other charities, why are they not expected to be regulated on the same footing?

Richard Arnott: The simple answer is that that is the current system and it has not caused any problems. Ministers were persuaded that it was worth continuing with a very similar system.

Patrick Harvie: Saying that it should be done this way because it was done that way before does not really address the question why there should be a different regulatory framework or situation for one particular set of organisations. Other large charities could argue that they have sufficient internal scrutiny to ensure that problems do not arise. Why has this distinction been made in the first place?

Richard Arnott: It was made mainly because religious bodies have a long-established system of internal controls and a special legal status. However, OSCR can still investigate them and, if it suspects misconduct, could ultimately remove them from the register and take away their special status.

Patrick Harvie: OSCR could indeed do that, but it would be less able to take intermediate steps such as removing an individual from a management position or conducting inquiries.

Richard Arnott: It could conduct an inquiry, but you are correct to say that it could not remove an individual.

Patrick Harvie: It could not remove an individual.

Richard Arnott: No.

Quentin Fisher: OSCR could not remove an individual without first removing the body’s designated religious charity status.

Patrick Harvie: You said that OSCR could suspend a body’s designated religious organisation status. However, I understand that that status is based on the number of people that the organisation claims to represent and whether it has existed for more than 10 years.

Richard Arnott: An organisation could be removed if it failed to meet the criteria.

Patrick Harvie: Are you saying that that status could be removed because of misconduct or impropriety?

Quentin Fisher: Section 64(5) says:

“OSCR may, by notice … withdraw the designation of the charity … where … in consequence of an investigation … it is no longer appropriate for the charity to be a designated religious charity.”

Mary Scanlon: I have a supplementary question on subsection (5). You say that if misconduct is suspected, the designation of charitable status may be withdrawn. However, if—because of exemptions—less information about accounts and other matters is given than other charities give, how can misconduct be examined, accounted for or proved?

Quentin Fisher: It may help to differentiate information that is supplied regularly—information for monitoring—from information that OSCR seeks in the course of an investigation. The latter is less limited.
Mary Scanlon: Did that cause you concern? Is it not out of kilter with the bill’s basic principles of transparency and accountability to have exemptions because it has aye been like that and we must carry on in the same way? The exemptions do not appear to be in line with the basic principles of transparency, accessibility and accountability. Will the public be concerned that some charities provide less information than others do?

Richard Arnott: We proposed the measure in the consultation. Responses in general supported the proposals and said that they were appropriate.

Donald Gorrie: I understand that the Church of Scotland and other churches may be concerned that the bill breaches the settlement in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which described the churches’ independent position on internal management. The bill would allow OSCR to interfere if two congregations were being merged, for example, because each would be a separate charity under the law. Will you reassure churches that the independence of the church from the state will be maintained?

Mary Scanlon: That is a challenge.

Richard Arnott: The basic answer is that the proposals set out some controls for OSCR over religious bodies, but those are more limited. OSCR must be convinced that religious charities have internal control systems.

OSCR should not interfere in a church’s governance. Churches have independence on that. If OSCR were convinced that public benefit would still be provided after the merger of two churches and that that was the most efficient way to proceed, that would not be a problem.

Donald Gorrie: Our predecessors fought bloodily in the 17th century and have fought since about such matters. The idea that churches must put their internal affairs past a regulator—however worthy—who is external to the church would cause great concern.

Quentin Fisher: An important principle for many years has been that charitable status is voluntary and that the benefits that one enjoys from having such status attract duties and regulation.

Donald Gorrie: Is it possible to distinguish between OSCR’s legitimately ensuring that all charities—religious or otherwise—are delivering the benefits that they say they are delivering, and churches conducting their own internal affairs and maintaining their independence? There is obviously considerable concern, judging by some of the information that is being circulated by the church.

Richard Arnott: I refer to the example that you gave of two congregations merging. For normal charities, such action would constitute a reorganisation, so they would have to seek OSCR’s approval before carrying out that reorganisation. However, that is one of the items from which religious bodies would be exempt. They would have to notify OSCR of a merger because OSCR has to keep the register up to date, but they would not have to seek OSCR’s approval.

Donald Gorrie: That is helpful. It is an area that we will have to explore further.

Quentin Fisher: If there is any reassurance to be given, especially in respect of the Church of Scotland, to which you refer, it is that it is already subject to regulation. The 1990 act introduced regulation and made churches subject to regulations because they are charities. The bill continues along the same path.

Scott Barrie: Let us turn to disqualification of charity trustees. The whole committee welcomes the fact that the bill uses the term “trustee” rather than “steward”, which caused a fair degree of difficulty for us in considering the draft bill.

Section 68 details the circumstances in which a person will be barred from being a charity trustee. However, “mismanagement” is now subsumed under the definition of “misconduct” in section 103. Several organisations have commented that it seems to be particularly harsh for a person to be disqualified for being found guilty of simple mismanagement, which will be interpreted as misconduct under the provisions of the bill. Can you clarify the reasons behind those proposals? Do you think that there is any merit in what has been said to us by some consultees?

Quentin Fisher: The 1990 act uses the phrase “misconduct or mismanagement”; therefore, under the existing charity regulations, mismanagement and misconduct have been sufficient grounds for action to be taken by OSCR and OSCR’s predecessor. All that we are doing is seeking not to lose something of what has gone before in that regard, which is the inclusion of mismanagement in the definition of misconduct.

Scott Barrie: So, existing law encompasses that.

Quentin Fisher: Indeed, yes.

Linda Fabiani: Does existing law include both terms—misconduct and mismanagement—and is it proposed to do away with the term mismanagement and just call it misconduct? To me, there is a difference between the meanings of those two terms.
Richard Arnott: We are not doing away with the term mismanagement; we have merely clarified the fact that the concept of mismanagement is included in the term misconduct.

Linda Fabiani: To tell someone that they are guilty of misconduct is different from telling them that they are guilty of mismanagement: there is a different perception of those two terms. To me—and, I suspect, to many people—a finding of misconduct would make it look as though somebody was doing something that was not quite above board, rather than just getting themselves in a total mess and not submitting their annual accounts on time.

Quentin Fisher: Is there not—I am sorry: I should not be asking the question. To my mind, mismanagement and bad management are also two different things.

Linda Fabiani: Yes, but “misconduct” sounds dodgy.

Scott Barrie: I have to agree with Linda Fabiani on that. “Misconduct” sounds like somebody is at it—

Linda Fabiani: Yes.

Scott Barrie:—and that they are doing something that is possibly illegal.

Cathie Craigie: And which—

The Convener: I ask that one member speak at a time, rather than the entire committee.

Linda Fabiani: It is so nice to have this degree of unanimity. Cannot we all speak?

Scott Barrie: The word “mismanagement” sounds like minor incompetence. Whether or not the two are one and the same thing, there is a difference in perception of the two in the public eye. It might be a semantic point rather than a legal point, but semantics are important, sometimes.

The Convener: Have you finished your line of questioning?

Scott Barrie: I have.

Mary Scanlon: The UK Government has recommended the establishment of a self-regulation scheme for fundraising, with powers to introduce statutory regulation if necessary. Under what circumstances would a statutory regime be brought in to govern the sector?

Richard Arnott: It is important to understand that there are the beginnings of a self-regulatory scheme at the moment. The Institute of Fundraising already has codes of conduct that members must follow. We aim to improve the system, and the industry itself aims to improve its self-regulation in order to improve public confidence, which will be in the industry’s interests. It is likely that a statutory regime would consist of something similar to what the industry proposes. However, it would be mandatory.

Mary Scanlon: I understand that. I really want an idea of what sort of circumstances you envisage before a statutory regime would be brought in to govern the sector.

Richard Arnott: At the moment, we do not have any specific triggers in mind. We are working with the industry as it develops its proposals for a self-regulatory system. We need to work with the industry to clarify its objectives. If the industry fails to meet those objectives, that may well be the time to introduce a mandatory regime.

Mary Scanlon: One or two bodies asked questions about when a new statutory regime would come in. I realise that this is about fundraising for benevolent bodies, but how would such a regime impact on existing organisations with their own boards of management, trustees and so on?

Richard Arnott: I am sorry—I do not think that I understood the question.

Mary Scanlon: It is to do with the public school sector and other sectors. I realise that this is not to do with fundraising, but if someone else came in to govern that sector, how would that impact on its existing management?

Richard Arnott: If a mandatory fundraising regime were brought in, anybody who was fundraising would have to follow it. Does that answer the question?

Mary Scanlon: I think that we will have to come back to the matter.

The Convener: I understand that Scott Barrie has an outstanding issue to raise.

Scott Barrie: Thank you. A number of respondents commented that the Scottish charity appeals panel will not be strictly independent of the Executive. What provisions are proposed by the bill to ensure the panel’s independence?

Quentin Fisher: In providing for the appeals panel, the bill has attempted to take on board the guidance on tribunals, which indicates that the important thing is that members of the tribunal be independent of the body or bodies that are party to the case before the tribunal; that is to say that the charity appeals panel will be independent from OSCR and from the charity that is appealing a decision by OSCR. We believe that the appeals panel will indeed be independent of those two bodies.

Scott Barrie: I accept that but, given that Scottish ministers may make rules as to the practice and procedure of the panel and will
appoint the panel, will it be sufficiently independent?

**Quentin Fisher:** It is normal for ministers to appoint members of public bodies and tribunals. In doing so they will of course follow public appointment procedure—the Nolan procedure—and will be overseen by the Scottish Law Commission. We believe that the panel will be sufficiently independent.

**Linda Fabiani:** I suggest that an organisation with the acronym SCAB does not exactly promote confidence in its independence from the Executive. Perhaps a rethink is required of the name “Scottish charity appeals board”.

**Quentin Fisher:** The body will be called the Scottish charity appeals panel.

**Linda Fabiani:** It says “board” in our papers, so I take that back. I would like clarification about the investment powers of trustees being extended. Why is that happening and what does it mean?

**Quentin Fisher:** The Scottish Law Commission, together with the English Law Commission, produced a report that was published in 1999 on trust law matters. The Scottish Law Commission made various recommendations about reform of the investment powers of trustees. Until then, that was governed by the Trustee Investments Act 1961, but it was felt that the provisions of that act were outdated and that reform was needed. The bill is fulfilling ministers' commitment to implement the proposals.

**Linda Fabiani:** Does it mean that we will be giving trustees more power to use the money that comes in?

**Quentin Fisher:** We will. I hasten to add that I am talking about trustees of trusts, not charity trustees. We will give them the power to make investments as they would have if they were the beneficial owners of the assets.

**Linda Fabiani:** That is what is confusing me. We are talking about trustees of trusts, rather than of charities.

**Quentin Fisher:** Yes.

**Linda Fabiani:** Will trusts also be able to become SCIOs?

**Quentin Fisher:** If the trust in question is a charitable trust, it will be able to become an SCIO.

**Linda Fabiani:** On one hand we are saying that a trust will be able to be an SCIO because that will mean that trustees have no financial liability if things wind up, but we are also giving trustees more powers to take decisions on how to invest money. Where does that leave the beneficiaries of the trust if mistakes are made?

**Quentin Fisher:** If a trust were to become an SCIO it would no longer be a trust and the provisions would no longer apply to the trustees.

**Linda Fabiani:** That is a comfort.

**Mr John Home Robertson (East Lothian) (Lab):** I offer my sincere apologies for being late, but it is difficult to attend two committees at once.

I have a quick, but rather technical, question about the charities test. Has consideration been given to the case for incorporating into the definition of public benefit some kind of requirement that there not be disproportionate private benefit? Do you see what I mean? Part of the assessment of public benefit should be that there is an absence of private benefit.

**Richard Arnott:** I see what you mean. That is precisely what we are aiming for in the first of the two criteria that we propose.

**Mr Home Robertson:** So that provision is in the bill.

**Richard Arnott:** We believe that it is.

**Mr Home Robertson:** I apologise for raising that, but it is an important point, which I might want to pursue later.

**Linda Fabiani:** I have another question, which I forgot earlier, on regulators. The convener prompted me. We talked about Communities Scotland being exempt, or about ministers having the power through Communities Scotland. Why is that the only exemption in the bill? Why were not the Scottish Commission for the Regulation of Care and other agencies not included?

**Richard Arnott:** That is merely because we believe that Communities Scotland is the only regulator that has the range of overlapping powers that OSCR would have.

10:45

**Mary Scanlon:** When charities register with OSCR, information will come in every year. There is no doubt that charities will use extremely creative accountants to ensure that what is sent to OSCR, while being open, accessible and accountable, is the information that will satisfy OSCR. I appreciate and support that. However, how can the bill ensure that charities operate effectively, responsibly and appropriately and that they do what they say they will do at local level?

**Richard Arnott:** That is precisely why we need to establish an independent regulator that will have the resources to enable it to regulate the bodies it will oversee. OSCR will not visit charities, but it will listen to and spot check information that is provided to it. However, we are trying to encourage charities to be transparent to the public
as well as to OSCR. If members of the public notice something suspicious, they should report it.

**Mary Scanlon:** All of us operate at local level and we regularly hear founded and unfounded criticisms of charities. However, members of the public will have access only to the information that is given to OSCR which, as I said, will be the information that satisfies all of OSCR’s criteria. How can we be sure that the process will satisfy needs at local level? How will examination of one set of accounts once a year enable us to be sure that a charity is working well locally? If people have concerns about a charity, the accounts that they will be able to examine will tell them nothing. I am trying to think of how that accountability can be guaranteed.

**Richard Arnott:** We have tried to set up a balanced system that will not impose an undue burden on charities but will provide the public with a regulator that can answer questions, follow up queries and keep an eye on charities. A balance must be struck.

**The Convener:** I believe that members have concluded their questioning. I am sure that we will come back to a number of issues over the course of the next few months.

I thank you all for attending and for answering our questions as helpfully as you were able to.

Before I conclude the meeting, I should say that I received apologies from Christine Grahame, who was taken ill and was unable to attend.

*Meeting closed at 10:48.*
WRITTEN EVIDENCE FROM CHARITY LAW ASSOCIATION

I am writing on behalf of the Charity Law Association ("CLA") which, as you know, was one of the respondees to the consultation draft of the Charities and Trustee Investment (Scotland) Bill (the “Bill”). The members of the CLA Working Party on the Bill have reviewed the Bill as introduced to the Scottish Parliament and wish to comment on it.

We should be most grateful if you could pass on our comments to the MSPs on the Communities Committee.

Office of the Scottish Charity Regulator

We remained concerned about the status of OSCR. The policy document accompanying the Bill describes it as being set up as a non-Ministerial Department. Admittedly it emphasises that it is to be an “independent statutory regulator” but we believe that OSCR should be further from the Scottish Executive. This comment is reinforced by the duty clause 2(4) imposes on OSCR, to comply with Ministerial directions over not just the form but also the content of its annual report.

We should like to see inserted in the Bill the following additional duties on OSCR:

- to advise ministers
- to use its resources efficiently and effectively,
- to have regard to the principles of good corporate governance,
- to have regard to principles relating to public bodies, and
- to give advice and guidance on good practice.

Also we still question whether the general function set out in clause 1(2)(c) is too narrow in being limited to compliance with the Act’s provisions. Shouldn’t this function be to encourage and facilitate compliance by charities with the provisions of the Act and charity law generally?

We believe OSCR should be under a specified time limit in which to produce its annual report. We question the power of Scottish Ministers to give directions as to the content of the annual report (clause 2(4)).

The powers of Scottish Ministers set out in Schedule 1 of the Bill are very wide in relation to Board members. We question that Scottish Ministers will have the powers:

- to determine all terms and conditions of appointment, and
- to remove a member of the Board from office without restrictions limiting such power to dismissal for misbehaviour or incapacity.

We welcome the removal of the earlier draft provision that being a charity trustee should disqualify an individual from being a member of OSCR.

Scottish Charity Register

We still believe it would be useful to know what other information may be sought from an applicant under clause 4(d) e.g. whether an applicant’s charitable status will be judged by its activities as well as its purposes – we think this would be wrong.

The consultation draft of the Bill contained a clause 5(3) which stated that OSCR must give an applicant notice of its decision and, if refused, state its reasons therefor.

This is missing from the Bill as introduced and we question the removal of what appeared to be a helpful clause.

We would re-iterate our suggestion that a new clause 7(1)(c) be added which states that a body meets the charity test if it is registered as a charity in England and Wales.
It would be helpful if the Bill were to specify that all institutions which qualify for registration are under a duty to register, as in England.

At the time of writing we have not seen the English Charities Bill as amended after consultation and as to be introduced into the Westminster Parliament but we continue to hope that the differences in the lists of charitable purposes in the two Bills will disappear. If not, the tax position will either be different from the charity test in Scotland or different as between England/Wales and Scotland (which would seem intrinsically unfair and divisive).

As to the new clause 8 setting out the principles to which regard must be had in determining whether a body provides or intends to provide public benefit, in our view it is a laudable attempt to enact a public benefit test but it fails to deal with certain issues of importance: (i) the principle that the poor should not be excluded, (ii) the principle that benefits to the public can be direct or indirect, (iii) the principle that there must be a genuine benefit e.g. not ‘foisting on the public a mass of junk’ as in Re Pinion, (iv) the definition of a section of the public to exclude very small groups e.g. the inhabitants of a particular street or groups who have a subjective characteristic in common, e.g. employment by a particular company, membership of a particular family, hair or eye colour etc. However, in relation to the English Bill the CLA has been against the proposal to enact the test, preferring that the question be left to the general law as explained in guidance to be provided outside the Bill, The reason for this was to allow the law to develop and also to prevent the Government/Parliament from influencing the definition and thus introducing the potential for a political element to come into charitable status.

In England & Wales there is an established body of case law on the meaning of “public benefit”. That case law does not apply directly in Scotland but it has been used by the Inland Revenue to determine charity status in Scotland up to now. So, on public benefit, the position is at the moment that charity for the purposes of tax law, in Scotland as well as England, means charity according to English law, and the meaning of public benefit is part and parcel of what charity means. Therefore unless the meaning of charity, including the public benefit test, is the same in Scotland as in England there may either have to be separate taxation provisions for England and Scotland or some Scottish charities may not get tax relief. In our comments on the consultation draft of the Bill we suggested that the Bill include a provision to the effect that the existing law, as applied in Scotland for regulatory and tax purposes, should be followed. We believe this is still a good idea.

We welcome the new clause 14 specifying the very limited circumstances in which a body not on the Register can represent itself as a charity. Perhaps clause 14(b)(ii) might be clarified. We are aware of non-Scottish charities carrying out services pursuant to contracts with, for example, local authorities in Scotland. Is the carrying out of obligations under a contract caught by “carrying out activities in any office, shop or similar premises in Scotland” if employees of a charity are carrying out contractual obligations whilst on, for example, local authority premises?

We continue to be concerned about the need for OSCR to give consent to amalgamations and dissolutions in clause 16. The practical issue relating to amalgamations is demonstrated by the following example given to us by one of our members:

“I have personally helped merge a large Scottish charitable company into an even larger E&W charitable company. As the Scottish charity was at the end of the month and could not pay its staff it was on the point of liquidation under the Companies Acts when the E&W charity was invited to help. I don’t know if this new Act would over ride the Companies Act. The mechanism used in this case was to transfer all assets and liabilities from the Scottish charity into the E&W charity and then keep the Scottish charity on the shelf as a registered charity and dormant company just in case there was future income so it may be the intention of this new Act would have been avoided by this technicality. But if we had been obliged to wait six months or even only 28 days the Scottish charity would have been liquidated and a big charitable asset lost to Scotland.”

Furthermore we note that the time periods have been extended from 28 days to 42 days for the notice to OSCR and from 14 days to 28 days for OSCR’s response. This is a pity.
Co-operation and information

Why in 23(1) is there the phrase "if the request is reasonable"? We can think of no no circumstances in which a request for a charity's constitution and accounts would be unreasonable. We believe that 23(1)(b) should refer to the annual report and accounts rather than the statement of account as the annual report is an essential commentary on the accounts allowing them to be properly understood in context.

Regarding clause 23(3) of the Bill, paragraph 34 of the Scottish Bill Policy Memo states:

“34 ...Scottish Ministers may, however, make an order setting the maximum level of such fees and may also exempt charities from having to provide the documents. It is intended that this power may be used by Ministers to exempt smaller charities from the burden of having to provide documents to the public, but this might only be considered when it is clear that such information is easily available elsewhere (such as via OSCR).”

We would submit that there is no reason why even the smallest charity cannot photocopy its constitution and accounts and post them to an enquirer, especially as it is permitted to charge the cost. We would suggest that this sub clause should be deleted. But a useful substitution could be made by a sub clause stating that, if OSCR publishes these documents on its own website, then no charity is obliged to supply them to any enquirer but, if it does not supply them, it must direct the enquirer to OSCR's website.

Supervision of charities

We are very glad to see that the very strong powers of OSCR to direct charities and other bodies not to undertake certain activities are to be capable of being appealed to the Scottish Charities Appeals Panel.

In clause 29 we were surprised to see the removal of the phrase “in that person’s possession or control” which was in the previous draft of the Bill. How can OSCR require a person to provide documents to it that that person does not have in its possession or control?

At the end of clause 30 we suggest that the sub clause in the consultation draft be re-inserted that said OSCR was obliged to notify the charity of its removal and the reasons therefor.

We note the introduction of “a body controlled by a charity” in clauses 31, 34 and would mention that OSCR cannot act as regulator of a non-charitable body and any concern it may have with a body controlled by a charity must only be on behalf of the charity itself. It might be helpful to state this in the Bill. We do, recognise, however, that the recent fundraising scandals in Scotland have been because of companies controlled by charities and that is why there is a desire to regulate them.

We feel that the new power of OSCR to suspend a person concerned in the management or control of a charity who appears to it to be unable or unfit to perform that person’s functions (clause 31(4)(c)) is rather strong. Surely the rules relating to disqualification of trustees are sufficient?

We note the introduction of “a body controlled by a charity (or by two or more charities, when taken together)” in clauses 34(1)(a)(ii) and 35(1)(b). We don’t see how OSCR can direct the transfer of funds belonging to a non-charity – the Charity Commission couldn’t.

Reorganisation of Charities

We see that there have been considerable changes in this chapter from the consultation draft. We are not clear in which circumstances OSCR will approve reorganisations under clause 40 and in which circumstances OSCR will apply to the Court. It might be helpful to insert some criteria?

Charity Accounts

We are disappointed that our suggestion in relation to the consultation draft Bill that what is now clause 45(4) should apply only to Scottish charities has not been taken up. We are still hoping that charities
operating throughout the UK will not face additional costs of, in effect, having to produce a different set of accounts for Scotland.

We commented on the consultation draft Bill that we felt it somewhat draconian to impose personal liability on charity trustees of the costs of an appointed person in what is now clause 46(4) and so we are disappointed to see that sub-clause extended to cover personal liability for the costs of OSCR in relation to such appointment. We continue to believe that the normal rule should be that the charity itself pays for the expenses of such an appointed person (and of OSCR) and that only in exceptional circumstances should charity trustees be made personally liable. There can be extenuating circumstances why charities may be a little late with reports, especially if they don’t employ staff.

Scottish Incorporated Charitable Organisations

We question why it is felt necessary that a SCIO must have 2 or more members (clause 49(2)(c) and see also clause 56(2)(b) which derives from this)? We are glad to see sub-clause 4 states that members are not liable to contribute to the assets of the SCIO if it is wound up.

We welcome the further detail in the Bill as introduced as compared to the consultation draft.

Charity Trustees

We welcome the renaming of charity stewards as charity trustees and the new provisions relating to remuneration of charity trustees except that we feel that, where there are only two trustees, not more than one should be eligible for remuneration (see clause 66(3)). The safeguards seem adequate.

Decisions: Notices, Reviews and Appeals

We welcome the extension of the types of decisions of OSCR which are capable of being appealed but we would still like to see a “catch-all” provisions so that it is clear that all decisions which impact on a charity/trustee of OSCR are capable of being appealed.

Sanctions on trustees generally

We commented on the previous draft of the Bill that our view is that it is inappropriate to use criminal sanctions (e.g. see clause 65(5) and clause 99) for all breaches of the general duties of charity stewards. We do feel that criminal sanctions should apply only to extreme cases where there has been deliberate wrongdoing, dishonesty or fraud. We believe that civil sanctions are appropriate for other breaches.

We believe that the Bill should enshrine the following principles:

- honest but mistaken trustees who have innocently committed mismanagement should be helped with advice by OSCR;
- trustees who persist in mismanagement through wilfulness or incompetence should be removed by OSCR and disqualified as trustees;
- trustees who deliberately and knowingly commit misconduct, especially if it involves personal gain should be charged with criminal offences, punished and disqualified as trustees.

We should be very happy to expand further on these comments or answer questions that MSPs may have on them.

Linda Kabi
Principal
For and on behalf of the Charity Law Association
30 November 2004
WRITTEN EVIDENCE FROM TURCAN CONNELL

Charitable Purposes

The approach for extending the list of charitable purposes is supported.

Given proposals for reform of the definition in England and Wales (and also through the Westminster Bill, for UK wide taxation purposes); and the similarity of the lists, could greater effort not be made to make the definitions identical? This would give much greater clarity both to charities operating on both sides of the border, to the Inland Revenue, and to supporters of charities in both jurisdictions.

Public Benefit

The insertions of principles in the Bill, to guide OSCR and the Courts, is supported. This is not a matter which should be left to the Regulator.

The way in which the principles are set out is slightly difficult to follow.

Non-Scottish Charities

The charities which will principally be affected by the requirement to register with OSCR, and which are not Scottish charities, will be those registered with the Charity Commission in England and Wales. While the relaxation from the proposals in the consultation draft is welcomed, it is still the case that English charities which occupy land or premises in Scotland or carry out any activities in an office, shop or similar premises in Scotland will have to register with OSCR.

It appears that any concerns about the activities of English charities based in Scotland could be dealt with through appropriate cooperation and exchanges of information between the Regulators (activities envisaged in the Bill in any event).

Is registration of English charities best use of OSCR's resources?

Section 7 – The Charity Test

In respect of “third party” control, what is the intended impact where central or local government has the right to appoint Trustees – either in a majority or minority – or where holders of central or local government posts are trustees ex officio?

Is an appointment making power seen as equivalent to control or is the legislation directed at bodies where there is a direction making power in the relevant Constitution? Is the practical control of funding the activities of a body caught or not? This is not normally written into a Constitution.

Philanthropy

Part of the purpose of the Bill is to encourage philanthropy: giving to a favourite charity or in response to a specific charity appeal. It might be on a very substantial scale – establishing a privately funded permanent endowment or foundation. Regulatory structures should seek to encourage all types of giving and the position of the grant giving charities (which mainly give to other registered charities) should be recognised in the regulatory structure. The risks associated with these types of charities are different from those operating on the ground or receiving substantial new inflows of money from government grants or fundraising programmes. The risks are not size-related.

Remit of OSCR

The lack of a support and advice function is an omission from the Bill and detracts from a balanced system of charity law and regulation as envisaged in the McFadden Report.

Turcan Connell
9 December 2004
Comments by Turcan Connell on the Consultation Draft

Turcan Connell is pleased to have the opportunity of commenting on the Consultation draft of the Charities and Trustee Investment (Scotland) Bill (“the Bill”).

The Firm
Turcan Connell is heavily committed to the charity sector, and the firm believes that it has the largest charity law practice in Scotland. Three partners in the firm are accredited by the Law Society of Scotland as specialists in charity law. Simon MacKintosh was a member of McFadden Commission and has contributed to the response on the Bill by the Charity Law Association. The firm acts for and administers a very large number of charities, including publicly and privately funded foundations, endowed and grant giving charities, conservation and membership organisations, non-departmental public bodies, charitable trusts concerned with the National Heritage and Historic Houses, and single issue bodies. Many of its partners serve or have served as Trustees of charitable bodies.

General Policy
The firm welcomes the establishment of an effective regulatory system for Scottish Charities. It is however important that the administrative requirements imposed on charities are not over-burdensome, while enabling wrongdoing to be identified at an early stage. The firm believes that the role and title of the Regulator should specifically extend beyond legal compliance with statutory requirements, to the encouragement of best practice, and the provision of advice and guidance. Such an extended remit would enable charitable activity to flourish. Prospective donors and volunteers must not be discouraged by administrative requirements or premature recourse to criminal sanctions. Against that background, more specific comment is made as follows:-

Role and Title of Regulator
Clause 1 of the Bill sets out the general functions of the Regulator.

While it is implied that the maintenance of the register of charities will involve the granting of charitable status, that grant is itself such an important operation that it ought specifically to be included within the list of duties.

The list of duties of the Regulator should be further extended to:-

(i) the encouragement of best practice (that is, preventing things going wrong rather than waiting until they have gone wrong);

(ii) the provision of definitive advice and guidance, linked with the above. For example, the Charity Commission for England and Wales provides detailed guidance on matters such as ethical investments, trustee insurance and political activities by charities. We are of the view that the Regulator is best placed to provide the required definitive advice and guidance on topics such as these.

(iii) advice to Scottish Ministers on matters affecting Scottish charities.

Just as specific duties are placed on charity stewards/trustees to act in accordance with certain standards, it is proposed that there should be specific requirements placed on the Regulator in the Bill to act in accordance with best regulatory practice and other standards affecting public bodies.

We are of the view that the proposed structure for the Regulator – a non-ministerial department – meets the necessary requirements for independence of action coupled with accountability to the Scottish Parliament. The proposed structure also offers the possibility of obtaining outside expert assistance through the appointment of members. Any alternative structure proposed should be measured against the current proposal in terms of provision of all three of these characteristics.

We are however of the view that it is inappropriate to disqualify charity trustees/stewards from appointment to the Board of the Regulator. This stipulation appears to exclude a substantial proportion of those people with relevant experience, which experience will be badly needed, particularly in the formative years of the Regulator. Any conflicts of interest could be managed by applying the normal rules for public bodies.
Presumably appointments to the Board of the Regulator will be made in accordance with Nolan principles but it might be helpful to specify this.

Given the extended remit which is proposed for the Regulator (and which we believe is widely sought by the charitable sector) the title of the Regulator should be examined. The present proposal places too much emphasis on regulation and not enough on maintenance of the register, the granting of charitable status and encouragement and facilitation of compliance with the Act – let alone the additional functions proposed by us. The former title of “Scottish Charities Office” or the McFadden proposal of “CharityScotland”) would be preferable.

Trustee Issues

The clear statement of standards of care in Clause 50 of the Bill is to be welcomed.

The Scottish Law Commission is currently reviewing the position for trustees (which work will include the trustees of charities and other trusts) and it is important that the standards imposed on charity trustees/stewards coincide with those imposed under the general law on trustees properly so called.

The Bill is silent on the topic of payment to trustees. We have no objection to the payment of trustees as a general principle. Given the time consuming and challenging requirements placed upon trustees, it may on occasion be necessary to pay trustees for acting as such. While most charities will probably continue to be led by volunteers, we do not believe that there should be any general prohibition on payment to trustees.

We recognise the requirement for a generally understood title to include all of those in management or control of a charity, however it is constituted. However we do not feel that the term “charity steward” is appropriate. The term “charity trustee” is already widely used. What is required is legislation to make it clear that that term, in the context of charity law, includes all of those in management or control of a charity – similar to the way in which the term is used in the 1992 Charities Accounts regulations. We therefore propose that in Clause 81 the definition of “charity stewards” serves as a definition of “charity trustees”.

For reasons more fully set out above we do not believe that trustees should be disqualified from the Board of the Regulator.

Examining further duties on trustees/stewards under the Bill, there appears to an over-reliance on criminal sanctions in parts of the Bill in which that does not seem appropriate. For example, if a charity changes its name, Clauses 10 and 13 of the Bill make it clear that that would be a breach of duty if OSCR is not involved. Clause 50(5) makes that an offence and Clause 50(6) makes clear the level of punishment which may imposed under the criminal law. The over ready resort to criminal sanctions for what may be innocent or careless mistakes may result in a narrowing rather than a widening of the pool of people prepared to offer themselves as charity trustees/stewards. We propose that criminal sanctions should be reserved for the most serious offences only under this Bill, for example for actions involving fraudulent or dishonest or deceptive behaviour.

The provision of information

Bearing in mind the aim of avoiding over-burdensome requirements on individual charities, we propose that, once accounts have been lodged with the Regulator, it should be a function of the Regulator to meet statutory duties to disseminate that information further.

We therefore propose that the requirements in Clause 19 should be replaced with a duty on the Regulator to provide any member of the public who asks for it, on payment of an appropriate fee to the Regulator, with a copy of the Constitution and latest Statement of Accounts lodged by any particular charity. That might be extended to the provision of a copy of the most recent Annual Return or, possibly, contact details for the charity. In this way the Regulator would be acting very much as Companies House does at present in making copies of statutory documents relating to companies generally available to the public.

If Clause 19 is to stand, then we believe that it is important that if a charity is to be obliged to make information available to the public, it should be able to make a reasonable charge for copying and postage. Further, given that charities will already, by definition, have prepared information for their
Annual Report and Accounts in a statutory format, they should not be obliged to provide the information in such other form as the person requesting it “may reasonably request”. There appears to be great scope for dispute if trustees faced with a request for information have first all to judge “if the request is reasonable” and secondly if the request for information in a particular form is “reasonably” made.

The Register
It is clear from the Consultation documentation that the Scottish Charity Register to be maintained by the Regulator in terms of Sections 3 and following of the Bill is to include initially all existing charities on the current Inland Revenue list. We believe that it should be made absolutely clear that that is going to be the case – the Consultation document states this but if there is no blanket provision for transfer of the existing Inland Revenue list to the new Scottish Charity Register, it appears to us that the Regulator will have to go through the process of admitting each individual charity to the new Register on its inception.

Again, the Consultation paper states that there is intended to be a requirement on charities registered in England (and possibly further afield) to register with the Regulator. We do not understand the policy behind this requirement. We are not aware of any major concerns relating to English charities operating in Scotland. Presumably any concerns could be met by providing for exchange of information between the Scottish Regulator and English/Welsh and Northern Ireland counterparts, coupled with power to the Regulators in the individual jurisdictions to take action at the request of another UK Regulator which would be the “lead” Regulator for charities based in their own jurisdictions. The Consultation paper does not rule out the possibility of charities based outside the UK – for example in the Republic of Ireland or the United States of America – having to register with the Regulator. In our view, provided that such bodies made it clear that they were not UK charities, thus avoiding any confusion over whether tax benefits were available for contributions to them – there should be no registration requirement.

In our view there is an indirect threat to Scottish charities in this requirement. If there is a need for English charities to register with the Scottish Regulator then presumably there may at some stage be a requirement for Scottish charities operating in England and Wales to register with the Charity Commission. That would be an extra administrative burden on Scottish charities and anything which is more likely to make that happen should be avoided.

Definition
The Firm generally welcomes the approach of providing an extended and flexible list of charitable purposes coupled with a public benefit test.

Having compared carefully the list of charitable purposes in Clause 7 of the Bill with the equivalent list in the Westminster Bill, we are concerned that the lists are very close to one another but not exactly the same. We doubt whether the charitable activities which are to be encouraged in Scotland and England are so different as to require a different definition. Unfortunately, the fact that the lists are different meant that they are bound to be interpreted in different ways. This will lead to great confusion and difficulty for charities operated in Scotland and in England, whether they are registered in England or in Scotland. There is also the scope for tax difficulties if the Westminster and Holyrood Parliamentary definitions differ. While some difficulties could be avoided if the Westminster Bill were amended to make it clear that the Inland Revenue would accept rulings as to charitable status given by the Scottish Regulator, we believe that the greatest possible effort should be made to make the Scottish and English definitions coincide precisely. There is a role in this for members of the Westminster Parliament sitting for Scottish seats.

In our view the final head “any other purpose intended to provide community benefit” is better than the English “by analogy” route as it would enable more flexible interpretation of charitable purposes in the future to react to changing circumstances. However, guidance on the meaning of the word “community” needs to be given - preferably by way of a definition or guidelines in the Bill - and guidance as to the extent to which, if any, this differs from “public” benefit.

Public Benefit Issues
While we welcome the change to the existing law, to put all charities on an equal footing by providing that none is to be presumed to provide public benefit, we do not see how the Regulator can issue
guidance under Clause 8 as to how the charity test is met, without some guidance as to what law to apply in respect of public benefit. If no guidance is given to the Regulator in interpreting “public benefit” then it will be difficult for the Scottish Charity Appeals Panel or ultimately the Courts to take decisions as to whether the Regulator has acted properly in any decision as to the granting or withdrawal of charitable status.

It would be possible to direct the Regulator, under the Bill, to follow existing law; or a statutory definition; or guiding principles set down in the Bill. If nothing is said then presumably the existing law as to public benefit will have to be applied by the Regulator. That would be principally English law as applied in Scotland through the introduction of the English definition of “charity” for tax and regulatory purposes. That approach appears to give the Regulator - possibly in conjunction with the Charity Commission - little scope for developing the law and practice together, as development of the law would presumably be a matter for the Courts.

We foresee great difficulties in a full statutory definition of public benefit in a way which would be flexible enough to enable new charitable purposes to be added in the future.

Our preference therefore is for a set of principles to be set out in the Bill, in accordance with which the Regulator, the Scottish Charity Appeals Panel and the Courts would be required to take and review decisions in relation to charitable status in Scotland. That said, the principles proposed in the consultation paper appear to us to be too closely based on the Scottish public and issues of public benefit relating to the human community. Existing charitable purposes - which presumably are not under threat - include for example international aid and reconstruction and animal and bird charities. The principles on which these are recognised as charitable would need to be included in the Bill.

It is not our purpose to put forward arguments on behalf of any particular types of charity which might be affected by a change in the law. Much comment has centred on the position of independent schools and certain religious bodies. In drafting principles we simply ask that proper consideration is given to the whole range of charitable bodies to ensure that the way in which they provide an acceptable public benefit is recognised.

The position of the endowed, grant giving charities does require to be considered. These charities do not directly carry out any charitable activities themselves but instead support the charitable purposes carried out either by other charities or by individuals or non-charitable groups. We propose that any statement of public benefit principles should recognise that charitable purposes can be achieved by the support of such bodies or individuals directly involved in charitable activities.

In our view, unless it is intended that the existing law of public benefit as understood in Scotland is intended to continue, the Bill as drafted will not achieve its aims in this area.

**Independence of Charities**

While the Bill is silent on the topic of the independence of Charity Trustees we are aware that it will be proposed that the McFadden stipulations as to a maximum number of Trustees appointable by Central or Local Government, should be implemented.

In our view it is important to consider the independence of action which is available to Trustees of such bodies rather than applying a fixed formula. We are aware that non-departmental public bodies which are also charities are subject to five yearly reviews, and that as part of these reviews consideration had been given as to whether they should follow the NDPB or charity route. Given the fairly limited number of bodies affected by this difficulty at a national level, we suggest that this is an appropriate way of dealing with such bodies.

**Investment Issues**

We welcome the provisions of Clauses 73/75 of the Bill extending the general investment powers of Trustees. The introduction of these powers will bring Scotland broadly into line with the position in England and Wales and in many other jurisdictions around the World.

There are two minor additional issues which cause difficulty in practice. These are the ability or otherwise of Trustees to delegate investment management on a wholly discretionary basis to properly qualified managers; and to use nominees to hold their investments. We propose that these additional
powers are implied for all Trustees. It would be useful also to add a duty on Trustees, equivalent to that under the (English) Trustee Act 2000, to supervise and review the activities of those to whom delegation has been made.

We welcome the proposal in the equivalent English Bill that common investment funds should be made available to Scottish as well as English Charities. It would be of great assistance if equivalent provision could be made for the establishment of common investment funds in Scotland, subject to the supervision of the Scottish Regulator and subject to the approval of the Inland Revenue - enabling the provision of local expert management specifically for Charity Trustees in Scotland, while also enabling such funds to be opened up to English Charities although based in Scotland.

Clause 74 assumes a “need” for diversification of investments. There are circumstances, for example in relation to express wishes or directions of settlers, or because of the nature of assets held, where trustees cannot readily diversify. This clause would be improved by referring to “any requirement or ability” to diversify instead of “need”.

Scottish Charitable Incorporated Organisations
We welcome the provisions of Chapter 6 of the Bill paving the way for these organisations to be established.

Reorganisation Provisions
We welcome generally the provisions of Clauses 54-58 of the Bill which should enable the better application of funds held in small outdated Charitable Trusts.

These provisions are partly connected with those in Clause 13 of the Bill. We understand why the Regulator should be required to consent to amendments of Charities, amalgamations or dissolutions of them (presumably where the purposes allow) but we do not understand why the consent of the Regulator should be a necessary pre-requisite to an application to Court on those topics. This requirement will merely lengthen the Court process. If it is felt necessary to go to Court then the Court itself will have an opportunity to judge whether the actions of the Trustees in applying to the Court are appropriate. We do not see what the Regulator can add.

Accounting Issues
We support the general duties under Clause 36 which mirror the duties under the existing legislation. The addition of a requirement to send a copy of accounts to the Regulator is welcomed and fills a substantial gap in the existing regulatory provision. Much of the impact of new rules will be contained in the regulations to be made under this Clause. We do suggest, and ask, that great effort is made (a) to integrate the requirement of the forthcoming Statement of Recommended Practice for Charities with the regulations to be made under this clause; and (b) that so far as possible, and particular, for smaller Charities, accounting regulations should be simplified. Further, the information required under the Accounts should be integrated with the information required in terms of the Annual Return to the Regulator so that Charities are not required to rework figures substantially in order to complete their Annual Returns.

Under Clause 37, the sanction for failure to provide a Statement of Account involves the appointment by the Regulator of a person to prepare a Statement of Account. This sanction appears to operate rather too early in the process and there should be provision for, at least, warning of impending action under this clause.

This clause is another example of a criminal sanction being imposed in circumstances where that may not necessarily be appropriate.

Summary
These comments are made against the general background of support for the proposals for the establishment of a Scottish Charity Regulator and redefinition of charitable purposes, coupled with a wish to see a flourishing charitable sector in Scotland. We trust that the comments are of assistance and we will be pleased to discuss them further with the Bill Team.

Turcan Connell
25th August 2004
WRITTEN EVIDENCE FROM ANNE SWARBRICK, ANDERSON STRATHERN

Biography:
Anne Swarbrick is accredited by the Law Society of Scotland as a specialist in Charity Law. She is an Associate of Anderson Strathern, Solicitors. She was, for more than ten years, a legal adviser to the Scottish Charities Office (SCO), which was a division of Crown Office responsible for the supervision of charities in Scotland before that function was transferred to the new Office of the Scottish Charity Regulator (OSCR). Thereafter she was Head of Investigation at OSCR.

Anne, has over many years, conducted or supervised the majority of SCO investigations, including all of their major enquiries. She has also provided advice to many charities which were under investigation but where it was appropriate, to address any shortcomings by offering the charity advice and assistance to improve its governance and practices.

Anne is also an experienced litigation lawyer.

Chapter 2 – The Scottish Charity Register (sections 3 to 9)

The principle
“All charities either managed or controlled from Scotland or with significant operations in Scotland will have to provide information to OSCR for the Register, which will be publicly available on OSCR’s website.” (Policy Memorandum para 27).

Is this principle achieved?
No. There will be a number of charities managed or controlled from Scotland or with significant operations in Scotland which will not appear on the Register.

Why is this?
Section 97 (3) (a) of the Bill potentially creates two new categories of Scottish charities which may not appear on the Register. These are (i) bodies which may call themselves charities, but which do not appear on the Register and (ii) temporary, or time limited, charities.

It is unclear how anyone will access information in relation to such charities, nor know of their existence, as they cannot form part of the Scottish Charity Register. Their very existence would create uncertainty as to what are Scottish charities, erode the principle of a comprehensive, publicly available register and challenge the principle of an entry in the register being conclusive evidence of charitable status and lack of an entry proving the contrary, which was the proposal of the draft Bill.

Owing to the defects in the proposed charity test (see item 2, below) there could be a considerable number of these “off register” charities in Scotland.

Non-Scottish charities with significant operations in Scotland would also have to seek registration with OSCR, but because the proposed Westminster charity test is more widely stated than that proposed for Scotland, many charities registered in England and Wales will not be able to satisfy the Scottish charity test. They, too, will presumably be “off register” charities.

What requires to be done to achieve the desired aims?
• If the Register is to have integrity it must be a complete record of all charities which have charitable status in Scotland.

• The way to do this is to achieve the aims set for the Scottish charity test. This would also resolve any potential problem with “off register” charities from that jurisdiction.

The Charity Test (s. 7 to 9)

The principle
“The proposed Bill aims to set a Scottish definition which, for good reasons, is very similar and compatible with that currently being proposed for England and Wales.” (Policy memorandum para. 53.) The particular reasons why this course has been adopted relate to the tax advantages which are
gained by charities and the fact that these must be applied fairly and uniformly across the whole of the UK. “The definition has been prepared with the intention that it is compatible with that being proposed by the Home Office which is preparing the Charity Bill for Westminster as it is accepted that the link to the charity definition which will be used by the Inland Revenue for UK tax relief purposes is important to Scottish charities. It is expected, that as long as the definitions used in Scotland and the rest of the UK are not widely different, the Inland Revenue will accept OSCR’s decisions on tax relief for Scottish charities.” (Policy memorandum para 29)

Is this policy achieved?
No. The proposed Scottish and Westminster definitions are not “similar and compatible”. They are very different.

Why is this?
The Westminster proposals take the present UK definition of charity as their starting point. They do so for the very good reason that this was the basis upon which all existing charities obtained their charitable status. The definition is then extended from that starting point. The Scottish charity test does not start with the present definition and does not appear to regard existing charitable purposes as having any relevance to the exercise. Instead, it repeals all of the existing law and replaces it with a completely new definition which is much narrower in scope than the proposed new Westminster definition. The proposed new Scottish charity test therefore potentially excludes activities which would be charitable in terms of the new Westminster test. It also potentially excludes activities which would be charitable under the present UK wide test. There is therefore a risk that a number of existing Scottish charities will fail to satisfy the new Scottish definition.

The proposed charity test is narrower than that proposed by the Westminster Bill.

The list of 13 charitable purposes forming the first part of the Scottish Charity Test (s. 7(2)) are expressed in narrower terms than their Westminster counterparts. The differences would become greater still if the changes proposed by the Joint Committee of the House of Lords and House of Commons are adopted.

The second part of the Scottish Charity Test (s. 7(1)(b)) is the “public benefit” test. The Scottish Bill proposes to repeal the existing body of common law. That common law does 2 things. It provides the tests of what “public benefit” is, some (but not all) of which are repeated in section 8. It also describes a substantial part of the activities that are charitable under the present law. Some (but not all) of these are included in the 13 purposes which comprise the first part of the charity test. The Westminster definition retains the common law and so retains all of the public benefit tests and all of the types of charitable activity which it describes. The result of this is that the Westminster test is more widely stated in this area. It is also more flexible so that it is likely that the 2 definitions will diverge ever more widely.

Despite achieving a wider and more inclusive charity test, Westminster is concerned about it still being too narrow. The policy statement which accompanies the Westminster Bill indicates that although the list of 12 new English charitable purposes cover the great majority of purposes which are currently recognised as charitable under the present law, they do not cover everything. If that is true for England and Wales where both parts of the charity test are more widely stated, the problem is even more acute for Scotland. To avoid the possibility of leaving some charities stranded because they do not comply with the new definition the Westminster Bill provides two safety nets:-

(a) any purposes which are not specifically covered by the new statutory definition but which are recognised as charitable purposes under the existing law will remain charitable purposes under the new law, and
(b) the charitable status of all existing charities is specifically retained.

The Joint Committee was of the view that a third safety net should be added. This would provide that any activities “within the spirit or intent” of the list of specific purposes would also be charitable.

The Scottish Bill offers none of these safety nets. It does provide for transfer of all existing charities on to the new Scottish Charity Register, but that does not have the same effect because the transfer is only temporary and is not guaranteed to continue unless the body demonstrates that it satisfies both
parts of the charity test (s. 5(1)). At this point the narrowness of both parts of the Scottish charity test has its effect. If the charity cannot satisfy it, it must be removed from the register. The fact that its purposes used to be charitable under a previous charity test would be irrelevant.

The cumulative effect of all of these differences is that the Scottish definition is much narrower than its English equivalent and so the charitable status of many Scottish charities may be endangered. The lack of accurate information about the charitable sector in Scotland is such that we do not even know how many active charities there are in Scotland. It is therefore not possible for anyone to state with certainty the number of charities which will experience this problem. It is however clear from a comparison of the 2 charity tests that the problem exists. In view of the fact that the problem will show itself most severely in relation to the 4th head of charity under the present law, i.e. “other purposes beneficial to the community” (see SPICE briefing, page 6) and also to the fact that this has been the head of charity which has expanded most over the years through case by case decisions, I would anticipate that there will be quite a number of charities which will experience these difficulties. For the sake of clarity, I should add that the revised purpose (m) in the Scottish Bill does not resolve this problem.

It remains to be seen whether the Inland Revenue will be prepared to accept OSCR’s decisions on tax relief for Scottish charities if they are based on this charity test.

What requires to be done to achieve the desired aims?

• The problem with the Scottish Charity test as it stands is that it does not do all of the things that the Westminster Charity test does. If it aspires to be very similar to the Westminster definition it must offer the same coverage.

• The existing common law should not be repealed. It has applied in Scotland since at least 1891 and is very important to existing charities and to the future development of the charitable sector. It is fairer and more constructive to adopt the Westminster approach of embracing the present definition as a starting point and then extending the definition. This would not mean abandoning a uniform public benefit test for all charities, nor would it mean that new areas of charitable activity would be prevented from developing. The Westminster definition is designed specifically to achieve these two goals

• Both parts of the Scottish Charity test must be widened.

• Provide “safety nets” as has been done in England and Wales.

Transitional provisions (s. 97)

The principle
“Section 97(2) provides general transitional arrangements to allow Ministers to make, by order, provisions considered necessary in consequence of the Bill.” (Policy Memorandum para 99)

Is this achieved?
This statement of principle is incomplete. What Section 97(2) and (3) also do is to address some of the deficiencies of the charity test referred to at 2 above.

Why is this?
Section 97 (3) allows Scottish Ministers to make an order “… that a body specified in the order, or a body of such type as may be so specified, may, despite not being entered in the Register, refer to itself as a “charity” for such period as may be so specified.”

This clause would permit Scottish Ministers to admit as charities bodies which do not satisfy the charity test and which would not appear on the Scottish Charity Register. This would create one of the two new categories of charities referred to at para. 1.3 above.

This approach is misguided for 3 reasons.

It is a cornerstone of the Bill that OSCR will make decisions on charitable status, based on the charity test contained in clause 7, (see s. 5(1)). Section 97(3) would permit Scottish Ministers to override
OSCR’s decisions and in effect to create their own “charity test”, irrespective of that contained in the Bill.

Section 97 compromises OSCR’s independence in determining charitable status and politicises the regulatory process. One of the themes of the consultation process has been the desire of the charitable sector to ensure that OSCR is seen to be independent of political control and influence. This concern exists partly because charities often criticise government and campaign vociferously. OSCR has been at pains to reassure charities that it will be “independent, proportionate, accountable, transparent and consistent” in the exercise of its functions. Because of the unpredictability of section 97 there is no transparency as to how this power would be exercised and, therefore, how charitable status would be granted or refused. There is no guarantee that this power will be exercised in a consistent manner and as no appeal is provided it is not accountable. It is unnecessary and undesirable to grant charitable status in this manner.

One of the main criticisms of the existing definition of charity is that it is complicated and creates uncertainty as to which bodies can achieve charitable status because of technicalities which only a specialist lawyer understands. But it would not be possible, even for a specialist lawyer, to advise how the power granted by section 97 might be exercised, nor which bodies might achieve charitable status. There is no clarity as to the criteria which are relevant to its exercise.

What requires to be done to achieve the desired aims?

• This provision should be deleted. The Scottish Charity test should be reconsidered and a satisfactory Scottish definition provided on the face of the Bill. See section 2 above.

Reviews and Appeals - Chapter 10 (sections 73 to 77)

The principle
“In order to satisfy the sector’s calls for a simple and freely available means of questioning OSCR’s decisions without recourse to the court the Bill … sets out a review and appeal regime.” (Policy memorandum para 47).

Has this been achieved?
In part only. The proposed appeals system is restrictive in its approach and so it is questionable whether it can be said to be freely available. OSCR has great power. The Bill fails to balance that power by allowing all of those affected by its decisions full access to the appeal process. There are also questions about the imbalance of power between OSCR and appellants.

Why is this?
Those who have a right of appeal in Scotland are limited to either (a) the charity or (b) the person in respect of whom the decision was made, depending upon the type of order. So, if an individual is suspended from his role with a charity, he would have a right of appeal, but the charity does not. This means that the tribunal cannot hear the arguments of all parties and it is therefore very doubtful whether it can in fact resolve the issues arising in such cases. It seems perverse to establish a specialist tribunal which cannot hear from all parties which have an interest, nor consider all relevant factors.

The Westminster proposals are better. They permit appeals by any person “who is or may be affected by the decision”. This would potentially allow several appellants to raise issues with the tribunal, which would allow the English tribunal to resolve all the issues surrounding the Charity Commission’s orders. The Westminster Joint Committee have expressed the view that even this wide and inclusive approach is insufficient and they have proposed that the remit of the tribunal for England and Wales be further widened to allow it to review every decision or non-decision of the Charity Commission and also to empower the tribunal to award compensation to charities and costs against the Charity Commission.

The Scottish tribunal is prohibited from awarding expenses to either OSCR or to an appellant. The result of this is that if a charity or an individual wishes to take legal advice, they must bear that cost, even where OSCR’s decision is found to be wrong. The costs of going to the tribunal properly advised may therefore be prohibitive, but it would be inadvisable for charities to forego legal advice in such circumstances as this would result in a gross inequality of arms between the appellant and OSCR.
The proposed new Scottish appeals system is arguably more restrictive than the present one. At present OSCR may only take action against a charity through the Court of Session. Such proceedings must be served on all parties who may have an interest. They are all entitled to appear and to be heard by the Court. That would not be the case before the tribunal.

What requires to be done to achieve the desired aims?

- Widen the potential appellants to include “any person who is or may be affected by” the decision in question.

- Consider giving the Scottish Charity Appeals panel power to award expenses to successful appellants but to OSCR only where the tribunal decides that an appeal amounted to an abuse of process. That is what the Joint Committee has proposed for England and Wales. The arguments for this apply equally in Scotland.

Charity Trustees – Chapter 9 (section 65)

The principle

“The objective of the Bill is to ensure that there is a robust, proportionate and transparent regulatory framework that satisfies public interest in the effective regulation of charities in Scotland and meets the needs of the Scottish Charities Sector” (Policy Memorandum para 2).

Is this principle achieved?

The charity trustee provisions are unnecessarily heavy handed. They do not meet the needs of the sector and so fail to achieve the desired balance.

Section 65 (2) provides that, “The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.”

Section 65 (4) provides that any breach of section 65 (2) duties is to (please note “is to”, not “may”) be treated as being misconduct in the administration of a charity. This formulation is strict liability which means that those who are simply confused or forgetful are as culpable as those who intend to defraud. Section 65 (5) goes on to provide that certain failures are also criminal offences, even where they are inadvertent. One failure which would warrant criminal proceedings would be a simple omission to advise OSCR of a change to the charity’s name.

Charity trustees are largely unpaid volunteers who run charities in their spare time. It is already difficult for charities to attract people willing to undertake the increasingly onerous role of charity trustee. Such people already face heavy civil sanctions and unwelcome front page publicity as a result of possible action by OSCR. The requirements of clause 65 and the criminal provisions are much too demanding of volunteer charity trustees and are likely to deter people from volunteering for this role.

The problem arises from section 65(4) where all breaches of this duty are deemed to be misconduct, but its real origins lie in section 31(1)(a). There will be cases of misconduct, but they will be few. The overwhelming majority will be cases involving varying degrees of mismanagement, and these cases should be handled differently.

Section 31(1)(a) is the section which narrates OSCR’s powers following enquiries. It provides that OSCR may take action if it is satisfied, as a result of enquiries, “that there has been misconduct in the administration of a charity.”

The equivalent of this power in the present legislation is to be found in Section 7(1)(a) of the Law Reform (Miscellaneous) Provisions (Scotland) Act 1990. These powers may be exercised by the Court where there is “misconduct or mismanagement in the administration of a charity”.

The powers of the Charity Commission in England and Wales are to be found in Section 18 of the Charities Act 1993. This section also allows the Charity Commission to take action where there is “misconduct or mismanagement”.

It is because the present Scottish Bill only allows OSCR’s powers to be exercised where there is “misconduct” that it has to deem minor acts of mismanagement to be “misconduct”.

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This leads the Bill to impose in Section 65(4) standards which amount to perfection and in Section 65(5) criminal penalties which are disproportionate and fail to distinguish between the culpable and the merely disorganised.

**What requires to be done to achieve the desired aims?**
- Allow OSCR to act in cases of mismanagement as well as misconduct. It can already do so under the existing law.
- The result of this will be that the unrealistically high requirements of Section 65(4) are not required.
- Criminal penalties should be imposed only for real misconduct in the administration of a charity.
- If necessary “misconduct” could be defined within Section 65.

**Investment Powers of Trustees – Part 3**

*The principle*

“The changes in this Bill will benefit trusts in Scotland which do not have adequate powers in their trust deeds by enabling them to invest trust assets in ways which may produce a better return than the investments to which they are restricted at present.” (Policy Memorandum para 93).

**Is this principle achieved?**

The Bill misses an opportunity to give to Scottish trustees important powers which trustees in England and Wales obtained under the Trustee Act 2000. These powers, if granted, could result in significant improvements in both investment performance and income for some charities and trusts.

**What is the missed opportunity?**

In Scotland there is a prohibition against trustees delegating the management of trust investments to agents or nominees. In difficult investment conditions this is unsatisfactory because investment decisions can be taken much more effectively by an agent or nominee than they can by a body of trustees.

Part IV of the Trustee Act 2000 gave trustees in England and Wales power to delegate certain functions, including investment of assets. It is unfortunate that the present Bill has not taken the opportunity to address the disadvantage under which Scottish trustees are operating.

**What requires to be done to achieve the desired aims?**

Give Scottish trustees the power to delegate investment functions to agents or nominees.

Anne Swarbrick
Anderson Strathern
8 December 2004

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**WRITTEN EVIDENCE FROM THE CHARITY LAW RESEARCH UNIT (CLRU), UNIVERSITY OF DUNDEE**

**Introduction**

This submission has been prepared at short notice and gives only a general indication of the main points on which the CLRU would be glad to give evidence. The headings used below are taken from the Bill.
Part 1

Chapter 1: Scottish Charity Register

The charity test

- The principle of a charity test which is “compatible” with the England & Wales/UK tax definition, yet different from it, needs careful examination
  - Advantages of full compatibility widely recognised
  - Best way of assuring full compatibility is to link Scottish test directly to UK tax definition (as now)
  - Charity test as currently drafted gives wide scope for divergence from E&W/UK tax definition proposed in Westminster draft Bill
  - Key difference is Westminster Bill’s continued reliance on existing case law, versus Scottish Bill’s apparent repudiation of existing case law

- Arguments for a separate Scottish test (i.e., not fully aligned with E&W/UK tax definition)
  - Scope to develop distinctively Scottish concept of charity for regulatory purposes (and protection of associated “charity brand”)
  - Scope to develop distinctively Scottish concept of charity for purposes of local government tax reliefs

- Arguments against a separate Scottish test
  - Loss of general advantages of alignment: i.e., loss of advantages to public authorities and sector of use of common definition of charity UK-wide for both regulatory and tax purposes
  - Regulatory burden: applicant organisations in Scotland required to satisfy two tests, one to qualify as charities in Scotland for regulatory/local government tax relief purposes, another for UK tax relief
  - Possible regulatory deficit: organisations eligible for UK tax relief may not necessarily qualify for (or wish to apply for) registration with OSCR – so might enjoy UK tax reliefs without quid pro quo of supervision by OSCR
  - Complexity: further definition in play in addition to other relevant definitions – e.g., “charity” for UK tax purposes, “benevolent body” for fund-raising purposes, “educational endowment” for reorganisation purposes
  - Abandonment of tested resource: existing E&W/UK tax definition has attracted criticism over many years but English reformers have failed to devise satisfactory alternative to retaining existing case law definition (subject to adjustments); such is proposal in Westminster draft Bill (with further adjustments recommended by Joint Committee), representing best efforts of English reformers to achieve balance between certainty and flexibility

- Uncertainty of Scottish charity test as drafted
  - Charity test as drafted gives excessive discretion to OSCR
    - Examples (per McFadden Report): fee-charging schools, religious sects, credit unions, campaigning organisations, sports organisations – would they be charities under test as proposed, or not?
  - OSCR effectively invited to define own regulatory jurisdiction
  - OSCR effectively invited to define terms of mandatory relief from local government taxation

Chapter 5: Reorganisation of Charities

Reorganisation of charities: applications by charities

- Regulations should ensure adequate publicity for proposed reorganisations
- Should potential beneficiaries under existing arrangements have right to challenge proposed reorganisations?
Chapter 7: Scottish Charitable Incorporated Organisations

- Further opportunity for submission of evidence would be welcomed on publication of draft regulations
- Concern for position of third parties: protection required against fault of charity trustees – e.g., trading while insolvent – and other abuses of corporate status
- Is “underlying law” of SCIOs company law or trust law? E.g., will conduct of charity trustees be judged by company law standards (where no specific provision in the Bill) or trust law standards?
- Merits of SCIO as compulsory charity form should at least be considered, i.e., as vehicle for imposing charity governance requirements

Chapter 9: Charity Trustees

- Wisdom of defining “charity trustees” differently in Scotland and in E&W?
- What is the “underlying law”? I.e., by what standards will conduct of charity trustees be judged where statement of general duties gives insufficient guidance and where no specific provision elsewhere in Bill – English trusts law standards (as now, via E&W/UK tax definition of charity), Scots trust law standards, company law standards, fresh start?
- Examples of relevant issues:
  - Trustee remuneration (Bill assumes existing English charity law is starting point – but apparent repudiation of English case law in Scottish charity test severs link with English charity law)
  - Investment standards (e.g., in relation to ethical investment)
  - Personal insurance for charity trustees

Part 2

Fundraising for Benevolent Bodies

- Non-charitable benevolent bodies will be entitled to raise funds from the public. Why should they not be subject to the same continuing regulatory controls as charities (i.e., full supervision by OSCR, submission of annual accounts, etc)?
- Same issue of public confidence, and willingness to donate, applies

Other issues

The foregoing are the main issues of principle which the CLRU would like to draw to the attention of the Communities Committee. The CLRU will, however, strive to assist the members of the Committee on any other aspects of the Bill on which they wish to take evidence.

Patrick Ford
Charity Law Research Unit
9 December 2004

WRITTEN EVIDENCE FROM THE INSTITUTE OF FUNDRAISING SCOTLAND

Reserve Powers for Statutory Regulation, Commercial Participators’ and Professional Fundraisers’ Statement, Formal Agreements for Professional Fundraisers, Public Benevolent Collections, Dual Registration, Trading, and Public Benefit

Summary

Public Benevolent Collections

The Institute does not believe that the current bill will achieve a unified and proportionate scheme for licensing public benevolent collections, which is able to be applied consistently by local authorities. An organisation that wishes to conduct a collection, of goods or money, should at the very least be
required to notify the relevant local authority of its intentions. In this way, local authorities should have a clear picture of all legitimate collecting activity within their remit. This is not achieved by the Bill.

Much of the success of a licensing scheme will depend on the detail of secondary legislation. We welcome the provision that OSCR may issue guidance to local authorities, but are concerned that local authorities may not comply with it. We believe that OSCR should have a statutory role in the administration of public collections; registration with OSCR should be one of the principal criteria that local authorities apply to establish the status of a collecting organisation. We believe that Section 85 5 (d), (e) and 6 (c), which give powers to local authorities to alter conditions of licences, should be removed from the Bill.

Regulations Relating to Professional Fundraisers and Commercial Participators and General Fundraising

The sector has worked in partnership throughout the UK over the last year to develop plans for a self-regulatory scheme for fundraising. We support the inclusion of reserve powers for Ministers to make regulations pertaining to fundraising activities in Section 82 of the Bill, and welcome the commitment to consultation before doing so. The flexibility that the Bill provides for regulating the activities of professional fundraisers and commercial participators is welcome.

Cross Border Issues

We welcome the commitment to working with other regulators in other jurisdictions. We would like to see the establishment of clear protocols for joint-working between regulators, including requirements for reporting and accounting procedures. We believe that the approach set out in the Bill to charities that are registered in other jurisdictions but also operating in Scotland is pragmatic, recognising the range in scale of charitable activities in Scotland.

About the Institute of Fundraising

The Institute of Fundraising (registered charity number 1079573) represents fundraisers and fundraising throughout the United Kingdom. It is a membership organisation committed to the highest standards in fundraising management and practice. Members are supported through training, networking, the dissemination of best practice and representation on issues that affect the fundraising environment. The Institute of Fundraising is the largest individual representative body in the voluntary sector with 4000 individual members and nearly 200 organisational members. Membership reflects income to the sector of some 5 billion per annum and delivers more than £12 billion service-output covering all areas of social activity. Members are drawn from all types of Voluntary and Community Organisation (VCO), from large international charities to very small voluntary and community groups.

About the Institute of Fundraising in Scotland

The Institute of Fundraising in Scotland represents some four hundred individuals covering a broad range of Scottish voluntary and community organisations and provides training, networking and representation on fundraising issues. The Institute of Fundraising in Scotland acts as an interface with the public, media and sector stakeholders, developing policy in the voluntary sector arena and reacting swiftly to issues affecting the fundraising environment in Scotland.

Introduction

The Institute of Fundraising's evidence covers those areas of the Bill of particular relevance to fundraising, with special reference to the areas of public benevolent collections and self-regulation of fundraising. The Institute believes strongly in the benefits of self-regulation and is actively developing a self-regulatory model in partnership with the Voluntary and Community Sector (VCS) throughout the UK. At the same time, we also favour clearer and more consistent regulation of public collections, rather than a deregulated framework for them. Self-regulation needs a healthy, balanced environment of regulation to provide it with support and structure.

We welcome the accessible format of the Bill and the opportunity that we now have to comment on it. We recognise that this Bill, unlike its counterpart for England and Wales, has to set out a foundation of statutory regulation for fundraising that already exists south of the border. This presents an opportunity to develop regulation that captures what the public sees as “charities” and the draft Bill recognises as
“benevolent bodies”. We support this move as a fundamental shift enabling the consistent regulation of all charitable and benevolent activity for Scotland.

**Reserve Powers for Ministers to Introduce Statutory Regulation of Fundraising**

We support the inclusion of reserve powers for Ministers to make regulations pertaining to fundraising activities in Section 82 of the Bill. We also welcome the commitment to consult before any regulations are introduced.

The sector has worked in partnership throughout the UK over the last year to develop plans for a self-regulatory scheme for fundraising. The Executive and the sector should work together to develop the criteria against which the success of the scheme can be judged. A successful self-regulatory scheme should have targets that are regulated by the sector, rather than the Executive or its agents. The Executive should evaluate the success of the scheme over an agreed period of time.

The Institute of Fundraising recognises the pressure that scandals have brought to bear on both the Executive and Ministers in the last year. We welcome the commitment to developing strong and effective self-regulatory structures expressed in the Bill and look forward to helping to develop the regulatory framework that supports them.

**Background to Self-Regulation**

In 2002, following the publication of the Strategy Unit report, “Public Action, Private Benefit”, the Institute of Fundraising commissioned an independent report by Rodney Buse that examined the range of options available to the sector for setting up a self-regulatory scheme. The consultation process surrounding the Buse report has allowed the debate on self-regulation to move on from citing concerns that there was a lack of clear evidence to justify the introduction of a scheme, to determining how such a scheme can be used to drive up consistent standards in fundraising best practice throughout the UK. The Institute has achieved a broad general consensus of support for our proposals from the major umbrella bodies and the VCS as well as from our membership. We are now seeking to establish a system of best practice that incorporates the following:

- The capture of fundraising organisations through a voluntary membership scheme.
- A requirement from members of the scheme to abide by a set of Codes of Fundraising Practice. These standards cover the whole of the United Kingdom. Fundraisers and the Institute have a strong commitment to ensure national accessibility to the scheme in Scotland.
- A requirement that members must publicise their membership to supporters and donors by carrying of a quality mark.
- Donors having access to an independent complaints procedure if they fail to get satisfaction with their initial complaint to a charity. Donors should be able to access such a body in a fair and timely manner.
- A scheme that is structured in such a way that participation is not limited by either the size or the budget of an organisation. Any membership fee levied to fund the development of standards must not act as a barrier to the participation of small fundraising organisations.
- A scheme that puts responsibility on trustees and chief executives to participate in it and charges them with introducing systems to check that best practice is being followed. Such a scheme is designed to supplement and support trustees’ responsibilities for good governance.
- A self-regulatory scheme must be seen to work in full and effective partnership with existing regulators of fundraising activities.

**Commercial Participators**

The Institute believes that transparency in fundraising relationships is essential. We believe that contracts hold the key to more meaningful understanding of commercial participations than currently exists. The consideration given for goods or services or the royalty on a product or service should be specified by all commercial participator contracts; indeed, the “unit rate” and the proportion it represents of the return to the Commercial Participator ought always be clearly defined. It is not as straightforward to determine the total return to charitable causes. Total return of the participation to the
charity can only be defined following the audit of the participation and is therefore unlikely to be able to be defined with any accuracy prior to this.

We believe that this principle should be considered as part of any model contract that is developed with guidance from regulation supporting this Bill.

Professional Fundraising Declaration

Transparency of Collections
We welcome Section 82, which leaves the detail relating to commercial participators, professional fundraisers and other fundraising activities to regulation, if Ministers deem such regulations necessary. We also welcome the commitment to consultation before any such regulations are implemented. We believe this commitment recognises the complexity of fundraising activities and we welcome the flexibility and forward thinking that Section 82 provides.

The Institute believes that all collecting activity should be transparent. Where there is a direct cost attached to running a collection, collectors should be able to make the public aware of that cost. However, it is not always straightforward to form legislation for such declarations and therefore the flexibility of regulations that are not on the face of the Bill is preferred. We look forward to working with Ministers to develop these regulations.

A Discussion of the Difficulties of Forming a Fundraising Declaration
Many members of the public believe that all fundraising is carried out by volunteers and do not understand that the majority of voluntary income derives from professional fundraising activities. We believe that the current distinction between professional fundraisers and paid members of staff is damaging if misunderstood and complicated to explain in a short space of time on the street.

However, we would reiterate the point that we have made in previous submissions that the true distinction is between collections carried out by volunteers on behalf of a charity and collections undertaken by members of the charity’s staff or paid sub-contractors.

A straightforward statement that establishes that an individual is paid by the charity rather than being a volunteer is surely what a member of the public wishes to hear? We believe that if:
- a volunteer runs a collection, a simple statement should be made to that effect.
- a member of a charity’s staff runs a collection a statement should state that they are directly employed by the charity.
- a professional fundraiser runs a collection they should state that they are a paid sub-contractor of the charity and that a summary of the contract setting out the nature of their remuneration is available from the charity on request or in a hard copy carried by the fundraiser.

This would ensure that charities were able to place the fund-raising declaration in a clear, relevant and unambiguous context.

Prohibition on Professional Fundraising Without a Formal Agreement
The Institute strongly supports the powers proposed in section 80 and 81 of the Bill. Since the introduction of the 1992 Charities Act, the Institute of Fundraising has ensured that model contracts between charities and professional fundraisers, commercial participators and fundraising consultants have been freely available to the sector, acting as templates for those organisations lacking experience in negotiating such agreements.

In the light of developments in Scotland, as well as in England and Wales, the Institute has revised those contracts and placed them in the context of a new Code of Fundraising Practice. We hope that this new approach and format will prove to be supportive to the sector as it looks to implement professional fundraising agreements. A further Code of Fundraising Practice, Charities Working with Business also offers advice and guidance in this area.

We believe that the requirement in the Bill for a formal fundraising agreement will ensure that proper safeguards are established. We also believe that such contracts should establish methods of payment to fundraisers and remuneration to charities.
Public Benevolent Collections

Overview of Proposals

Context
The Bill sets out to establish the framework for licensing the range of public fundraising activity. Existing legislation is neither comprehensive nor effective and fails to cover the full range of collecting activity. Face-to-face fundraising (solicitation for direct debits) is not currently subject to regulation; the collecting activities of non-registered philanthropic and benevolent organisations are not subject to the same requirements or controls as those of registered charities; the definition of a public place does not equate to the public’s perception of it. All of these anomalies add up to a system that is difficult to enforce, hard to police and confusing to both public and collecting organisations alike.

Funds raised through public collections may generally be applied to any purpose and these unrestricted funds are vitally important to charities. Public collections allow a charity to promote awareness of its brand and its cause. Some forms of collection offer opportunities to engage in a direct dialogue, person to person, others to deliver communications setting out the charities’ objectives and what resources it needs to achieve them. Public collections also allow charities to expand donor bases (face to face fundraising has been particularly successful in helping charities to recruit new, younger donors). All of these combine to provide an opportunity for a charity to maintain a position in the public eye and potentially generate long-term, rather than short-term, support.

We appreciate that secondary legislation and guidance will set out much of the detail for regulating public benevolent collections. We welcome the inclusion of Section 91, which gives OSCR powers to issue guidance for Local Authorities. Many of the issues raised below could be included in such guidance. However, we raise these issues in this submission on the Bill to indicate how we believe public charitable collections should operate, to ensure a consistent, fair and proportionate system for charities and other bodies, that also enables Local Authorities to have a clear picture of legitimate collecting activity. We believe it is important that the Committee is aware of details of the scheme that may not be included on the face of the Bill but will be critical to the success of a new public benevolent collections scheme.

We believe that regulation of public benevolent collections should be fair, proportionate and consistent. The scheme should be comprehensive and allow any regulator of public charitable collections to have a clear picture of all legitimate collecting activity in any particular area, as this will help to reduce illegitimate activity. Application for a permit or licence to collect should be in two stages: first, checking whether the organisation is charitable, benevolent or philanthropic, and second, to check whether there is capacity for such collections or to notify the regulator of activity, if the collection is of goods or small and local in nature.

We appreciate that some of this regulation will be included in the Bill; some will appear as secondary legislation and guidance. It is important that regulations are implemented consistently. Whilst local authorities have a part to play in the regulation of public benevolent collections, we believe that OSCR has an important role in issuing guidance and ensuring Local Authorities interpret such guidance consistently.

Proposals in the Bill that the Institute of Fundraising Supports
We agree with and support the following key principles:

- The scope of the scheme should be extended to include recruitment using direct debits and standing orders
- The definition of a public place should be extended
- There would be no charge for licenses
- A right of appeal to sheriffs’ courts against the decision of the local authority will be established.
- Regulation for public benevolent collections will be extended to cover all charitable, philanthropic and benevolent institutions.

The principle of “exempt promotions” will continue as “designated national collectors”.
Proposals that Require Further Consideration

We believe that the following proposals represent significant issues within the existing structure and that their implications will need to be considered in some detail. We believe that their impact must be addressed.

- Powers of Local Authorities to refuse collections
- Appropriate forms of accountability for public collections
- Guidance issued by OSCR.

Certain operational aspects of the proposals within the Bill will also require consideration.

- Notification times for all collections and the corresponding notification period for the refusal of permission to collect
- Funding of new Local Authority diary-keeping infrastructure

Further proposals for inclusion in the Bill or Guidance

- The scope of the scheme should include a requirement of notification for those organisations and activities that are not subject to a requirement for a permit
- Local Authorities should maintain a record of all legitimate collecting activity, whether subject to a requirement for a permit or not
- Accountability for permitted collections should rest with the governing body of the collecting organisation and be demonstrated through the published accounts

We recommend that operating standards should be established between OSCR and Local Authorities that facilitate a unified and consistent delivery of the structure and processes for Public Benevolent Collections which could be supported by an annual audit encouraging a process of continuous improvement.

Consistency and Guidance

The Institute of Fundraising believes that binding guidance issued by OSCR could ensure, in combination with the Bill, the establishment of a clear, unified and, above all, consistent structure for the licensing of Public Collections (Section 91 of the Bill). We believe that such a structure should benefit charities and the public alike.

We recognise that the success or failure of the recommended scheme will rest in the detail of regulation and guidance and the ability of OSCR in ensuring that Local Authorities comply with the guidance issued by them. It will also depend on the capture of the scheme; we believe that all organisations that wish to conduct a public benevolent collection should be required to notify the relevant local authority at the very least.

We believe that it is essential to retain flexibility through the use of guidance to ensure clear understanding around the implementation of legislation. We see this is an appropriate principle but are concerned that Local Authorities may not regard such guidance as binding unless they have participated in its drafting.

The importance of clear, consistent guidance achieved through full consultation cannot be underestimated. Many of the problems with existing regulations arise because of the lack of consistency with which it is interpreted.

We believe that the guidance attached to the regulation should be clear and unambivalent when it sets out the criteria against which permission to collect is given or refused. This should not be left to be established through a process of judicial review. Though the mechanism for appeal through Sheriffs’ Courts has been established, few charities, particularly smaller ones, would be prepared to undergo the risk that it would entail.

Guidance cannot give powers to local authorities; it can suggest government’s proposed interpretation of regulation. It is for this reason that we believe that guidance, developed through consultation, should be statutory. However, if Local Authorities were satisfied that guidance, as drafted, is workable, the flexibility of non-statutory guidance would be preferable. We welcome Section 91 that gives power to OSCR to issue guidance in relation to public collections.
Notification for all Collecting Activities

Capturing All Collecting Activity

The Institute of Fundraising believes that all forms of collecting activity should fall within a unified scheme for Public Collections. Public confidence is damaged not by the collecting activities of responsible charities but by the activities of those outside the sector. Fraudulent collections are not frequent. However, it is often difficult for members of the public, local authorities or police to distinguish legitimate collecting activities from fraudulent ones. Increased awareness of new, consistent regulations will ensure that this is no longer the case.

Local Authority Administration of Licenses

We are concerned that it has proved difficult in the past to liaise effectively with Local Authorities, or to achieve consistent interpretation by Local Authorities of existing regulation. We believe that Local Authorities should maintain, in future, a record of all collecting activity and to issue permits based on that record, we believe that they should be supported in meeting that requirement through clear and unambiguous guidance interpreting the regulations. We welcome Section 91, allowing OSCR to issue guidance.

We further believe that consideration should be given as to how any scheme would be most accessible to collecting organisations and members of the public as well as cost-effective for Local Authorities to administer. An on-line system would certainly facilitate the process of making applications; it would also be an effective means of ensuring consistent application of guidelines as well as simplifying any administration of a diary system. We recommend that the funding implications of such a system should be considered as part of a regulatory impact assessment.

We believe that OSCR should have a defined role in verifying the status of collecting organisations. We believe that where a charity or philanthropic organisation is already subject to regulation by a recognised authority, such as the Office of the Scottish Charities Regulator (OSCR) or Companies House, Local Authorities should not have to undertake further checks relating to the effectiveness of the charity and should allocate permits to collect on the basis of capacity.

Proportionate Regulations and a Requirement for Universal Notification

Securing a license to collect would represent a disproportionate burden for small, local organisations running infrequent collections. Notification of the intention to collect, accompanied by the details of an individual responsible for that collection, would ensure that Local Authorities maintain a full record of all legitimate collecting activity falling within their jurisdiction.

Collections of Goods

The collections of goods raise specific issues. Sacks are dropped off door-to-door; there is seldom any direct, individual contact involved. Shops arrange to collect goods as stock levels fall, often at the last minute. Though we welcome Section 90, which allows Scottish Minister to introduce requirements for Local Authorities to receive notification of collections of goods, we believe that collections of goods should be subject to such a requirement of notification from the outset of the new operating procedures for public benevolent collections.

We believe that collections of goods should be subject to a requirement of notification in order to distinguish between legal activity and rare cases of misrepresentation. Charities should notify their intention to collect over a defined period in a specified area, rather than specify precise dates. We suggest that this should be on a standard basis, subject to the criteria set out in the Bill, as no issues of capacity or security are raised.

Conditions Relating to Collections

We believe that where the capacity to collect exists and where a charity has proved its fitness to collect by making acceptable returns to charity regulators, Local Authorities should allow access. We do not believe that a Local Authority is the appropriate body to determine the nature of collecting materials or the reasonable rate of return on a collection. We believe that Section 85 5 (d), (e) and 6 (c) should be removed from the Bill.
We believe that where an organisation can show that it meets the reporting requirements of the appropriate regulator, for instance, OSCR or Companies House, Local Authorities should not have the powers to scrutinise accounts or demand returns for collections unless there are exceptional (and defined) grounds for concern.

Capacity
Defining capacity is notoriously subjective. Differences over capacity have led to problems in agreeing collections between Local Authorities and charities. We believe that there must be an attempt to define capacity in guidance. This would ensure that Local Authorities and charities would have to apply guidelines consistently. Any definition must take into account

- the volume of traffic through a site
- the variation in volume (dependent on the time of day or day of the week)
- the physical characteristics of a site
- the reasonable number of collectors in relation to the above criteria
- the reasonable frequency of collections in relation to the above criteria.

The Public Fundraising Regulatory Authority (PFRA) has established a pilot diary scheme with Local Authorities based on an assessment of the above criteria. We believe that this pilot would be of considerable assistance in achieving a definition of "capacity" and a structure for ensuring equitable access for all organisations.

We believe that capacity is an issue that OSCR should consider in its guidance.

Further consultation must be carried out in this area between the Executive, Local Authorities, OSCR and collecting organisations to achieve a universal and consensual outcome. We welcome the provision in the Bill that allows for consultation with charities and their representative bodies, local authorities and such other persons as the regulator sees fit before such criteria are established.

Fair Access for Small and Local Collections
Small charities that wish to conduct small, local collections need to have equitable access to collecting opportunities. Local Authorities will have the opportunity or authority to assist smaller organisations to conduct a collection; we believe that the specific grounds on which they determine appropriate levels of access should be set out in guidance if a consistent and unified scheme is to be achieved. The criteria for 'small' and 'local' also need to be carefully established in guidance.

Definition of a Public Place
We support the broadening of the definition of a Public Place contained within the Bill. We believe that, just as it is important to ensure consistency in the registering of Public Collections, it is also important to ensure that wherever the public would consider a collection to be taking place in a public place that collection is suitably registered.

The Right of Appeal and Arbitration
We welcome the introduction of the right of appeal through Sheriffs’ Courts. We are concerned that issues such as the cost and length of the appeal process should be established. It has been suggested that even such a local approach could be onerous and inflexible for small charities and that an additional arbitration process should be considered. We believe that the costs of both appeal and arbitration will be determined by the nature of the legal advice necessary to support each appeal. The role of OSCR as an experienced and sensitive regulator of charitable activity will be critical in ensuring that disputes are seldom allowed to escalate to legal action.

We recognise that the principle of arbitration is attractive, but have difficulty in determining an appropriate vehicle that would allow for it. Furthermore, we do not believe that sufficient research has been done into the structure of an appeal through Sheriffs’ Courts.

We therefore recommend that a commitment to further research of the arbitration process be included within the Bill.
Implications for Charities and Local Authorities

Charities
We do not believe that the Bill, as it stands, will address the needs of charities in relation to existing legislation.

Local Authorities retain discretionary powers of interpretation of regulation making consistency across Scotland unlikely. Local Authorities are not the appropriate body to determine the nature of reasonable returns on collecting activities or the nature of collecting materials and these powers should be removed from the face of the Bill. OSCR, as the charity regulator, is able to provide informed guidance in this area. We welcome Section 90 which gives powers to OSCR to issue guidance, but would prefer this guidance to be issued in statutory form and not as good practice guidance.

The full range of collecting activity does not fall under the Bill. It will be difficult to control fraudulent activity without universal notification. We welcome the inclusion of powers for Ministers to introduce a notification requirement for the collection of goods, but believe that this requirement should be included from the outset of the new regime.

Local Authorities
While the recommendations in the Bill will not make significant changes to the regime for Local Authorities, we feel that, in the long-term, this represents a lost opportunity to streamline the existing structure and reduce the administrative burden of licensing for them. We believe that a clear definition of the relative roles of Local Authorities as access providers (possibly supported by such organisations as PFRA) and direct regulators (OSCR, Companies House and the Charity Commission) would help to reduce any administrative burden on Local Authorities and at the same time support them in developing greater awareness of charitable structures and working methods.

Support for Local Authorities
Second, we believe that Local Authorities should be encouraged and supported in developing an online applications procedure. This would be cost-effective and simple to use and administer. It would however, require research, consultation and investment.

We recognise that the Bill gives powers to Ministers to make grants to the sector to defray costs; we believe that this would be a suitable object of those grants. The Bill allows grants to be made to any person “enabling institutions generally better to implement their purposes”. We welcome this provision.

Conclusions for Public Benevolent Collections
We believe that these proposals offer an opportunity to achieve a unified licensing scheme for Public Benevolent Collections throughout Scotland. However, if these proposals are to work, regulators, access providers, charities and the public, must support them.

Further consultation, including representation from Local Authorities, to achieve appropriate regulation and guidance will be essential to ensure that the spirit of the legislation is correctly interpreted and applied. We welcome the opportunity to contribute to that process.

Trading as a Reserved Matter

The Strategy Unit Report leading to the Draft Charities Bill for England and Wales made recommendations that charities should be able to conduct trading activities (other than primary purpose trading) without the need to establish a separate trading company.

While we recognise that such a change would require education of trustees and staff as to the nature and degree of risk involved in this area, we feel that there would be benefits to some classes of charity were they able to do this. However, trading is a reserved area and therefore the decision to exclude these proposals from the Charities Bill for England and Wales means that Scottish Charities will not be able to make changes to the structure of their trading activity.
We would welcome a clarification of the views of the Executive in this matter. While we recognise that this is not a matter for the Bill, we believe that Scottish Charities should be asked for their views on this matter as a separate issue and would welcome the opportunity for further consultation on it.

Scottish Registration for All Charities Operating in Scotland

We recognise the requirement that all charities operating in Scotland will be required to register as Scottish Charities. We welcome the commitment to joint working as set out in Section 20 of the Bill. It is not clear, however, what reporting requirements that will entail for charities operating in jurisdictions throughout the UK.

We also recognise that for a small class of charities, lack of consistent definition of public benefit throughout the United Kingdom could potentially impact on their recognition as Scottish charities.

We believe that the Bill should establish whether organisations recognised as charitable in one jurisdiction would have the right to charitable status in another.

Role of OSCR in Supporting Public Confidence in Charities

We believe that the role of OSCR will be critical to the successful implementation of these proposals.

Clear procedures for reporting and accounting for charitable activity, transparent and appropriate procedures for investigations of charitable activities and an open procedure for appeals, will all enable charities to communicate more confidently with the public.

The Institute welcomes the establishment of OSCR and the impact that it will inevitably have in these areas. We believe that OSCR’s role should allow it to act as the principal agency in supporting and growing public confidence in the Scottish voluntary and community sector.

We welcome the flexibility allowed for in the Bill in relation to OSCR’s dual role as regulator and adviser of charities.

The Institute believes that the regulator should have a strong role in working to promote best practice. We believe that this will be best accomplished by OSCR working in partnership with the sector. However, we do not believe that this role can be set out in legislation and believe that it will develop as OSCR evolves.

We also welcome the proposed form of Non-Ministerial Department for OSCR, believing that this will provide an appropriate degree of independence and accountability.

Charity Trustees and Their Duties

We do not believe that in the main, it is necessary for a response from the Institute of Fundraising to address matters having no direct impact on the fundraising process.

Duties of Charity Trustees

The Bill establishes that Charity Trustees must ensure that a charity exercises its functions in a manner which is consistent with its purposes. We believe that the Bill should state at this point the duty of a Charity Trustee to act independently of outside interest to ensure that the best interests of the charity are served.

We believe that this would better satisfy the stated aim of the Executive as expressed in the consultation document for the Draft Bill (page 18) that charities should be independent. The duties set out in the Bill are intended to ensure that Charity Trustees are free from external direction.

Public Benefit (Charity Test)

We welcome the clarity that the Bill provides in relation to the list of charity purposes. We acknowledge that the definition of Public Benefit will be difficult to achieve. We believe that OSCR will
be best placed, following full consultation, to determine whether or not organisations meet any future Public Benefit test. We believe that in defining Public Benefit certain principles should be taken into account. Public Benefit should ensure the broadest range of organisations deliver maximum benefit to the greatest number of beneficiaries. It is vital that over time proper application of the Public Benefit test results in charitable funds being applied to truly charitable purposes.

We believe that the criteria set out in the Bill are appropriate.

**Registration of All Charities Carrying Out Any Fundraising in Scotland**

We believe that the requirement to register with OSCR dependant on the scale of the operations carried out by charities is a pragmatic approach that we support.

Maureen Harrison
Institute of Fundraising Scotland
9 December 2004

**WRITTEN EVIDENCE FROM SCOTTISH COUNCIL OF VOLUNTARY ORGANISATIONS**

**Introduction**

About SCVO
SCVO is the umbrella body for the voluntary sector in Scotland. Our 1200 members represent a vast constituency covering the majority of charitable activity in Scotland. This response is endorsed by the elected SCVO Policy Committee, which represents large and small, local, national and international organisations, covering many different fields of activity.

About Charity Law
For the past 10 years SCVO has campaigned to reform the out-dated and unsatisfactory state of the law for charities in Scotland. We were pleased to have been involved in the consultation that took place prior to the publication of the draft Bill, which we broadly welcomed and to which we responded as part of the formal consultation process earlier this year. Our response can be accessed online at www.scvo.org.uk/policy/law/charity_law/SCVO_Response_to_Charity_Bill_Final_Version_250804.htm

About this Response
In keeping with our response to the draft Bill we welcome the Bill as introduced. A Charities Act ought, in our view, to have the principal purpose of establishing a framework in which charitable activity in Scotland can flourish. With the inclusion of the proposals we make below we believe that public confidence in the worth, credibility and integrity of Scottish charities can be sustained.

This response highlights areas that are of continuing concern to us, reiterates a number of our proposals that the redrafted Bill has not addressed and deals with issues raised by provisions in the Bill that were not present in the draft.

**Defining Characteristics**
We have once again assessed the Bill against the defining characteristics of charities as we see them - non-profit distribution, volunteer leadership, independence, and the provision of a public benefit.

**Key Issues**

1) **Independence and Governance**
Section 7 (3) (b) states that a group cannot meet the charity test if ‘its constitution expressly permits a third party to direct or otherwise control its activities’. This measure would end the situation whereby Non-Departmental Public Bodies (NDPBs) with constitutions which require them to accept ministerial direction are able to attain charitable status. However, for those NDPBs that are not established in that way it would change nothing. In fact, section 100 (a) effectively allows Scottish Ministers to change the orders that have set up NDPBs in order to enable them to retain charitable status.
The provision of section 7 would not prevent government (national or local) from establishing charities and taking any number of seats on the board. Once there they would naturally no longer be third parties but we are extremely concerned that this ‘solution’ does not guarantee independence in a way that the proposals made by the McFadden Commission would do. Instead it relies on charity trustees fulfilling their duty to act in the interests of the charity. This manifestly failed to happen in the case of the Scottish Natural Heritage, despite it being a principle of existing charity law. In general, experience suggests that reliance on such a non-mechanistic solution is a weak safeguard of independence.

In view of this, we continue to advocate the recommendation of the McFadden Commission that the Bill should provide that no public sector body may appoint more than one third of the charity trustees of a charity.

We welcome the use, throughout the Bill, of the term ‘charity trustee’ in place of ‘charity steward’.

**The Responsibility of Charity Trustees**

Section 65 deals with the issues that were contained in Section 50 of the draft Bill. We welcome the removal of the provision that would have placed a differential responsibility upon those charity trustees with “any special knowledge or expertise” as opposed to their colleagues, when the group of charity trustees were discharging their duties.

A number of sections of the Bill make reference to a breach of duties being an offence. For example, section 46 makes it an offence for a person to fail to comply with a requirement of an ‘appointed person’ to, for example, enter premises, remove documents or assist him/her. Section 65 makes it an offence if a charity trustee does not follow procedure with respect to a change of the charity’s name. We understand that ‘offence’ means ‘criminal offence’ (and hence a criminal record). We fully appreciate the need to ensure compliance with the Act but we wonder whether making charity trustees guilty of criminal offences, when they may have simply made mistakes without any criminal intent, is an appropriate course of action. It could deter people from volunteering as charity trustees and provoke demands for remuneration and indemnities. If charity trustees make mistakes they should be helped. The criminal law should be reserved for deliberately wrongful acts, especially those involving fraud or theft. We therefore suggest that there should be scope for penalties to be issued in circumstances using civil law where, for example, ignorance or incompetence rather than criminal intent is the cause of a problem. If trustees are proven to be incompetent they should be removed. Being charged with a criminal offence should only take place when the relevant authorities are convinced that a criminal intent lay behind an action.

We continue to recommend that OSCR or the courts be given an explicit power similar to that to be given to the Charity Commission in the Bill for England and Wales (Clause 29) whereby the Commission can relieve trustees from liability for breach of trust or duty if they have acted ‘reasonably and in good faith’.

We trust that sufficient resources will be made available to the relevant authorities to take forward cases where people have breached the Act.

**Payment of Charity Trustees**

SCVO believes that the unpaid voluntary character of charity trustees is a distinguishing feature of the charity sector as of the wider voluntary sector. We are therefore pleased to see in section 66 that the Executive has agreed with our suggestion to include conditions, along the lines of those contained in the draft English and Welsh Bill, under which payment to charity trustees may be made, that is, for delivering a service to the charity. This section includes the stipulation that a minority of the charities trustees are in receipt of payment at any one time.

However, we are concerned that the Bill as it is currently worded would not in fact comprehensively achieve the aim of preventing charity trustees from being paid solely for their duties as trustees.

The explanatory notes (paragraph 76) say ‘Section 66 provides that a charity trustee may not normally be paid for carrying out duties and functions of being a charity trustee, unless specific authority for this is provided.’ This ‘specific authority’ can be granted via provisions in Section 66 (4) (b) and (5) (a). These provisions appear to us to allow an almost limitless flexibility to pay charity trustees for carrying
out the duties and functions of being a charity trustee. This is because the former section allows that charity trustees can receive remuneration ‘otherwise than by virtue of such an agreement (to deliver a service)’ and the latter allows that a charity trustee is ‘entitled to receive (remuneration) by virtue of any provision in the charity’s constitution (etc)’.

It is not clear to us whether ‘any provision of the charity’s constitution’ means
a) that the constitution must contain explicit powers for charity trustees to make such payments
b) if there is no explicit prohibition from doing so in the constitution it means that the charity is allowed to make payments
c) if general powers would permit payment to be made, for example, the power: ‘To do anything which may be incidental or conducive to the furtherance of any of the associations objects’ which is a power very commonly granted by constitutions.

We would advocate payment only for specific services in circumstances that satisfy the section 66 conditions and as such would suggest the amendment of the Bill to make clear that payment for carrying out the duties and functions of being a charity trustee is otherwise prohibited.

We understand that other enactments may permit payment to charity trustees but we assume that this will be because they simultaneously hold another title (for example, director of the company) and it would be under the auspices of that title that payment would be made. We do not understand why other enactments would make provisions for matters to do with charity trustees solely in their role as charity trustees when then opportunity to make all such provisions (insofar as it is possible) should be taken with respect to this Bill.

**Paid Staff as Trustees**

We do not see anything in the Bill that would prevent paid staff of a charity from being charity trustees of that charity. As the inverse of the issue of payment of charity trustees we do not believe this is appropriate either as it allows for an inherent conflict of interest at the heart of charity governance. We suggest that the Bill is amended to explicitly prohibit this situation.

**ii) Public Benefit**

We very much welcome the fact that the Executive has accepted the case for some greater definition of public benefit and we welcome the inclusion of criteria in the Bill. However we do not believe that those proposed are yet quite adequate.

The language of the formulation adopted is convoluted and obscure. The requirement to have ‘due regard’ to the balance between the public benefit provided by a body and a) benefit to the members of the body or other persons who are not members of the public and b) disbenefit to the public does not place the regulator under an obligation either to ensure that public benefit is the overriding purpose and effect of the body nor even that a clear balance in favour of public benefit is achieved. It should always be the case that public benefit clearly outweighs any other consequences, including public disbenefit and private benefit, and the Bill should state this explicitly.

Where the benefit may only be provided to a section of the public the only criteria to which the regulator must have regard is whether any condition on obtaining the benefit is ‘unduly restrictive’. This is unacceptably vague, gives far too much ‘flexibility’ to the regulator and gives no confidence that certain charities will not be able to continue to make their services available to a small section of the public by virtue of charges which may reasonably be considered by the general public to be extremely restrictive.

The proposed criteria could allow charities to avoid offering, on balance, a genuine public benefit while taking advantage of the benefits of charitable status – a situation we hoped this Bill would prevent.

The only guidance promised on what any of this means will come from OSCR, following consultation with ‘such persons as (OSCR) sees fit’ - which may or may not include the voluntary sector. The experience of the voluntary sector with respect to being consulted by public authorities gives us no confidence that this will result in the sector’s opinions being given due weight in comparison with those of OSCR.
There will be no reference back to legislators for approval as in the case of statutory guidance. Overall we feel that the provisions fail to allow legislators the level of input to these criteria that we feel is appropriate. They are less than those that may emerge in England & Wales; where the Joint Committee that examined that draft Bill recommended that there be some form of statutory guidance on the meaning of public benefit.

The Executive also refers to the situation with respect to the Inland Revenue (IR) accepting a Scottish definition but, to our knowledge there is no clear evidence - or publicly stated position - that suggests the IR will be unable or unwilling to work with two definitions or the decisions of two regulators.

The Bill as is passes up the opportunity to more firmly establish what it means to be a charity without relying on (largely English) case law and interpretation (often by the Charity Commission for England and Wales). We therefore reiterate our call for strong criteria for public benefit to appear in the Bill in the form that we originally suggested in our response to the draft Bill.

iii) Charitable Purposes
We are satisfied that the inclusion of the reworded thirteenth purpose (‘m’ in section 7(2)) indicates the Executive’s intent to align with the potential Westminster Bill as far as is possible given the Bills will be subject to change via two separate Parliamentary processes.

We understand that case law in England and Wales has, over time, made it permissible for the advancement of trade and commerce and other forms of economic activity and growth etc to be deemed to have a charitable purpose, for example, businesses owned by and run for the benefit of the community. We assume the intention is to catch such measures under the ‘advancement of community development’ but we wonder whether, in the context of the growing social economy, it would be prudent to include a specific charitable purpose to cover the advancement of such areas – provided, of course, that they were for the public benefit.

We applaud support to any part of the voluntary sector that relieves it of inappropriate financial burdens and so welcome the proposal (section 96) that will formalise the extension of mandatory rates relief to community amateur sports clubs. However we wish to make the following points with respect to this issue:

- we are a little confused as to why a financial measure of this type appears in a Bill primarily concerned with charity law
- the definition of ‘community amateur sports club’ to which the Bill refers includes the concept of ‘eligible sports’. This covers some sports that might generally considered by the public to be of less benefit to them than others, for example, shooting. Yet because these organisations are to receive rates relief automatically - as opposed to via charitable status - they will never need to demonstrate public benefit. Other types of organisations can generally only access rates relief via charitable status. Thus it would be possible, for example, for a local shooting club to automatically enjoy rates relief while other worthwhile local, non-sports, non-charitable organisations would not.

In fact the definition of a community amateur community sports club has much in common with the definition of a charity. In view of this perhaps a better way to deliver the policy intention would be to encourage such clubs to become charities, thereby being called to demonstrate their public benefit and consequently enjoying a range of benefits, including rates relief.

iv) Accountability
We have previously offered our support for the establishment of the Scottish Charities Register. We welcome the provision for OSCR to be able to exclude certain details of specific charities from the public version of the Scottish Charities Register if OSCR believes inclusion might ‘jeopardise the safety or security of any person or premises’.

v) Regulation
We welcome the few small alterations to the proposals for OSCR’s role and powers particularly

- The requirement for OSCR to publish a report of an inquiry if the charity or person concerned asks them to. This will safeguard the reputation of those organisations found to have done no wrong after an OSCR investigation.
The removal of the requirement to exclude charity trustees from being eligible to sit on OSCR's board. However, we are not convinced that the appointment of OSCR's board by Scottish Ministers allows for sufficient independence from government. We therefore reiterate our call for appointments to be made by the Scottish Parliament.

There is still nothing in the Bill that places OSCR under a duty to discharge its functions in a manner that will generally protect or enhance the integrity and assets of the sector or encourage public confidence in the sector. We believe placing OSCR under such a duty would help make its practice more effective. Certainly OSCR should be obliged to take measures to protect the integrity of charities that are not themselves under investigation but which are in partnership with a charity that is.

While on general grounds we believe it is undesirable to fragment the system of regulation, we appreciate the practicalities that have led to the inclusion in the Bill of the provisions of Section 38. However we are concerned that Communities Scotland (on behalf of Scottish Ministers) – or indeed any other public authority – while expert in their own field may not be or come to be as expert as OSCR will presumably become in the field of charity law. We are also concerned that such fragmentation could lead to inconsistency through the different practice of various regulatory bodies acting with respect to the same issue (charity law). Furthermore it is not clear to us why the Bill gives OSCR's powers to Scottish Ministers with respect to Registered Social Landlords yet OSCR will have the discretion to delegate or not in other sub-sectors of the voluntary/charity sector.

We do not believe that the Bill as proposed allows the same degree of independence and accountability in the regulation of RSLs (by a government agency) as that it affords to the rest of the sector via regulation by OSCR (a non-ministerial department). We believe the situation should be remedied by the requirement that OSCR and Communities Scotland (or a future equivalent) establish working protocols, the details of which could be set out in regulations at a later date.

We are disappointed that there is to be no free third party right of appeal to the Appeals Panel on public interest grounds. We continue to believe that this would be a more effective system than the Public Services Ombudsman or judicial review.

In our response to the draft Bill we argued that the Appeals Panel should have the power to award compensation to charities, charity trustees and others who have suffered financial loss as a result of a wrong decision by OSCR. We still believe that the Bill should contain a provision to this effect. OSCR will strive harder to be fair, just and proportionate if the results of its mistakes have a financial implication for OSCR.

In keeping with that position we disagree with Section 75 (6) insofar as we interpret it to prohibit the awarding of associated costs to those who have appealed a decision of OSCR to the Appeals Panel. The section should be removed.

We would as a consequence argue that Section 77 should expressly permit the Court of Session to award costs to those who appeal a decision of the Appeals Panel to that court.

We also believe that the right of appeal for both charities and third parties should be to the Sheriff Court rather than directly to the Court of Session.

vi) Fundraising
We reiterate our call for public investment to support a Scottish self-regulation initiative.

vii) Diversity
We welcome the further detail concerning Scottish Charitable Incorporated Organisations.

Our position with respect to mutual and self-help organisations remains that they should be eligible for charitable status, provided they can satisfy the charity test - including the provision of an overriding benefit to the public. We believe that our proposals for criteria for public benefit would significantly help these organisations to attain charitable status should they apply for it. In fact, we are hopeful that even if the current section on public benefit was left unaltered it would allow the regulator to consider these organisations for charitable status. However because of the lack of greater clarity on this issue we feel it is absolutely essential that the regulator, via guidance, is left in no doubt that mutual and self-help
organisations should not be precluded from applying for charitable status but that each case should be considered on its merits with respect to the charity test.

viii) Equality
We welcome the duty placed upon OSCR to perform its functions in a manner that encourages equal opportunities and, in particular, the observance of equal opportunity requirements.

ix) Compliance
As we said in our response to the draft Bill the Act will place additional responsibilities and some burdens on charities in terms of compliance.

In the Financial Memorandum contained in the Explanatory Notes the Scottish Executive deals with issues of compliance costs. They include an estimate that ‘training seminars to raise awareness of the new legislation amongst charities’ would cost £150,000 for the sector based on £5,000 per 100-delegate event. This would appear to be based on holding 30 events reaching 3000 attendees. It is utterly unclear where the 3000 figure comes from.

While we believe the sector will see the benefit of changes and accept there will be some associated cost we believe that considerably more people would require direct training of the kind described. Given any shortfall between training costs and available funding would impact upon the sector itself we consider the figure of £150,000 to be wholly unrealistic and that a figure ought to be arrived at only after proper consultation with the sector.

x) UK Dimension
Trading is a reserved matter. We take this opportunity to restate our belief that charities should have the freedom to make their own decision about what form of trading best suits them. Therefore we support a permissive regime whereby it would be legal for any charity to trade either within the charity or through the use of a trading company as the charity saw fit and look forward to measures in the Westminster Charities Bill to remedy this situation.

Other Unresolved Issues

Section 19 Removal from the register: protection of assets
We believe what is now section 19 to be an over complicated provision intended to address an unlikely set of circumstances. We believe that an organisation no longer wishing to be a charity should be wound up and the assets (income and property etc) accrued while it was a charity transferred to another charity.

Section 6 Applications: further procedures
We do not agree that Ministers should have the power to make further provisions regarding applying and determining applications for registration. Such provisions should be on the face of the Bill.

Section 68 Disqualification from being Charity Trustees
The Bill omits a requirement for OSCR to maintain a full publicly available list of people that it has disqualified from being charity trustees. We would prefer that OSCR be subject to such a duty. In its absence we assume that as part of the process of checking applications for charitable status OSCR will check the details of proposed trustees against the records it holds of disqualified people. We believe that however provided such a checking measure will assist in generating public confidence in the regulatory regime.

Section 34 Powers of Court of Session
We think it would be useful if it were made clear that OSCR will pay the costs of judicial factors. Evidence from England and Wales suggests that there can be an unnecessary use of Receiver and Managers at a cost to charities of sometimes hundreds of thousands of pounds. We believe that only if OSCR pays for them will they be used appropriately.

Section 46 Failure to provide statement of account
It is proposed that charity trustees are to be personally liable for the expenses of an accountant appointed by OSCR to produce charity accounts when these are late. We do not agree with this proposal. There are lots of understandable reasons why smaller charities may be a little late with
accounts. A small sliding scale of fines for charities would produce the necessary incentive and a satisfactory result in nearly all cases. In other cases OSCR should remove and replace misbehaving or incompetent trustees, rather than fine them.

Section 44 Endowments
We understand the provisions of this section to refer to the register of educational endowments. We believe that this register should not be kept separately from the Scottish Charity Register but that educational endowments should be added to the latter.

Section 78 Interpretation of Part 2
Unless there is a legal reason not to do so the internet and the world wide web and cinema screenings that are open to members of the public in return for payment or otherwise should be included as well as ‘radio and television programmes’. If this cannot be done because of the balance between devolved and reserved powers the Executive should lobby the UK Government to legislate accordingly.

Section 82 Regulations about fundraising
Scottish Ministers should, in consultation with the sector and the regulator, agree and publish the criteria by which they will judge the success of self-regulation and the circumstances that would trigger Ministerial initiatives for further regulation.

Conclusion
The actual Bill represents a significant improvement on the draft.

We suggested the draft bill provided the basis for a robust and effective framework of regulation within which the charitable sector could flourish and grow and that the public could have confidence in.

On examination of the actual Bill we are convinced that it will provide the required framework only if the issues we raise are properly addressed in the way we outline.

We are hopeful that in one way or another the Bill can be altered to do that and thereby become the effective piece of legislation that we all agree is so necessary for Scotland.

Andrew Jackson
Scottish Council of Voluntary Organisations (SCVO)
9 December 2004

WRITTEN EVIDENCE FROM THE NETWORK OF COUNCILS FOR VOLUNTARY SERVICE (CVS) SCOTLAND

Background
There are 58 CVS in Scotland, which offer a range of services to Scotland’s voluntary sector at local level. CVS are in touch with 26,000 organisations.

A significant part of their work is assisting organisations to improve their governance by looking at legal issues, and internal policies and procedures. A significant number of new charities ask their local CVS for help in writing their constitution, and in gaining recognition as charities.

The Charities and Trustee Investment (Scotland) Bill is welcomed by the Network. Some CVS have submitted formal responses, but welcome this chance to give evidence to the Committee.

SCVO now offers direct support and development to the CVS Network through its Networks Division. The following issues have been collated from direct contact with CVS.

CVS views show general support for the issues raised in SCVO’s response, but in particular the following are issues of concern:
Ch 2 Section 7 The Charity Test Charitable Purposes

Divergence of language between the Draft Scottish Bill and Charities Bill for England and Wales could create difficulties where alignment is desirable across the UK.

(2) (m) may need interpretation. There are activities that do not fit easily under the heads of charity; examples include development trusts, community radio, community newspapers, advocacy and community transport. Can the Bill, or statutory guidance, ensure that activities which demonstrate public benefit, can be deemed charitable even when they might not fit easily under any of the specific headings?

Although not directly linked to the new Bill there is concern that the current difficulties being experienced by organisations seeking charitable recognition now, might not be alleviated without some clear guidance. CVS report long delays and difficulties for some new organisations seeking recognition. CVS hope that OSCR will start afresh within the provisions of the new legislation.

CVS consider the Inland Revenue’s current practice of asking for business plans is unacceptable and inappropriate when dealing with fledgling organisations. Organisations seeking to become charities are at different stages of development, and many organisations are not able to provide such documents. We would hope that OSCR, would use its power in section 4. (d) (ii) with discretion and understanding. Guidance on this should be provided.

Ch 7 SCIO

Will the level of liability for SCIO stewards be prescribed? If not, how will it be decided?

Ch 9 General

The independence of the sector is highly prized by local organisations. There is support for SCVO’s proposal that the Bill should include the MCFaddyn provision that no public body may appoint more than a third of the trustees of a charity. There is disappointment that there is not clearer wording in the Bill about the future status of NDPBs. Although there is more detail in the supporting documents to the Bill, CVS would suggest that it might be necessary to include stronger provision in the Bill itself to safeguard independence.

There is no evidence of support for the term Charity Steward, and the Network therefore welcomes the use of the term Charity Trustee.

Payment of trustees

The sections on payment of trustees should be tightened up so that it is clear that trustees cannot be paid to be trustees, but may be paid for specific work which calls on their expertise.

The voluntary nature of charities is what separates them from other sectors. People serve on committees because they care about the cause being tackled, to introduce payment to trustees would remove this unique element.

There is strong support for SCVO’s proposal that paid staff of a charity should not be eligible to act as trustees of that charity. Failure to specifically bar staff members from serving as trustees will create a conflict of interest on committees/boards in charities that do not prohibit this practice in their constitution. At the very least there should be specific guidance on trustees being unable to take part in decisions about their payment.

• There is concern that funding streams such as Future Builders, with their emphasis on public service delivery and income earning, may create conflict with charity law definitions.

Public service commissioners, Communities Scotland, OSCR and charities themselves need to ensure that they check contracts or other agreements so that they do not compromise charitable status through receipt of payment for delivering public services.
There is strong support for SCVO’s proposal that Charities be allowed to decide for themselves the most appropriate vehicle to use for trading activity.

- Although not directly linked to the principles of the Bill, CVS have expressed concern at the level of demand for their services that will result from the Bill. We would ask that costings for training be re-visited and that consideration be given to the level of work for umbrella bodies that will result from enactment of this Bill.

Collated by Margaret Wilson
Networks Division, SCVO
9 December 2004

WRITTEN EVIDENCE FROM VOLUNTEER DEVELOPMENT SCOTLAND

A Submission from Volunteer Development Scotland

Volunteer Development Scotland welcomes the publication of the Draft Charities and Trustee Investment Bill and its general proposals. We fully support the view of the Scottish Council for Voluntary Organisations that there are four defining characteristics of charities: non-profit distribution, independence, the provision of a public benefit and, importantly from a VDS perspective, volunteer leadership.

We believe that to ensure the future well-being and integrity of charities they will have to demonstrate engagement with the communities of place and interest they serve. Crucially this will include the ability to engage the public not only as potential financial donors to the charity, but also as volunteers actively participating in achieving the charity’s stated aims and objectives.

Charitable Purposes and Public Benefit

VDS welcomes the proposed extension of categories of charitable purpose to include such new areas as the promotion of human rights and areas such as sports and community regeneration.

VDS is disappointed that the draft bill sidesteps the issue of public benefit, and as such we fully endorse the view of SCVO that the provision of explicit criteria of public benefit is critical to the effectiveness of the Act. We take this view not simply to deprive organisations of their charitable status and the benefits it brings, but because we believe that there will be genuine confusion in the public mind as to how those organisations which appear to offer services to small and often privileged sections of the community are providing a public benefit and are therefore entitled to charitable status. We endorse the recommendations for a public benefit test contained in Appendix A of the SCVO response.

We strongly agree with SCVO that a benefit to the public should be understood in one of three senses, one of which is “a benefit accessible in principle to the whole public”. We believe that the Act should clearly state that the promotion of volunteering is an example of a benefit accessible to the whole public. Alternatively the 13 charitable purposes given in the Draft Bill could be amended so that section 2 (e) the advancement of civic responsibilities or community development becomes the advancement of citizenship or community development. We believe that the phrase civic responsibility places too much emphasis on duty whereas citizenship implies a fuller, more balanced idea of rights and responsibilities. It could then be made explicit that the advancement of citizenship includes the promotion of volunteering – as we believe happens with the Draft Charity Bill for England and Wales. This would bring the two Draft Bills into alignment. It seems to us that it makes little sense to have the two bills diverging on this important issue.

Charities and Volunteering – An Opportunity for A Renewed Sense of Community Engagement

If the vision of a volunteer led charity sector is to be strengthened, charities must be encouraged to offer volunteering opportunities to as wide a section of the community as possible, not only as office bearers or committee members but also in delivering the charities aims and objectives. If charities are to continue to flourish and to maintain public confidence and goodwill they must show that they are
representative of the communities of place and interest they serve, that they are firmly rooted in the community and that the community is seen as a key resource in tackling the issues the charity is set up to address. In particular, opportunities should be made available to those sections of the community which research has shown are under-represented in volunteering: disabled people, those from lower socio-economic groups, young people, black and minority ethnic groups and ex-offenders. Clearly, the involvement of volunteers is crucial to the operation, success (and indeed the survival) of charities.

A charities Act should contain a general requirement on charities to discharge their responsibilities “in a manner which encourages equal opportunities and, in particular, the observance of equal opportunity requirements”. We strongly believe that offering volunteering opportunities to as broad a section of the community as possible is one of the best means available to organisations to meet this requirement. Explicitly encouraging charities to promote volunteering would give them the opportunity to make connections with the Scottish Executive’s Strategy for Volunteering. One of the key strands of the Strategy is to dismantle the barriers to volunteering and to increase the numbers of volunteers from under-represented groups. It is encouraging that people from all sectors of society in Scotland demonstrate a willingness to volunteer. However, it is clear that while some people are quite ‘volunteer ready’, others are at a further distance from actually taking up an opportunity in what is increasingly being seen as the ‘market place’ in volunteering. To ensure a continuous flow of volunteers, charities should offer opportunities at every level in the organisation. This will help to give individuals the confidence to eventually progress to an office bearer/management committee member position. The majority of charities (63%) have been set up to provide a service and social welfare is the largest single area of activity (43%). Again, we believe that these figures highlight the need for the involvement of the community at all levels of the operation of charities.

Charity Trustees

The draft Bill proposes the term ‘charity steward’ in place of ‘charity trustee’ to describe those legally responsible for directing Scottish charities.

We believe that the use of the term Charity Trustee should continue – it is very widely established and accepted throughout the UK and we see little benefit it changing it.

We agree that the unpaid, voluntary character of charity trustees is a distinguishing feature of the charity sector, as it is of the wider voluntary sector. We therefore oppose any move to relax the current law against the payment of charity trustees for discharging their normal duties as trustees. Trustees should of course continue to be eligible for the reimbursement of expenses such as travel, care costs and subsistence. Provision should also be made for Trustees to have access to any special aids or equipment they might require to enable them to volunteer. (The provisions described above should of course be available to all volunteers in a charity).

To encourage people to become charity trustees and to ensure that charities continue to be led by volunteers we urge either the Scottish Executive or OSCR to publish clear guidelines, plainly written in all of Scotland’s languages, on the new Act and on the responsibilities it places on trustees. This is a vitally important opportunity to encourage our citizens to become involved in helping to organise and run charities, but it must be made as clear as possible what people are actually signing up for and what will be expected of them.

We believe that the effective running and governance of charities is likely to be a key issue. If financial resources are to be made available to train charity trustees we would argue that it should include training on how charities can develop a strategic approach to all aspects of volunteering in their organisation. Given the central role volunteers play in the management and operations of charities we believe that more considered, robust and properly resourced plans on volunteer engagement need to be developed by charities. Training on this front should be based on the recently published Voluntary Sector National Training Organisation Standards in the Management of Volunteers and the new Investors in Volunteering initiative. The potential benefits of investment in this area would include

- Charities taking a strategic approach to citizens’ engagement (as volunteers) in delivering their aims and objectives, and recognising the need to resource volunteering
• Charities operating inclusive practice in citizens’ engagement by working with people to
develop a range of opportunities for them to participate as a volunteer with the charity. The
intention here is to broaden the range of people volunteering.
• Charities better able to release the stated willingness of people to volunteer.
• More effective volunteering, which is of prime concern to people who volunteer.

Background Information

Definition of formal volunteering
“Volunteering is the giving of time and energy through a third party, which can bring measurable
benefits to the volunteer, individual beneficiaries, groups and organisations, communities, the
environment, and society at large. It is a choice undertaken of one’s free will, and it is not motivated
primarily for financial gain or for a wage or salary”

The United Nations classify volunteering into four groups, which inevitably overlap.
• Service Giving
• Campaigning
• Mutual Aid
• Managing/taking decisions

Volunteering Facts and Figures
VDS Research Briefing (formal volunteering)
43% of the adult population of Scotland have undertaken some form of volunteering activity, unpaid, to
help others in the past year. Based on 2001 Scottish census data, this equates to around 1.76 million
adults.

Gender: Women (44%) Men (43%)

Age: Adults aged 35 - 54 are the most likely to undertake voluntary activities

Socio economic class: Upper/middle class (53%) Lower middle class (42%) Skilled working class
(39%) Working class (26%)

Scottish Area: West (42%) East/South (40%) North (50%)

What do Scotland’s volunteers do?
• Helping to raise money (25%) is the most popular activity
• Organising, helping to run an event (12%)
• Providing a service or offering support (11%)
• Helping with sports or recreational activities (11%)
• Serving on a committee (10%)
• Helping with administration or office activities (6%)
• Working in the environment (4%)
• Campaigning or advocacy (3%)

Source: NFO Omnibus Survey October 2004

Type of organisation: Voluntary (41%) Public (25%) Private (34%)

Source: NFO Omnibus Survey August 2003

Employment: Adults employed in full or part time work are most likely to volunteer. Full time (40%)
Part time (49%) Not working (33%)

Families: Those with children in the household are more likely to volunteer. Children in household
(44%) no children in household (35%)

Source: NFO Omnibus Survey August 2002
Scottish Household Survey 2003

Over 1.2 million adults (24% of the population) volunteer formally and informally on a regular basis in Scotland. The adult population of Scotland (16 years and over) is around 4 million. Over 9 million hours are volunteered in Scotland each month.

*Volunteer Development Scotland*

What we do?
Volunteer Development Scotland works strategically and in partnership to promote, support and develop volunteering in Scotland.

Volunteering takes place in all parts of our community and across all sectors of our society.

Our Vision
Volunteering is at the heart of defining Scotland, its people and places. Our 'Volunteer Landscape' in all its diversity helps shape a positive, healthy, fair and learning society at home and abroad.

Our Mission
To learn about the 'Volunteer Landscape' of Scotland, and serve within an international context as the National Centre of Excellence to appreciate and maximise the positive impacts of volunteering on individuals, groups, organisations, communities and society.

Key Aims
- To develop and strengthen the Volunteer Centre network in Scotland.
- To provide services which address members needs.
- To provide an advocacy, media and promotional service.
- To develop partnerships and innovative projects.
- To provide a Scottish Research Centre for Volunteering.
- To provide training, information and knowledge exchange service.

Norrie Murray
Head of Policy
Volunteer Development Scotland
9 December 2004
Charities and Trustee Investment (Scotland) Bill: Stage 1

09:35

The Convener: Agenda item 2 is stage 1 of the Charities and Trustee Investment (Scotland) Bill.

On behalf of the committee, I welcome the first panel of witnesses this morning: Simon Mackintosh of the Charity Law Association; Douglas Connell, joint senior partner of Turcan Connell; Anne Swarbrick of Anderson Strathern; Stephen Phillips, a member of the charity law sub-committee of the Law Society of Scotland; and Dr Patrick Ford, a lecturer in law and member of the charity law research unit at the University of Dundee.

I am grateful to you all for taking the time to provide full written submissions, which committee members have had the opportunity to read prior to today’s evidence session.

I will ask a question about consultation. The Executive received a number of responses—250 in total—to its consultation. Are you satisfied with the Executive’s consultation process? Was it fully inclusive and comprehensive?

Anne Swarbrick (Anderson Strathern): Yes, I think that it was a full exercise.

Stephen Phillips (Law Society of Scotland): I endorse that.

The Convener: You are satisfied.

I will move on to the Office of the Scottish Charity Regulator, which is the body that will regulate charities. Will the model that is laid down in the bill ensure that OSCR has sufficient independence?

Simon Mackintosh (Charity Law Association): There is concern that certain of the powers that Scottish ministers have taken will lead to some restriction on OSCR's independence of action. For example, the powers of Scottish ministers to determine the terms and conditions of the chief executive and other staff, the number of employees that the body has and the form and content of its annual report suggest that ministers will have quite a lot of control over the way in which OSCR discharges its functions and reports to Parliament. The Charity Law Association's submission raises the concern that there is perhaps too much ministerial control over how OSCR will go about its business.

Anne Swarbrick I am much more concerned about the content of section 97, which I covered in section 3 of my submission. Section 97 allows Scottish ministers to appoint that a body may be called a charity without appearing on the charity register. The issue is not really about the form that OSCR will take, but about the powers that Scottish ministers will have to override OSCR’s decisions. I am much more concerned about that provision possibly interfering with OSCR’s independence.

Stephen Phillips: The Law Society of Scotland’s charity law sub-committee has no particular concerns about OSCR’s independence.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Part 1 of the bill establishes OSCR as a body with statutory duties and outlines the general functions of OSCR and how it will operate. The bill does not include objectives for OSCR, but I understand that the equivalent English legislation does. Should the Scottish bill do the same?

Douglas Connell (Turcan Connell): It would be immensely helpful if one of the stated objectives was the promotion and nourishment of philanthropic giving in Scotland. We are beginning to see some seed corns of that happening and it would be unfortunate if the operation of OSCR in any way inhibited that growth. As members know, we have seen huge initiatives recently from people such as Tom Hunter, Tom Farmer, Ann Gloag, Brian Souter and, on a slightly smaller scale, many others.

There is some concern among wealthier business people in Scotland that an over-zealous OSCR could interfere with the corporate governance of some grant-making charities—not operational charities, but grant-making charities. It would be immensely helpful to that area of Scottish life if one of OSCR’s objectives were to promote and encourage the formation of grant-making charities and philanthropic giving in general, and it would be good to see that objective in the bill.

Dr Patrick Ford (University of Dundee): I will put a contrary view to the committee and say that the primary role of OSCR should be regulatory and that creating initiatives to encourage the voluntary sector, in particular the charities sector, should be the role of some other body, primarily the Scottish Executive. That is another view. It is not the way in which the English bill is going.

Anne Swarbrick: As members will see from my biography, I used to be with the Scottish Charities Office. I was a civil servant then, but now I am back in private practice. One of the difficulties that OSCR faces is in treading the line between being a regulator and an adviser. I think that that is what Patrick Ford is talking about.

At the same time, I see Douglas Connell’s point about the encouragement of charity. Another way to consider the matter might be to say that OSCR’s role is to act in the public interest, which would encompass all those concerns. The manner
Among OSCR’s functions is assistance with compliance with the terms of the legislation, into OSCR’s remit. That would go beyond charities—charity law and so on—should be built as a further element, because OSCR would require a much larger budget if it was going to carry out those functions. I am not sure, but I think that the Charity Commission’s budget is in the region of £50 million, 10 per cent of which would be £5 million. From memory, I believe that OSCR’s current budget is £1.73 million, which is a substantial difference. A major question is whether that is a sensible and appropriate use of funds.

**Anne Swarbrick:** Yes. It is an interesting idea.

**Mary Scanlon (Highlands and Islands) (Con):** Anne Swarbrick said that the public must be aware of OSCR’s role and responsibilities. In its written submission, the Charity Law Association says:

“We question the power of Scottish Ministers to give directions as to the content of the annual report”.

The annual report is where most people would look for transparency, accountability and information. Are you concerned that Scottish ministers might be able to give guidance on its content?

**Anne Swarbrick:** I suppose that that would depend on what the guidance was and how detailed it became.
Mary Scanlon: I was thinking about ministerial directions.

Anne Swarbrick: Ministerial directions on the general content of the report might be in order. However, we would be worried if ministers made directions on what should not go into the report.

Simon Mackintosh: Section 2(3) says: “It is for OSCR to determine the form and content of a general report and by what means it is to be published.”

However, the Charity Law Association is concerned about Scottish ministers’ control over the regulatory body if, under section 2(4), ministers can somehow forbid OSCR from reporting matters to Parliament.

Anne Swarbrick: That is exactly the point.

Mary Scanlon: The provision causes you concern.

Simon Mackintosh: Yes.

Mary Scanlon: How would you like OSCR to be accountable to the Scottish ministers? Why is it necessary for ministers to give directions as to the content of an annual report?

Simon Mackintosh: They could say that OSCR should report to Parliament annually on certain issues in such form as OSCR thinks fit, but I do not understand why they should have the power to give detailed instructions on how OSCR should discharge that function.

Mr John Home Robertson (East Lothian) (Lab): We and the Executive have received several submissions saying that it would be good for the charity test to be as near as possible the same north and south of the border. Are you content with the changes to the list of charitable purposes and with the inclusion of the broad public benefit criteria from the consultation draft of the bill to the bill as introduced?

Anne Swarbrick: Put shortly, no.

Mr Home Robertson: Will you expand on that briefly?

Anne Swarbrick: Yes. The difficulty is that the subject quickly becomes rather complicated. I covered it in quite a lot of detail in section 2 of my submission. Scotland has 13 charitable purposes in the first part of the charity test, but the Westminster bill’s 12 purposes are wider. There are two reasons for that. The first arises from drafting points, which could be sorted out fairly readily, although they are quite profound. For instance, Scotland has two purposes that relate to disability, at paragraphs (j) and (k) of section 7(2). Paragraph (j) relates to the provision of accommodation for people who are disabled and paragraph (k) relates to the provision of care for those who are disabled. In contrast, one purpose in England relates to the relief of disability, and is much wider than simply the provision of accommodation or care. Relief includes training guide dogs, which provision of neither accommodation nor care covers. Relief covers disability rights advice, which the Scottish definition will not cover. The Scottish definition will not cover the provision of some specially adapted equipment, such as cars, but the English definition does. Those are drafting points, but they are important.

Mr Home Robertson: They could not be more important. The committee should consider those matters. I hope that the message is being sent out that now is the time to flag up such issues.

Anne Swarbrick: The second point is slightly more difficult, because it concerns the common law. The common law that has decided what is charitable is rather far-reaching and complex. Part of the common law defines public benefit. There are two strands. The first is public benefit tests, some of which are in section 8. The second defines types of charities, such as those for promoting the charitable sector and the relief of unemployment.

If we swept away the common law, as the Scottish bill proposes to do, we could jettison such types of charities, unless they are specifically covered by the 13 purposes in the first part of the Scottish charity test. I am afraid that the answer to whether such charities are covered is that that is, at best, uncertain. In many cases, the problem is not that they definitely would not be covered by the Scottish charity test, but that the whole thing is uncertain, which potentially leaves many charities in Scotland uncertain as to whether they are covered. That is not good enough.

Dr Ford: I agree with Anne Swarbrick’s criticisms of the detail, but I ask you to step back and ask: what is the point of having a separate Scottish definition? At the moment, there is a United Kingdom-wide definition of charity. It has its origin in English charity law, but it is a UK definition and has been so, through the tax system, for more than 100 years. Now the proposal is that there will be a departure from that, along the lines that Anne Swarbrick has laid out, but the question is why we should step out of line at all. What are the advantages of doing so?

Mr Home Robertson: That is something about which we will have to make up our minds in the light of the representations that we receive.

If, at the end of the day, distinctions between the UK definitions of charitable purposes and the definitions in Scotland come to pass, what legal difficulties might arise?

Simon Mackintosh: I will give one or two examples. A grant-giving trust based in Scotland...
that wanted to give grants to charities that operate in England whose activities were not covered by the Scottish definition but were covered by the English one might find itself unable to assist the cause that it wanted to help. That might also work the other way around, with English grant-giving bodies being unable to assist particular Scottish bodies that would qualify under the Scottish test, but not the English one.

The other cross-border issue concerns tax. The policy memorandum says that it is expected that the Inland Revenue would follow OSCR’s decisions about charitable status based on the Scottish test, but I have not yet seen anything from the Inland Revenue saying that it would definitely do so. That raises the spectre of a body that OSCR recognises as a charity in Scotland not qualifying as a charity for UK tax relief, which could mean severe difficulties for Scottish and English taxpayers who support charities in the other jurisdiction.

That only scratches at the surface of possible difficulties.

Douglas Connell: I will give an example of one important area in which Scotland would be seriously disadvantaged in comparison with England and Wales. As the bill is drafted, there is a serious threat to some of our most important national institutions. The charity test would not be passed if there is some form of third-party control, which, it is thought, could have the effect of removing charitable status from the National Galleries of Scotland, the National Museums of Scotland, the National Library of Scotland, the Royal Commission on the Ancient and Historical Monuments of Scotland and the Royal Botanic Garden Edinburgh. Those are immensely important national institutions, because they are the custodians of collections of huge international importance. The main issue with the removal of charitable status from those bodies is that they would be placed at a severe disadvantage compared with their counterparts in England and Wales. For example, the National Galleries of Scotland could lose charitable status, but the National Gallery in England would have it, and that could have a major effect on fundraising and the gift of works of art. It is important that the committee be aware of that major threat to some of our national institutions.

The National Galleries of Scotland recently completed the Playfair project at a cost of £30 million, £13 million of which was raised from a combination of private donors and grant-making charitable trusts. The tax breaks for private donors that encouraged such giving would not apply if the National Galleries of Scotland were not a charity. Many of the grant-making charitable trusts would be completely unable to give money to such projects, because they give money only to charitable organisations. The matter is of great importance.

10:00

Mr Home Robertson: I am sure that everyone would agree with you on that. That is precisely what we need to know about and what we need to find a way of addressing.

Your reading is that a body would not qualify under the Scottish charity test if, as stated in section 7(3)(b),

“its constitution expressly permits a third party to direct or otherwise control its activities,”

therefore the prospects of bodies such as those that you just described getting the benefits that you were talking about would be jeopardised.

Douglas Connell: There is a severe risk that that would happen. There are, of course, other related issues to do with rates relief and the benefits of gift aid, but the issue of losing charitable status and not being eligible for grants from grant-making charities is major.

Mr Home Robertson: We have a constellation of legal expertise in front of us. Can anyone suggest an amendment to the bill that would get round that problem?

Anne Swarbrick: The answer to that is that we would be happy to do so, but not on the hoof.

Mr Home Robertson: And not for free, I suspect. Thank you—the issue is important. We will want to return to it.

The Convener: Linda Fabiani has a follow-up point.

Linda Fabiani (Central Scotland) (SNP): You paint a horrendous picture. Can you explain in layman’s terms why what you describe would happen?

Douglas Connell: It would happen because, under the bill as I read it, it could be stated that an organisation such as the National Galleries of Scotland, whose trustees are appointed by the First Minister, is under Government control. Incidentally, that could also apply to certain local authority charitable bodies. In charitable law, there is nothing wrong with a local authority or central Government creating a charity, because quite often—

Linda Fabiani: You are saying that the First Minister could become the third party.

Douglas Connell: Exactly.

Mr Home Robertson: It is the Scottish Natural Heritage story. The problem was highlighted by
the fact that ministers directed SNH to move its headquarters.

**Simon Mackintosh:** That reading of the bill is encouraged by the explanatory notes and the policy memorandum.

**Mr Home Robertson:** Given the distinctions that we have been discussing, my final question on the charity test is whether you are concerned about the implications of a requirement for dual regulation, by both OSCR and the Charity Commission.

**Douglas Connell:** I will comment on that, because we look after quite a number of UK charities that happen to be registered with the Charity Commission.

Section 14 of the bill is the relevant provision. It says that charities that are registered with the Charity Commission do not require to register with OSCR if they do not—note the double negative—occupy premises or “carry out activities in any office, shop or similar premises in Scotland”.

The phrase “carry out activities” is pretty broad—it could apply to the holding of meetings and consultations and the exercising of monitoring activities, for example, which many charities do. There are many UK charities that operate in Scotland, both in collecting money and in distributing it. For example, as well as raising money in Scotland, Cancer Research UK distributes large sums for medical research here. It has office premises and carries out activities in Scotland. Under the bill, it would need to register with OSCR and perhaps meet OSCR’s differing requirements as regards the paperwork that would have to be lodged and its accountability.

In my view, if all such charities that are registered with the English Charity Commission were required to reregister with OSCR, that would place an unnecessary burden on OSCR. I can see some merit in OSCR having a discretionary power to require a specific English-registered charity to submit to its registration requirements if, for example, OSCR had received a complaint about that body’s activities, but I do not think that reregistration should be mandatory across the board, as it would create extra burdens on the charity sector and extra unnecessary work for OSCR.

**Anne Swarbrick:** I agree entirely and would go further. I do not understand the point of the provision, which is entirely new. At the moment, if a charity is registered with the Charity Commission for England and Wales, it can call itself a charity in Scotland and get on with doing what it does, without let or hindrance. The new provision will be a change and I do not really understand why it is being made. OSCR will not have jurisdiction over the management of charities, if they are managed from England, because the Scottish courts will not have jurisdiction over that management. What is the benefit of the change? We could allow OSCR to control the activities of the charities in Scotland by giving it powers to control activities on its patch. I do not understand the logic behind the proposal.

**Simon Mackintosh:** I support the point that Anne Swarbrick makes. The provision is wide enough to cover charities registered anywhere in the world, but we are focusing on charities that are registered with the Charity Commission for England and Wales. There is fairly easy access to information that is held on charities by the Charity Commission. Anne Swarbrick has already highlighted the fact that OSCR has a limited budget. The bill contains provision for exchange of information with other regulators and places a duty on OSCR to co-operate. It seems to me and to the Charity Law Association that, unless there are serious concerns about the activities of English charities that operate in Scotland, OSCR should concentrate on other things and not the activities of foreign charities. We recognise that those charities are adequately regulated by the Charity Commission for England and Wales. This is not a priority area for involvement by OSCR, especially given its budget.

**Anne Swarbrick:** There might be a halfway house. OSCR might require a charity that said that it was registered in Iceland, for example, to register with it. However, I do not understand the logic of requiring Charity Commission registered charities to do that. There could be exemption from that provision for English and Welsh-registered charities. That would take out of the equation the vast majority of foreign charities that operate in Scotland.

**Simon Mackintosh:** Section 36 of the bill gives OSCR the power to intervene in the affairs of English charities, at the request of the Charity Commission. If the more general registration requirement were removed, it might be necessary to extend the intervention power.

**Anne Swarbrick:** Simon Mackintosh is absolutely right.

**Mr Home Robertson:** Does everyone accept that, if OSCR has any concerns about an English-registered charity that is doing work in Scotland, it should have the opportunity and the right to intervene?

**Anne Swarbrick:** Absolutely.

**The Convener:** The issue was raised with the committee regularly as we took evidence from many charitable organisations that operate in Scotland. The voluntary sector expressed concerns that allowing a charity that is based in
England to operate in Scotland without being regulated in the same way would be inequitable. The sector thought that that was grossly unfair. I understand your point that the provision is unnecessary, because such charities would be regulated by the Charity Commission for England and Wales, but there seems to be some inequity. How do you respond to the concerns of the rank-and-file voluntary organisations that operate in Scotland?

Douglas Connell: There is something of a paradox, because the English charities have been regulated for many years, whereas there has been a vacuum in Scotland. The position is much more likely to be that English charities could say that they have been subject to regulation and intervention by the Charity Commission in a way that charities established in Scotland have not. If there were no rigorous regulation south of the border, the argument that has just been put would be sound, but that is not the case. English charities are already regulated by the Charity Commission for England and Wales, which is heavily resourced, as Anne Swarbrick has said.

Anne Swarbrick: Scottish charities operate in England without being registered with the Charity Commission. I do not understand the point that the voluntary sector is making. As a riposte to the bill, the Charity Commission might say that it wants Scottish charities to register with it, in order to create a level playing field.

Christine Grahame: I want to return to section 7(3)(b) and what has been said about third parties. If the bill stated that a minority of any such board of trustees can be appointed by a third party, would that remedy the problem?

Douglas Connell: An interesting issue is whether the mechanism for appointing charity trustees gives control or whether the way in which trustees act once they have been appointed is the important factor. Of course, charity trustees have an obligation to act in the charity’s interests. If the First Minister was involved in making appointments and it was made absolutely clear when the appointments were made that the charity trustee’s duty was to act in the charity’s interests, that would be far more important than the mechanism that is used for finding appointees. Of course, all the people who are appointed to the public bodies in question are subject to the Nolan principles. Their positions are advertised and they go through a proper scrutiny process. I do not think that the answer is to fix a particular majority or minority.

Christine Grahame: I take it that nobody agrees with the proposal.

Anne Swarbrick: I think not.

Christine Grahame: However, that approach would be perceived as more democratic and at arm’s length.

Simon Mackintosh: One recommendation in the McFadden report was that there should be a limit on the number of members who could be appointed by central Government or local government. That is a mechanistic way of approaching the problem, but it should be seen in the context of considering trustees’ independence of action, which is the overriding principle. Against that background, it was said that we should certainly not want more than a particular number of members being appointed, in the expectation that other ways of finding appropriate trustees of those bodies would be found.

Douglas Connell: I simply believe that the status of national institutions with collections of international importance should be separately recognised. There should be no doubt in anybody’s mind that the charitable status of institutions is secure, especially when people are about to embark on major fundraising projects for them. That matter should be urgently addressed.

Donald Gorrie (Central Scotland) (LD): I want to pursue some of the latter points that have been made and the issue of continuity. I understand that the English proposals start from the status quo and try to improve it, whereas the Scottish proposals start with a clean sheet. There is a school of thought that, if the Inland Revenue thinks that a school, trust or museum is a charity, it will carry on thinking so, whatever OSCR says. Do you think that that will happen? What would be the position if the Inland Revenue still thought that a body deserved tax relief, although it had not qualified for it? The example of guide dogs was given. It was said that, technically, a body that trained guide dogs would not qualify as a charity for OSCR. Is that a problem? Is it likely to happen? What difficulties will there be if the English continue to build on the status quo and there is a totally new system in Scotland, but many people—such as those in the Inland Revenue—do not accept the new system? I am sorry to ask such a complicated question.

Anne Swarbrick: I am afraid that the issue is complicated. The short answer is that things could easily become rather chaotic. In principle, it would be possible for the Inland Revenue to say that a body qualifies for tax relief and for OSCR to say that it does not qualify for calling itself a charity. That would be an odd result, but it is entirely possible on the basis of the current proposals. The result would be undesirable and would lead to confusion in the minds not only of potential applicants for charitable status, but of members of the public. The public fund charities to a large extent, so public confusion—or, ultimately, the
public turning off from the entire issue—would be undesirable and a very worrying way to go.

10:15

Simon Mackintosh: The follow-up point to that is that, if a body meets the Inland Revenue test but not the OSCR test, it ends up obtaining the UK tax benefits but not having to be registered with OSCR and therefore not being regulated by OSCR. We could end up with a tax charity getting all the tax benefits without the public supervision that the bill is designed to create.

Stephen Phillips: That points to the need to have some harmony between the tests of charitable purpose that are used in an English context and those that are used in a Scottish context. However, even that does not solve the problem, because there could well be a divergence between the detailed decisions that are made at the Scottish end and those made by the Charity Commission, particularly in relation to section 7(2)(m), which mentions “any other purpose”.

Donald Gorrie: Until I read your stuff over the past two days, the whole idea that we should perhaps reconsider and build on the status quo and improve it, rather than going for a new thing, had not occurred to me. Do you think that that is a serious proposition that the committee should be considering?

Dr Ford: I am afraid that I am going to challenge the idea that the bill represents a completely new start. It is heavily imitative of the English arrangements, but the charity test as it is drafted would certainly be a significant new departure within that broad context. I want to underline the problem of uncertainty about what would happen. Mr Gorrie asked whether divergences would occur and how that might happen. One can give specific examples, but it is difficult to give an overall picture, because there is insufficient direction to OSCR on how to apply the charity test. I can go into more detail than that, but in my view the greatest problem is the broad uncertainty about how the charity test would be applied.

Donald Gorrie: On any of those issues, relatively short pieces of paper are extremely helpful to the committee, as well as your oral evidence.

Stephen Phillips: One point has not been raised as yet. The charity law sub-committee had a concern about the way in which section 7(2)(m) is drafted, particularly the reference to a “purpose that may reasonably be regarded as analogous”. One of the features of the charity sector in Scotland is the diversity of aims and objectives, which evolve over time. I think that the concept of being analogous is probably too tight and restrictive. That may be a lawyer’s concern, but it needs to be looked at. We need to go for a much broader test by reference to the kind of benefits that are achieved through pursuit of those particular purposes, or something along those lines. Otherwise, scope for innovation in the charity sector could be stultified.

Anne Swarbrick: I am afraid that that brings us back to the common law, because the common law provides that flexibility to expand the definition. I have covered that in the paper that I submitted to the committee. I agree that we need to start with the status quo and go out from there. I think that that is the right approach and it is broadly the approach that Westminster is taking—that we keep what we have and expand it.

Mary Scanlon: Before going on to chapter 3 of the bill, on co-operation and information, I have a question relating to section 16, which many witnesses have mentioned. The written evidence states:

“We continue to be concerned about the need for OSCR to give consent to amalgamations and dissolutions”.

I think that the Charity Law Association—if my papers are not mixed up—cites the example of a Scottish company that was on the point of liquidation when the Charity Commission for England and Wales got involved, under the Companies Act 1989, to help to bail it out. You are probably the only people of whom we can ask this question. Will the bill override the Companies Act 1989? The scenario that is painted in the written evidence is of considerable concern. Can you elaborate on that point before we discuss chapter 3?

Simon Mackintosh: The point of concern relates to section 16(2). It is perfectly reasonable that, if a charity wants to amend its constitution “so far as it relates to its purposes”, OSCR, which is the custodian of charitable purposes, should have to consent to that, as that sort of thing can be quite complex and easy to get wrong, although it is absolutely fundamental to the status of a charity. If we accept that OSCR should have to consent to that, there is concern about the other activities that are listed in section 16(2). A charity’s constitution might provide for its amalgamation with another body that is a charity or for its winding itself up or dissolving itself, perhaps by making over its funds to another charity. Why should OSCR have to consent to that, if the trustees are merely implementing powers that they have in the deed? Why, specifically, should the charity have to wait six weeks for OSCR to give a decision?

Perhaps the most worrying concern is that, if a charity’s trustees want to apply to a court in
relation to any of those matters, they have to get OSCR to consent to that. If the trustees who are in charge of a charity are not talking about amending the purposes of the charity, why is it felt necessary that OSCR should get involved by looking over the shoulder of the trustees as they do something that they are entitled to do anyway? OSCR can always enter an appearance in the courts if it feels strongly about what the trustees are doing. That is the concern.

A member of the Charity Law Association has said that, in the absence of that sort of power, the association can take fairly rapid action to support a Scottish charity that is failing. We have concerns that the bill, as drafted, would stop that rapid action being taken. The question is whether OSCR should get involved to that degree in activities of Scottish charities that do not relate specifically to their purposes.

Mary Scanlon: That is a matter of significant concern, which we will probably have to discuss beyond today. Is it your understanding that the bill will override the Companies Act 1989?

Simon Mackintosh: That seems to be the case. The bill states what any charity must do in addition to any requirements on the body under the Companies Act 1989, if it happens to be a company.

Stephen Phillips: In the context of a charitable company having to wind up on the ground of insolvency, it seems anomalous that the board should have to wait for OSCR’s consent before initiating procedures that were invented to address that situation.

Mary Scanlon: So the bill could be detrimental to charities that are at the point of liquidation but could be saved. The procedures under the bill are more bureaucratic and could have an adverse effect on charities in the long term.

Simon Mackintosh: The bill would add a layer of control and delay, which could be fatal to a charity’s ability to continue with its activities.

Anne Swarbrick: The proposal is an undesirable English import. The Charity Commission would be required to give its consent to such things in England, in general terms, but, hitherto, OSCR has not been required to do that in Scotland. I do not see why we need to go down that road at all. As Simon Mackintosh said, if the trustees of the charity already have the powers, we should let them get on with it.

Mary Scanlon: Thank you for explaining that.

Let us move on to chapter 3. Under section 20, OSCR will be obliged to

“seek to secure co-operation between it and other relevant regulators.”

As we have gone around Scotland doing our consultation, that has been raised as a matter of concern among charities, which think that they are going to have to produce different pieces of paper and information for different regulators. Do you think that other regulators should be placed under the same obligations to co-operate with OSCR, both in Scotland and in the UK as a whole? Can you explain any problems that you feel could arise should that not happen?

Anne Swarbrick: In principle, co-operation is a two-way street, so the answer to your first question is yes.

Simon Mackintosh: I very much agree. There is no point in requiring one body to co-operate if the others do not have that duty.

Mary Scanlon: The issue is straightforward.

We have already considered whether the bill strikes the right balance on the registration requirements for charities that are registered in England and Wales, but I want to raise a related issue. Last week, we took evidence from members of the bill team, who told us that any charity with a significant presence in Scotland—we discussed what “significant” would mean in this context—will be required to register as a Scottish charity. However, the Charity Law Association’s submission raises a question about that. It states:

“We are aware of non-Scottish charities carrying out services pursuant to contracts with, for example, local authorities in Scotland. Is the carrying out of obligations under a contract caught by ‘carrying out activities in any office, shop or similar premises in Scotland’?”

Will you explain that point about charities that do not have an office or shop in Scotland but carry out a contract here?

Simon Mackintosh: The question whether charities that are registered with the Charity Commission for England and Wales will be required to register with OSCR depends on what the bill means by the phrase “carrying out activities”. For example, would a charity that provides services under a contract without having any other presence here be required to register? Would a medical research charity that funds a laboratory or research workers in a Scottish institution be considered to be carrying out activities? Those sorts of registration issues about where the edges of “carrying out activities” lie would need to be clarified.

Mary Scanlon: We questioned the bill team on that point last week, but the discussion will no doubt go on. In your view, will the bill cover charities that advertise on television, on the internet and in national newspapers? Charities could carry out significant activities in Scotland and collect significant amounts of money in those ways but still remain outwith the remit of OSCR. Could anything be done to address that?
Simon Mackintosh: The section to which you refer was amended after the consultation on the draft bill. The bill is clearly designed to remove the registration requirement from English charities that solicit funds in Scotland through newspapers, television and telephone. My reading of the bill is that it does not intend to force charities that are registered in England and Wales to register in Scotland just because they advertise in Scottish newspapers and newspapers that happen to circulate in Scotland, or because they have a television advertising campaign that is shown in Scotland.

Anne Swarbrick: One of the great ironies is that the bill was introduced partly because of a couple of cases concerning fundraising that the Scottish Charities Office took to court a couple of years ago. If charities can fundraise in Scotland without registering with OSCR, why are we asking charities to register at all?

Mary Scanlon: We will have a few questions on fundraising further down the line.

Section 23 provides that a person who requests a copy of a charity’s constitution and accounts is entitled to it, “if the request is reasonable”.

Many people have asked in their submissions why that phrase should be included. Could it be unreasonable to ask a charity for a copy of its constitution and accounts?

Douglas Connell: That is an interesting question. The provision will place a potentially significant burden on small charities, many of which are completely run by volunteers or by one paid member who has many other responsibilities. Given that OSCR will have a central register of charities, the fact that an individual or group of individuals could send a general letter every year to each charity in Scotland to ask for a copy of its constitution and accounts could pose a completely unnecessary burden on many small charities. A far better way of operating would be for OSCR to hold information on the accounts and constitution of every regulated charity in Scotland, to which anyone could have free access—the information could be online—so that people would not have to write to every charity and we would not impose a burden on charities to supply the information.

10:30

Anne Swarbrick: The situation could be even worse, because the charity would have to supply the information “in such form as the person may reasonably request.”

If a person requested information in Icelandic, French or German—choose a language—would the charity have to bear the cost of translation?

Stephen Phillips: That would probably not be a reasonable request.

Anne Swarbrick: Well, it might—

Mary Scanlon: I notice that section 23(2) states: “A charity may charge such fee as it thinks fit for complying with such a request”.

However, we must strike the right balance. Openness, transparency and accountability cannot be achieved unless people can reasonably ask for information. Are the provisions a bit heavy handed, or are they reasonable?

Douglas Connell: It is absolutely right that there should be transparency in the charities sector; that is essential. OSCR will keep a file on every charity, which will include up-to-date copies of charities’ accounts and constitutions, so it should not be difficult for OSCR gradually to scan in the items and make the information available online to anyone who wishes to conduct a search.

Stephen Phillips: I recollect that that obligation exists under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and I am not aware that people have moaned and groaned under the burden of it. However, as Douglas Connell suggests, the difference is that there will be a central registrar, who ideally will be able to disseminate the information more systematically.

Mary Scanlon: That brings us back to the earlier point about whether OSCR should have an advisory and regulatory role. As I said at last week’s meeting, I am concerned that if creative accountants have done a charity’s annual accounts, the accounts might not reflect whether the charity is operating excellently at grass-roots level.

Douglas Connell: We are not accountants, of course; we are just lawyers.

Mr Home Robertson: Much worse.

Patrick Harvie (Glasgow) (Green): I raise a matter that came up at last week’s meeting, when we were talking about cases of suspected misconduct. The bill says that the Court of Session must be “satisfied” that misconduct has occurred, whereas the test in the existing legislation is merely that it must “appear” to the court that there has been misconduct. At last week’s meeting the committee was told that the two terms mean the same thing and that, according to the “Oxford English Dictionary”, if someone is “satisfied”, the implication is that they have deduced a matter from evidence, and if something “appears” to be the case, the implication is that evidence exists. However, the terms seem to have different meanings in everyday language. Can you enlighten us?
Anne Swarbrick: The terms are different. Section 7(1) of the 1990 act provides that the court may act

"Where it appears to the court"

to see the evidence. There is a lot of scope for spoiling tactics, which means that OSCR may experience difficulties in exercising the powers.

Patrick Harvie: The point that Dr Ford made could apply in that situation—OSCR can act when it is "necessary or desirable" to do so. However, we need further clarification from the Executive on the issue.

Dr Ford: I cannot claim that point.

Patrick Harvie: Sorry, it was Mr Phillips.

Linda Fabiani: Ms Swarbrick mentioned her concern about the budget that OSCR will have to exercise its functions, let alone expand them. Under section 38, registered social landlords will be exempt from OSCR’s supervisory functions. The Executive told us that Communities Scotland will perform that function in relation to RSLs. The reason we were given why only RSLs will be exempt was, more or less, that the Executive thought that Communities Scotland was capable of doing that. Should the provision be expanded? Is it fair that charities that have been formed by RSLs—which bother me slightly—may be the only bodies that are exempt in that way?

Anne Swarbrick: Several arguments can be made on the issue. One is that all charities, whether they are RSLs or otherwise, ought to be regulated uniformly and that there is no reason for RSLs to be exempt from regulation by OSCR. The reason we were given why only RSLs will be exempt was, more or less, that the Executive thought that Communities Scotland was capable of doing that. Should the provision be expanded? Is it fair that charities that have been formed by RSLs—which bother me slightly—may be the only bodies that are exempt in that way?

Anne Swarbrick: In response to the draft bill I made the point that OSCR would have no powers that it could exercise urgently; it would be able to exercise powers only on the basis of full evidence and after full consideration, which is a nonsense.

Patrick Harvie: OSCR has argued in written evidence that the change in wording raises the bar and makes it more difficult for what it called “protective” measures to be used. Do all the witnesses agree with that?

Stephen Phillips: Under section 34(1)(b), the Court of Session needs to be satisfied only that it is

“desirable to act for the purpose of protecting the property”. Concerns have been raised about the ability to take interim measures, but the court does not necessarily have to be satisfied that there has been misconduct in the administration, only that it is desirable to act for the purpose of protecting the property—it does not have to be necessary to act for that purpose. That measure goes some way to addressing the concerns that have been expressed.

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One thing that might be top their list of priorities. any expertise in charity law such concerns would out, because other regulators do not really have charity law, whereas other regulators might emphasise other legal aspects that they are concerned with. As Stephen Phillips has pointed out, because other regulators do not really have any expertise in charity law such concerns would not top their list of priorities.

We also need to examine the various issues that affect charities and to draw out best practice and concerns from all sorts of different bodies that are charities but that, for whatever reason, fall under different regulators. As a result, there is a tension between the need to avoid overburdensome dual regulation and the need to ensure that, however they are set up, charities operate in accordance with charity law. I would be fairly careful about fragmenting the regulatory system any further.

Anne Swarbrick: We should also bear in mind the stipulation that OSCR should co-operate with other regulators. One would think that it would be enough to make that provision a two-way street.

Linda Fabiani: One can see that the bill’s provisions might be used to fragment the regulatory system even further. However, what would happen with the RSL function if the bill were passed as it stands? Many RSLs have started up various arm’s-length charitable ventures; indeed, some already have more than one—these things tend to snowball. Although Communities Scotland is perfectly capable of supervising housing organisations, many of which are charities simply so that they can operate under better tax regimes, does it have the proper functions to be able to check out charities all the way down the line? Moreover, my reading of a provision further on in the bill suggests that if a charity forms another charity and is confident that it is operating properly, it is taken out of the net a little bit.

Anne Swarbrick: At the moment, RSLs are regulated by OSCR and Communities Scotland. My impression is that Communities Scotland has, quite properly, been leaving the charitable aspects of RSLs to OSCR. I suppose that I am saying that your question whether Communities Scotland would have the expertise to deal with such matters, given that it has not done so up to now, is a valid one.

Donald Gorrie: I wonder whether you could comment on chapters 5 and 6, on “Reorganisation of charities” and “Charity accounts”, which give ministers the power to lay down different scales for the amount of accounting that is necessary for different sizes of charities. That might result in differences between Scotland and England. In general, are you satisfied with the provisions for charity accounts, reorganisation and in particular dormant charities? After all, between you, you must control an enormous number of dormant charities in which the people in charge have died off or whatever. They should be made to do something useful. Will the bill assist in that regard?

Douglas Connell: That is one of the bill’s many aspects that we welcome. Indeed, despite the tone of our discussion this morning, we all greatly welcome the creation of OSCR and the introduction of the bill. However, one of people’s great frustrations with charity law has been the difficulty of getting variations of trust purposes through the Court of Session, which in recent years has adopted a less than pragmatic approach to the matter. I should point out that that situation does not affect only small charities; some quite large charities have also been involved. We greatly welcome the streamlined procedure for reorganising charities. Personally, I am positive about the provisions and would like them to be put in place as quickly as possible.

10:45

Stephen Phillips: I endorse that view. I have a number of clients who are waiting for that to happen because the costs of an application to the Court of Session are so high.

Anne Swarbrick: One thing that might be improved relates to the fact that the reorganisation provisions in the bill apply only to charities. There is another type of organisation in Scotland, public trusts, which will be allowed to continue to reorganise under the provisions of the 1990 act. The problem is that the transfer provisions apply only between public trusts. A public trust can transfer its assets to another public trust but not, as things stand, to an incorporated charity. More and more charities are incorporating and the public trusts that are transferring their assets under the 1990 act tend to be the ones with outdated purposes. Often, they want to transfer their assets to an incorporated charity that might be doing a similar thing, but they cannot. For that reason, I would like the 1990 act to be amended—I think that the relevant sections are sections 10 and 11—to allow those provisions to apply to public trusts that want to transfer their assets to incorporated charities.

Linda Fabiani: I am interested in the situation regarding the Scottish charitable incorporated organisations. Why is that different from the situation regarding a friendly society or a charity that is registered under the Companies Act 1989?
Dr Ford: In a way, we do not know how different it is going to be because the regulations will reveal the detail. The raison d'être is that it should be much easier to incorporate as an SCIO than as any of the other available options. That is the rationale, but we do not know whether that will be realised.

Linda Fabiani: And you are not accountants, so you will not know whether there is any benefit to be had in that regard.

Simon Mackintosh: There are obvious benefits in providing a simple structure that gives corporate continuity. For example, a charity’s employee commitments or leasing commitments should continue despite any change of the trustees. There are difficulties in those areas for trusts. The simple structure will limit the liability of the members and directors of the organisation in a way that is difficult to achieve with a trust, but it does so without having to go into the requirements of the Companies Act 1989, which are perhaps inappropriate for charities to have to deal with. Further, it ensures that there is one regulator for that creature, OSCR, which will deal only with charities. The proposal seems to meet a need in relation to the way in which charities operate.

One slight gap is that, although the draft bill provided for existing charities that are companies or friendly societies to roll themselves into charitable incorporated organisations, there is a question as to whether any other sort of organisation should be automatically empowered to do so as well. I do not know whether that is the case.

Stephen Phillips: I suppose that I am slightly biased, in that I was involved in drafting the model constitutional documents to assist the consultation processes around the issue of the SCIO. However, I believe that that model will solve a problem that has existed in the charity sector for years. It addresses not so much the position of a conventional charitable trust, in relation to which, as Simon Mackintosh has mentioned, there are technical issues to do with succession and demonstrating a link in title between the original trustees and trustees further down the line, but that of a smaller type of charity that would normally use an ad hoc constitution, become an unincorporated voluntary association and have a management committee that would be exposed to personal liability. The concept of having a clear and straightforward way of ensuring that such bodies get the benefit of being a clear legal entity with limited liability is welcome.

Linda Fabiani: I cannot remember which of you it was, but someone in their evidence had a section on non-charitable benevolent bodies.

Dr Ford: It might have been us, in relation to fundraising, which was our main point. The section of the bill on fundraising is directed at charities, but also at non-charitable benevolent organisations. However, so far as control on a continuing basis is concerned, they will not have to put in annual accounts to OSCR or any other body. That was the area of exposure that we were pointing to. It can also be said that non-charitable benevolent organisations are a good thing, and should perhaps have the benefit of a vehicle similar to the one for charities.

Linda Fabiani: So at the moment they could not be pulled into the legislation.

Dr Ford: No.

Patrick Harvie: I would like to ask about designated religious charities. I was surprised at how much of the bill exempts designated religious charities from various aspects of regulation, either by OSCR or by the Court of Session. What is your understanding of the legal grounds for that exemption?

Anne Swarbrick: The historical reason is that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 exempted designated religious bodies from much of its scope—more than we are proposing with the bill—because they are perceived as already having in place rigorous checks and balances and accounting procedures. The situation is similar in England. I think that the Church of England is exempted from just about everything that is in the ambit of the Charity Commission, as perhaps one would expect. There is an historical reason for the situation and—wearing my former regulator’s hat—I think that the matter was not raised to any extent under the 1990 act. There was no perceived difficulty with religious bodies that could not be addressed by the regulator.

Patrick Harvie: I wonder whether other substantial charities that have been operating for a long time without any problem would question why they are subjected to one regulatory regime when other large bodies that operate without problems have fewer hoops to jump through.

Anne Swarbrick: Perhaps they would, but that is the historical basis for the situation. Again, wearing my former regulator’s hat, I think that if I was required to examine the finances of one of the major churches, I would find it a difficult exercise.

Patrick Harvie: Would anybody else care to comment?

Dr Ford: In looking at the provisions in the 1990 act, I always felt that the protection for the public lay in the ability of the Scottish ministers to remove the designation by fiat. The special status of religious organisations can be removed readily.
OSCR will be in the same position. Designated religious organisations are only a step away from everybody else.

Scott Barrie: I turn to the grounds under which a person will be barred from being a charity trustee. In her paper, Anne Swarbrick refers to the question of mismanagement versus misconduct. We discussed that issue with the bill team last week because, as lay people, some of us feel that there is a difference between the general incompetence and disorganisation that is implied by the term “mismanagement” and misconduct. Are the two terms exactly the same, or is there a difference legally?

Anne Swarbrick: There is a difference. The working definition that is applied to the two terms by the Charity Commission is that misconduct is something that the person knows to be wrong or is illegal in terms of the criminal law. Mismanagement, on the other hand, is something that could occur inadvertently. It could be a simple muddle or mistake. Those are the working definitions that the Charity Commission uses when applying the Charities Acts in England. The Scottish Charities Office took the same approach.

Simon Mackintosh: Section 65 deals with the duties of charity trustees. Section 65(4) states:

“Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.”

That includes a breach of the duty to comply with the requirements of the act or failing to act to the required standards of care and diligence. If a charity trustee slips, perhaps inadvertently, we move quickly to charges of misconduct, the involvement of OSCR and the possibility of criminal sanctions. A number of organisations have expressed concerns about the readiness with which criminal sanctions will be applied in situations where there may just be a mistaken trustee. If someone falls short of the duties of care, we will move straight to misconduct proceedings.

Stephen Phillips: The feedback that I have received in a few seminars that I have run on the provisions suggests that there is concern in the sector about the way in which the standard in section 65 is phrased. The duty of a director under company law is to act in what he or she considers to be the best interests of the company—what was known to them at the time, rather than what they know with the benefit of hindsight. That is rather different from saying that someone should have acted in what was the best interests of a charity.

The duty of a director is also to exercise the care and diligence that is reasonable to expect of a reasonably diligent person when looking after their own affairs. However, the standard in section 65(1)(b) is “the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.”

With some validity, it has been asked why directors in a private sector context, who derive significant remuneration from acting as directors, are subject to a lower standard of care than that which we are placing on well-meaning people who act as charity trustees. These may seem like fine distinctions, but people take them on board and start to ask questions about the nature of the liabilities to which they may be subject if they sit on a charitable company board or a board of trustees, and whether they are prepared to take those on.

Anne Swarbrick: I was asked a very hard question at the seminar that Stephen Phillips also attended. I was asked whether, if the provision is implemented, I would be prepared to volunteer to serve as a charity trustee. I had to think hard about the answer to that question, as it is difficult. The duties that section 65 imposes are very onerous and involve potential criminal charges. If I were convicted of a criminal offence, I might lose my practising certificate, which means that I would also lose my job. The provision has far-reaching consequences.

Simon Mackintosh: There may be a distinction to be drawn between standards of care and the implications of someone failing to meet those. If criminal sanctions follow, the situation is very serious. I have less concern about the standards of care, which are based on the Scottish Law Commission’s recommendations for the standards of care that ought to be applied to trustees of trusts generally. We expect that charity trustees will look after funds for others, so it is reasonable to include a test based on what we would expect a person to do with money that they have a duty to look after for someone else. I am more concerned about the criminal implications of failure to meet the standards.

Dr Ford: I endorse completely what Simon Mackintosh has said.

Anne Swarbrick: I, too, agree with Simon Mackintosh. It is also important to allow OSCR to distinguish between cases of mismanagement and cases of misconduct. In cases of mismanagement, OSCR might give advice; in cases of misconduct, it might take action. That distinction must be made, but the bill fails to make it and to allow OSCR room for manoeuvre.

Dr Ford: It is fair to say that the dictionary definition of “misconduct” would include mismanagement. However, the words have acquired distinct meanings in English charity law, and indeed under the 1990 act. The bill is missing the opportunity to make the distinction and do away with the confusion.
**Scott Barrie:** Last week, some of us made the point that we feel that the term “misconduct” implies that people are at it, whereas mismanagement has a lower tariff and is more about general incompetence. Section 103, on general interpretation, states that “misconduct’ includes mismanagement”. Would a way around the issue be to differentiate between the two words? How do we get out of this and separate the two ideas?

**Dr Ford:** I will enlarge on that point slightly and my reason for doing so will become clear. As a result of the charity test’s departure from dependence upon English case law, OSCR and the Scottish courts will be deprived of the resource of existing case law, which is mostly, although not exclusively, English. So when OSCR comes to read a particular provision, such as that which contains the word “misconduct”, it will be on its own. That is also true of the words in the charity test. OSCR will not be obliged to go to the existing case law. However, if the case law were to be made expressly available, and that was the clear will of the Scottish Parliament, I suggest that the words “misconduct or mismanagement” could be reinstated. They would then have a meaning that words “misconduct” could be reinstated. They would then have a meaning that was established in case law and the case law contains the word “misconduct”, it will be on its own. That is also true of the words in the charity test. OSCR will not be obliged to go to the existing case law. However, if the case law were to be made expressly available, and that was the clear will of the Scottish Parliament, I suggest that the words “misconduct or mismanagement” could be reinstated. They would then have a meaning that was established in case law and the case law would be available to OSCR. That would be a way of dealing with the specific problem, but it is part of the larger issue of the availability of the resource of existing case law.

**Anne Swarbrick:** That is right. Section 30 of the bill gives OSCR the power to investigate mismanagement as well as misconduct. Section 31 gives OSCR the power to take action in respect of mismanagement. That action might be giving advice to the charity. Indeed, speaking from my experience of the Scottish Charities Office, 95 per cent of all the cases on which we took action meant giving advice to charities. Those were cases of mismanagement. That leaves 5 per cent of cases that arose through misconduct. That seems to be the right balance and that is what is missing from the bill. Mismanagement as an issue seems to have been removed from the bill and that has resulted in the bill becoming more extreme and calling things misconduct that are not misconduct. The term “mismanagement” should be reinstated and the result of that will be that the bill will take a much more reasonable approach.

**Christine Grahame:** I am looking at chapter 10 of the bill, from section 70 to section 77.

**Anne Swarbrick:** Those who have a right to appeal in Scotland are either the charity or the person against whom the order is made, and that depends on whether the order is against an individual or the charity.

For example, if a trustee of a charity is suspended, and that trustee chooses not to appeal, the charity cannot do anything about it; it cannot tell OSCR that it has got it wrong or ask OSCR for help if it is in difficulties. In England, the range of people who have a right of appeal is much wider; it is anyone who is or might be affected by the decision. That is a better formula because it allows the appeals tribunal to consider evidence from everyone and decide all the issues arising out of a decision of the regulator rather than only some of them. It does not seem to me to be particularly productive for the range of those who can appeal to be drawn as narrowly as it is in the bill. It would be much more fair, just and sensible to allow a wider range of people to appeal.

**Christine Grahame:** I was thinking that if, for example, someone regularly gives large donations to a charity they would have no entitlement to appeal the decision.

**Anne Swarbrick:** They would not.

**Christine Grahame:** Perhaps things might even be said about that person in their actions and they would have no right of redress within the format that is laid out in the bill.

**Anne Swarbrick:** That is right. One of the things that OSCR could do is to freeze bank accounts. The account might be a joint account, but the joint account holder would have no right to come to OSCR and say, “I have something to say about this.” That seems to be particularly unjust.

You could argue that what is proposed in the bill is more restrictive than the current position. Currently, if OSCR decides to take action against a charity it goes to court and the petition is served on everyone who has an interest. All those people have the right to come along, lodge answers and be heard by the court.

**Christine Grahame:** I am astonished—perhaps astonished is too strong a word; no, I am astonished—as some of the points that are being made in evidence seem to be about pretty basic errors in the drafting of the bill. I do not understand why we are in this situation. Those would be quite substantial amendments.

**Simon Mackintosh:** The approach taken by the Charity Law Association was to say that almost any decision of OSCR should be appealable and that instead of having a list of decisions that...
someone can appeal against, why not state that any decision of OSCR can be appealed by anybody who is affected by it? That would avoid any possibility of missing out decisions that ought to be included.

The general principle of providing us with a quick and cheap appeals process is entirely right. One of the reasons why we do not have many charity law cases in Scotland is because people have found that the process is too expensive and too difficult, so other ways must be found to deal with, for example, the decisions of the Inland Revenue on charitable status. The idea of having a quick appeals process is entirely right. It is a matter of ensuring that everybody who ought to get into the appeals process can get into it. First, OSCR has to review its own decisions on request, then there is the Scottish charity appeals panel and then there is the court. That is the right pyramid to go up.

Christine Grahame: But as I understand it, someone would have to have money to go to appeal, because there is no award of expenses. Is my understanding of the situation correct?

Anne Swarbrick: That is right.

Simon Mackintosh: The process removes the pressure of someone going to court and having to worry about paying the other side’s expenses if they are unsuccessful, which is a disincentive. When someone goes to the charity appeals panel they are not faced with the prospect of having OSCR’s expenses landed on their desk. That should mean that decisions by OSCR are perhaps more readily appealed than those of previous regulatory bodies.

Christine Grahame: On the other hand, if someone’s appeal is successful, there is no award of expenses in their favour. Should there not be discretion to award expenses in certain cases?

Anne Swarbrick: I think that there should be. If an individual tries to appeal a decision made by OSCR, they have to take legal advice and pay for that themselves, or they have to turn up at the tribunal unaccompanied and face the might of OSCR.

The Joint Committee on the Draft Charities Bill, at Westminster, has proposed that successful appellants should be entitled to get their expenses from the Charity Commission for England and Wales, but that the tribunal should award expenses to the commission only when the appeal amounts to an abuse of process. That seems to be right, because otherwise charities and individuals would have to bear the whole cost of the appeals process. They would have no award of expenses made against them, but there would be a substantial cost involved in achieving equality before the tribunal.

Simon Mackintosh: In tax cases, the Inland Revenue will sometimes—it is a rare occurrence—pay expenses if it would like to see a point of principle litigated and a decision made on it.

Christine Grahame: Once the bill has been passed, in the early days in particular it could be tested on certain issues. There is a point of principle here. Rather than prevent people from testing interpretations of the act because they are concerned about costs, the law should award expenses to a successful appellant. Having a Queen’s counsel arguing on one’s behalf might be a very expensive business. I do not know how much QCs cost—it could be about £1,000 a day.

Douglas Connell: I support what Christine Grahame has said. Especially with a new regulator, it is very important that adequate checks and balances are in place, so it must be right to have a general right of appeal. It would be appropriate to have the ability to deal with expenses in the way in which Anne Swarbrick has suggested, especially given that we are talking about a brand new regulator that will have very broad powers, and that some criminal remedies will be involved. It would be good to have a robust system of review.

Dr Ford: Christine Grahame asked how we had arrived where we have on certain issues that we now recognise as important. I was a member of the bill reference group. Although I did not always agree with the group’s conclusions, I must make the general point that the step from identifying the need for something in principle and making a recommendation to producing detailed legislation is enormous. Points that one never had the opportunity to consider at the policy stage become apparent only late in the day. I think that that has happened again between the production of the draft bill and that of the bill that is before us. On behalf of the bill team—rather than the reference group—I would say that that is what seems to have happened. I am sure that it was unavoidable.

The Convener: I point out, too, that at the beginning of their evidence, everyone said that they were satisfied with the Executive’s consultation on the bill. Given the witnesses’ other answers, if they had not been satisfied, they would have said so. That suggests that, in general, the Executive and the bill team have got their approach right. That does not mean to say that there will not be times when what is on the table needs to be revisited or amended. That is the whole point of stages 1 and 2 of the bill process.

Mary Scanlon: I am pleased to say that we have reached the final question, which is about the investment power of trustees.

Part 3 of the bill implements the recommendations of the Scottish Law Commission
to extend the powers of investment of charity trustees of Scottish trusts, but the submission from Anderson Strathern says that the bill represents a “missed opportunity”. It states:

“In Scotland there is a prohibition against trustees delegating the management of trust investments to agents or nominees. In difficult investment conditions this is unsatisfactory because investment decisions can be taken much more effectively by an agent or nominee than they can by a body of trustees.”

It compares that to the situation in England and Wales, where

“Part IV of the Trustee Act 2000 gave trustees … power to delegate certain functions, including investment of assets.”

Will you clarify what you meant when you said that the bill was a missed opportunity? How much of a disadvantage could that be if the bill goes through in its present form?

Anne Swarbrick: At present, Scottish trustees cannot nominate investment managers to manage their investments for them—in effect, they have to do it themselves; they cannot delegate the task. That was a problem in England, too, but the situation was addressed by the Trustee Act 2000, which gave English and Welsh trustees powers to delegate investment of assets to fund managers. Such powers are especially important in the difficult investment conditions that we are experiencing at the moment. Managing one’s investments is easy when the stock market is going up all the time; it is not so easy when it is moving in fits and starts. To level the playing field, it is appropriate to give Scottish trustees the same powers as English and Welsh trustees. That would provide assistance.

11:15

Simon Mackintosh: England has the Trustee Act 2000, which provides extended investment powers, the power to use nominees and delegates and the important duty to supervise the activities of those to whom investment powers, for example, are delegated. I would not like the committee to go away thinking that trustees of charities or any other trusts cannot delegate investment management. We are talking about the position when a trust deed contains no specific power or a trust deed’s general terms are not wide enough to allow delegation. We are talking about the implied statutory powers when nothing else is said.

Plenty of Scottish trust deeds allow delegation of investment management and the use of nominees. Modern trust deeds will provide that. The risk for trustees is that if they do not have a specific power and the general powers are not wide enough, they commit a breach of trust if they undertake sensible financial management by giving an investment manager a policy to act within and the requirement to report to trustees quarterly or every six months. That is a perfectly sensible way to manage a trust fund’s investments, but the concern is that Scots law prevents trustees from acting in that way. The general principle of extending investment powers—which a joint report of the Law Commission and the Scottish Law Commission suggested and which has been applied in England—is to be supported. As Stephen Phillips said, some charities are waiting for the new reorganisation provisions, just as some are waiting for those powers.

Mary Scanlon: I will not go into the offences in section 99, which have been covered adequately. Anne Swarbrick talked about people becoming trustees. Will part 3’s provisions on investment powers act as a disincentive to some people to become trustees, given the responsibility that that involves?

Anne Swarbrick: Are we talking about the investment powers or trustees’ responsibilities?

Mary Scanlon: I am asking about the provisions on trustees’ responsibilities in relation to investment powers.

Anne Swarbrick: I do not think that they will have the suggested effect. The point that I made about trustees’ responsibilities is separate.

The Convener: I thank all the panel members for their full answers, which I am sure committee members found helpful. If you would like to make further points, I am sure that all committee members would welcome written submissions.

I suspend the meeting to allow for a change of witnesses.

11:18

Meeting suspended.

11:27

On resuming—

The Convener: I welcome our second panel to this morning’s Communities Committee meeting. We are joined by Maureen Harrison, the chair of the public affairs committee and vice-chair of the Institute of Fundraising Scotland; Martin Sime is the chief executive of the Scottish Council for Voluntary Organisations; Margaret Wilson is development officer for CVS Scotland; and Norrie Murray is head of the policy and strategy unit at Volunteer Development Scotland. I thank you all for taking time out of your schedules to be with the committee this morning.

I will ask a couple of questions that are similar to those that I asked our previous panel of witnesses, all of whom said that they were happy with how
the Executive had consulted on the bill’s proposals. Are you equally satisfied with the Executive’s consultation or do you have any concerns?

Martin Sime (Scottish Council for Voluntary Organisations): In general, I am very happy—the process has been good and inclusive. We have not been dealing with the Executive’s recent consultation alone; the same matters have been the subject of several consultations over the years and some of my members are familiar—or even over-familiar—with some of the questions about charity law, but there is still an enthusiasm for the task.

The Executive has gone about the consultation in a diverse way to represent the different stakeholders. However, my one caveat is that the Executive does not come back to us and say, “Well, that means that you have to be content with the content,” although there is broad consensus on large parts of the bill. The current consultation has confirmed that consensus on many aspects of the bill. There are a few areas where we feel that the bill could be stronger, but in general it has been a good consultation exercise and I commend the Executive on it.

The Convener: I am sure that those areas where you feel that the bill needs to be strengthened will be explored both at stage 1 and stage 2 of the bill. Do other members of the panel concur with that view?

Margaret Wilson (CVS Scotland): I agree.

The Convener: My second point concerns the independence of OSCR. It will be a statutory body—a non-ministerial department—and accountable to the Scottish Parliament. Questions have been raised about the independence of OSCR and indeed the witnesses who were here earlier this morning raised some concerns about the ability of Scottish ministers to influence OSCR. What are your views on the independence of the regulator as proposed in the bill?

Martin Sime: As a member of the reference group that the Executive established, I can tell the committee that it was broadly agreed that OSCR should have a significant degree of independence, particularly in relation to its decisions on the awarding of charitable status. There was no pressure to enable Scottish ministers to influence those decisions; there was a recognition that it would be much better if Scottish ministers were clearly disassociated from that kind of activity.

In relation to the discussion with previous witnesses earlier this morning, I understand why Scottish ministers might want to have the power to require OSCR to report on certain matters and to retain that power, because it is possible that OSCR’s future reports might not cover all the issues that might be of concern to Scottish ministers.

On the broader issue of independence, the point was not raised earlier—and SCVO would prefer this—that the role of making appointments to the board of OSCR should emanate from sources other than Scottish ministers. That would be a way to establish at the highest level that Scottish ministers have a low involvement in the governance of OSCR. The reference group explored a number of possibilities in that direction and I am rather disappointed that the bill has not picked them all up.

11:30

Maureen Harrison (Institute of Fundraising Scotland): From the Institute of Fundraising’s point of view, we agree that OSCR’s independence is vitally important, and that, especially for an organisation that aims to improve standards of governance for charities, it is extremely important that its own governance of the appointment of board members should be seen to carry that level of independence.

Norrie Murray (Volunteer Development Scotland): I agree with Martin Sime and Maureen Harrison that it is important that OSCR generates public confidence. Moves such as those that have been described would assist that.

Cathie Craigie: Establishing OSCR as the independent regulator would bring together all the main functions of regulating charities. We have heard some evidence in our journeys throughout Scotland that people feel that the bill lacks any directions or objectives for OSCR. Do you think that the bill should include objectives, and that those should be to promote charities and increase public trust in the sector? Do you think that part of OSCR’s statutory duties should be to provide advice to the sector on good governance as well as on adherence to the law? Do you think that OSCR’s remit should include an advice-giving role to Scottish ministers? You will have heard this morning’s earlier evidence. We realise that there are different views on the situation, and it is important to hear your views too.

Margaret Wilson: OSCR should have a restricted advice-giving role. I agree with some of the speakers this morning that the advice should be about compliance with the law and not about more general matters because that would be much better provided by the sector itself. Certainly, SCVO and CVS are already involved in that work. We have built up a body of expertise in that work so the advice would be much better delivered in that way. It would be a conflict of interests for OSCR to have a supportive role as well as being the regulator. That would not be comfortable for OSCR.
Martin Sime: These matters have been subject to considerable debate in England, because many charities there have had problems working out whether interventions from the Charity Commission are the commission acting in its policeman role or as a friend to the charity.

There is a further distinction to be made about whether OSCR would provide advice to individual charities as a result of inquiries, or whether more general advice would be provided. There is a broad consensus that the right way for OSCR to go about its business would be for it to offer individual advice to charities as a result of inquiries. This morning we heard that 95 per cent of the work of the Scottish Charities Office consisted of that kind of input. However, there are substantial issues to be addressed in relation to the general provision of advice to charities. The first is the provenance of that advice. It seems to me that, given the diversity of the sector, what is good practice for some might not be good practice for others. In our work on charity law during the past 10 years, we have come across examples of Charity Commission leaflets that contain things to which we would certainly not want our members to subscribe. Some of those areas can be quite contentious and I would say that there is no consensus on best practice.

Secondly, the nature of OSCR requires it to put its regulatory functions first. It is a regulator first and foremost and we are all wary of establishing a sort of super-quango with enormous numbers of staff. This morning, it was suggested that the budget of the Charity Commission is £50 million, but I think that it is probably around half of that. However, we do not believe that it is appropriate to over-resource OSCR in order to provide a solution to all the issues that face all the charities in Scotland. That would detract from its regulatory function.

Thirdly, I am not a lawyer, but I understand that there are some differences between Scots and English law in this area. The provision of advice by the Charity Commission is of quasi-judicial nature, which means that, if charities follow that advice, they are indemnified. I understand that that would not be the case in Scotland.

Finally, it is obviously in the interests of the sector to have advice provided. However, much support and advice is given within the sector and we would have some concerns that some of that might disappear if OSCR started to extend its role in that way.

Margaret Wilson: I wonder whether the bill is the best place in which to put objectives for OSCR. The world changes and it is unlikely that, in 100 years’ time, the same provisions will be required. With that in mind, it might be that other instruments could be used to give OSCR its direction. I do not know whether the encouragement of charities is the sort of thing that should be laid out in a statutory way in a bill. I would have thought that OSCR should be told that, in general terms, it should act in a way that encourages charities and gives the public confidence in charities and so on. However, I am someone who does not know about these things in any great detail and can provide only a layman’s view.

Maureen Harrison: I endorse Margaret Wilson’s last point. I am not sure that the bill is the place for objectives. I would also like to restate the fact that the Institute of Fundraising believes that, while regulators should have a strong role in working to promote best practice, that role should probably be carried out in partnership with the principal stakeholders in the sector, such as the people around this table. We have already had several discussions with OSCR on various arrangements that are coming into place. I think that working with umbrella bodies is the best way in which to take that objective forward.

Patrick Harvie: The witnesses will have heard our earlier discussion about charitable purposes and the public benefit criteria. In particular, we heard evidence about the cross-border issues that might arise as a result of the fact that various bodies have differing charitable purposes. Do you have any comments on the list that has been arrived at? Are you satisfied with it?

Martin Sime: Again, the issue is complex. I listened to the debate this morning and was disappointed to realise that the drawing up of the list was not conducted on a set of broad principles that would enable us to move forward. It may well be the case that we can satisfy ourselves and be comfortable with the charity legislation and regulation in other jurisdictions. That said, charity legislation and regulation is a fast-moving feast.

Although members of the first panel said that the bill should go down a particular line because the Charity Commission in England and Wales has been in play for a while and the panel members were broadly content with its activities, charities in Northern Ireland, which are not at present the subject of regulation, are in the process of putting regulation in place. At this stage, I simply could not comment on how charities are regulated in Iceland.

That brings me back to the first principle, which is that charitable activity in Scotland ought to be regulated. Subsequent to the passing of the act, the extent of regulation may be the subject of discussion between regulators in different jurisdictions. However, in Scotland, we should start from the first principle that all substantial charitable activity that takes place in Scotland should be regulated. I leave to one side the debate...
on the subject of newspaper advertisements, as I think that there is consensus that we should try to exclude such activities. However, if an organisation is undertaking charitable activity in Scotland, that activity ought—at least in principle—to be regulated by OSCR.

As I said, subsequent to the passing of the act, there will be a job for OSCR to negotiate with other regulators to minimise the burden and duplication of regulation that charities face. If that happens, the principle in the legislation will be established and—in the end—that is what the legislation is for. Those negotiations will also locate the issue of UK charities in the broader context of Scottish charities that are regulated by other regulators. In other words, dual regulation is an issue for many people, not just for charities that are based in England and which wish to undertake charitable activities in Scotland. If we return to that first principle, we will find a proper way forward in the context of the bill.

**Margaret Wilson:** I agree with the principle that activity in Scotland should be regulated in Scotland. Although we can all cite examples of well-organised charities that do excellent work, surely part of the reason for the bill is to deal with the activities of the less scrupulous operator. Sometimes the burden of regulation has to be placed on people who do not need it to stop the activities of those who need to be stopped. It is just one of those things. If we can get cross-border agreement on how to achieve a reduction in the burden on charities, the principle can apply that all charitable activity that takes place in Scotland should be regulated in Scotland.

I want to address the divergence of language between the draft bill and the bill as introduced. The issue was raised earlier this morning in the context of disability. That issue needs further exploration as it could cause problems for Scottish charities. We raised in our submission the fact that we want to ensure that the wording does not take precedence over the public benefit test.

Let us take the example of an organisation that provides advocacy on behalf of children. At the moment, advocacy is one of those grey areas; it is not of itself a charitable purpose. The Parliament should ensure that advocacy is listed as a charitable purpose because of the public benefit that results—in this case, to children. Another example is community transport—indeed, at the moment, several activities have to be fitted around something else for them to be recognised as having a charitable purpose. Within a broad spectrum of what is an acceptable activity in terms of tax relief and so forth, the Parliament should make it easy for people to do the things that help other people. After all, the whole point of charities is that they are there to help people.

As I said, we raised the issue of the wording that is used in the drafting of the bill as introduced. The Parliament might want to consider amending section 7(2)(m) to allow charitable activities such as advocacy and community transport to be included in the bill. I am also aware that, in 50 years’ time, we could be talking about different activities—things change over time.

11:45

**Patrick Harvie:** The message so far seems to be that the cross-border differences are not as serious as others have argued and are resolvable. Are there other issues with what is, or is not, in the list in section 7?

**Martin Sime:** There is a general view—it is certainly the SCVO’s view—that alignment with the definition of charitable purposes in the draft bill for England and Wales is desirable. That is also the view of the Joint Committee on the Draft Charities Bill at Westminster. The challenge for us all is to determine how we can get to the point at which we can align the definitions. There are parallel parliamentary processes, and I am not sure that there has ever been an attempt to legislate on the same issue in two different jurisdictions to achieve alignment. That is not to say that one definition is right or that another is wrong; it is just that there is a consensus that we should all cast the definitions of charitable purposes as broadly as possible to ensure that the definition of charity accords with public understanding and that it is durable enough to sustain the development of charity.

Public benefit is perhaps more complex, because the two jurisdictions are not starting from the same point, which means that there is not necessarily a possibility of alignment on the definition. There is a possibility that Scotland could hold up its hands and say that it is comfortable with what is going on down south, but there is also a possibility that we could examine the issue in the light of what we believe best meets the interests of the Scottish public.

**Norrie Murray:** Volunteer Development Scotland’s primary concern with the bill is volunteering—I hope that that came through in our written submission. We examined one particular aspect of the list and proposed that “the advancement of civic responsibility or community development” should read “the advancement of citizenship or community development”, on the basis that we have a straightforward idea that citizenship embraces much broader aspects—mutuality, rights and responsibilities—than civic responsibility. It so happens that that change would, as we understand it, bring the bill into
alignment with the draft bill for England and Wales.

Christine Grahame: I am interested in what Martin Sime said about the charity test and public benefit—if I can link together sections 7 and 8—and the public understanding of “charity”. I do not think that the public would understand that Fettes College or the BUPA Murrayfield hospital are charities. However, as I understand it, under the charity test, they would remain charities and continue to have charitable status. Is that correct?

Martin Sime: That is uncertain, and I am not sure that that uncertainty is necessarily a bad thing. The previous witnesses’ view seemed to be that uncertainty was to be avoided, but the important thing is that a strong charity brand emerges from the bill and that that brand is aligned as closely as possible with what the public understand a charity to be. If we have such a strong brand, that will create the conditions for the charitable sector in Scotland to flourish, develop its work and extend its contribution to Scotland. Therefore, the SCVO approaches public benefit not by taking a view on whether individual organisations might or might not qualify, but by seeking in the bill a definition of public benefit that aligns with a broad public understanding of what charity is and means.

Christine Grahame: If my test is that, under sections 7 and 8, Fettes College and the BUPA Murrayfield hospital would still count as charities, the bill’s definition of public benefit would surely not accord with the public’s idea of a charity.

Martin Sime: Many members of the public are shocked to discover that some institutions that are ostensibly privileged and to which the public do not have significant access are charities. However, I should also say that the argument spreads more widely into charity independence. For example, most members of the public are shocked to discover that the Scottish Qualifications Authority is a charity.

Mary Scanlon: The same goes for colleges of further education.

Martin Sime: On all those fronts, the SCVO, which has a long history of engagement on the issue of public benefit, wishes to establish in the bill a definition that would make it clear what charity is and what it is for.

Donald Gorrie: Are you content with the definition in the bill as introduced? From your point of view, has it been improved since the draft bill?

Martin Sime: It is better than no definition at all. I am not sure that I entirely agree with it, but it is pretty obvious from the explanatory notes that it will allow all existing bodies to continue to enjoy charitable status. However, we would like a tighter definition of public benefit. It seems to me that under the proposed definition it will be possible for an institution to offer a tiny charitable act within its overall ambit of activities, yet the whole organisation will still qualify as a charity. The public would not understand or support such a proposition.

Donald Gorrie: The written evidence from CVS Scotland refers to modern types of charity such as “development trusts, community radio ... advocacy and community transport”, which you feared would not be included in the definition in the bill. Do you think that we need to enlarge the list of 13 charitable purposes that is given in section 7(2), or should we approach the matter in some other way? Such organisations are good and probably deserve charitable status.

Margaret Wilson: The matter needs to be approached in a different way. As Stephen Phillips said this morning, section 7(2)(m) may well need to be re-worded. I do not understand the distinctions that are made by the word “analogous”, but it is not clear from paragraph (m) that organisations that do not fall easily under the other headings but pass the public benefit test would get charitable status. If people are to understand that, the paragraph needs to be clearer. Some organisations that seek to be charities have great difficulty in achieving that aim even if the public perceives that it is obvious that they should be charities. The Inland Revenue puts up tremendous barriers to such organisations becoming charities because they do not fit with the law. We want the new law to allow more flexible interpretation than is apparent on the part of the Inland Revenue.

Donald Gorrie: Do you think that the appeal system that is included in the bill is satisfactory for clarifying the disputes that will, no doubt, arise?

Margaret Wilson: It is a step in the right direction, but surely it is better to get things right at the first stage so that organisations that the public accepts as charitable do not have to go to appeal. We do not want to have loads of appeals; we want a clear set of tests that can be applied to determine whether an organisation is a charity, without having to jump through hoops. As I said in my evidence, one of the concerns that CVSs have is that there is a demand on fledgling organisations to produce documents, as if they will prove that the organisation is charitable. I am sorry, but I do not see how a business plan proves that an organisation is a charity. There has to be another way to investigate whether a proposal can be deemed charitable. I hope that OSCR will take a much more flexible approach and that the bill will include a test so that we can interpret activities that might arise in the future—we do not yet know
what they might be—to say that they are of public benefit and may be deemed charitable.

**Mary Scanlon:** I move on to chapter 3, on co-operation and information. Do you think that section 20(1), which obliges OSCR to “seek to secure co-operation between it and other ... regulators”, is sufficiently strong to prevent duplication of effort, particularly by smaller charities?

**Martin Sime:** The field of regulators is getting ever more crowded. That is a serious issue for charities—one thinks of the care commission and other actors in the field—and there is an overarching need for regulators and inspectors to meet one another and get their act together with a view to minimising the regulatory burden on charities of all sizes. Whether it is best for that to be cited in the bill is another matter. As we commented, it is all very well to put a duty on OSCR but the system will not work if no duty is put on other regulators, and the bill cannot do that. Maybe it would be better to remove all that from the bill and to require the Executive to ensure that all regulators are under a duty—perhaps a special duty—to work with small organisations.

**Mary Scanlon:** A duty is being placed on OSCR to seek and secure co-operation, but co-operation takes two. Is that all that is possible within the terms of the bill?

**Martin Sime:** Yes; I am just raising the question whether it is sufficient to ensure that all regulators engage in the discussion with the same degree of enthusiasm. On its own, that provision does not achieve anything, and the bill cannot achieve any more than that.

**Mary Scanlon:** But is it not likely to lead to more streamlining of information rather than duplication?

**Martin Sime:** It may do if the other regulators co-operate.

**Christine Grahame:** How does the role of OSCR interact and reverberate with charities and freedom of information? We already have freedom of information legislation. I presume that the public can now request a lot of information from charities that would not have been available before. Is that correct?

**Maureen Harrison:** There was always a duty on us to provide our annual accounts, for instance.

**Christine Grahame:** Yes, but the Freedom of Information (Scotland) Act 2002 imposes further duties now. I am trying to find out whether charities are going to have to duplicate work because they will be required to provide the same or similar information to OSCR. Will there be an extra burden on charities?

**Martin Sime:** It is quite easy to provide the same information to lots of different people; providing different information or information in different formats is more complex. That is why much more co-operation is required between regulators, the information commissioner and others to ensure that the forms in which charities are asked to provide information are lined up.

**Christine Grahame:** I understand. I was just trying to find out where the information commissioner came into the process, as the Freedom of Information (Scotland) Act 2002 will come into force in January.

**Martin Sime:** Some aspects of the matter are unclear—for example, whether the minutes of the governing body of a charity should be made available to the public. I am afraid that I do not know the position regarding such matters under the Freedom of Information (Scotland) Act 2002.

**Mr Home Robertson:** I want to return to a point that you flagged up in relation to the duty to co-operate. As drafted, the bill would lay that duty to co-operate on OSCR. You make the point that it is not possible to lay an equivalent duty on other agencies; however, that is not the case. I presume that it is open to the Parliament to lay a similar duty on other relevant regulatory bodies, provided that they come within the devolved remit. That could be done; are you suggesting that it should be done?

**Martin Sime:** If it could be done, that would be beneficial; however, whether it could be done by the bill is another question.

**Mr Home Robertson:** Well, we can look into that.

**Mary Scanlon:** Under section 23, which creates an entitlement to information about charities, a request can be made for a charity’s constitution and statement of accounts. Moreover, the information must be provided “by the charity in such form as the person may reasonably request.” Has that caused you any concern? It was brought to our attention by the lawyers this morning.

**Martin Sime:** I was very interested in that discussion. For the past five years, SCVO has been trying to do precisely what was suggested this morning was terrible—that is, to ask all Scottish charities for a copy of their accounts and founding documents. The only people who sought to charge us money or withheld that information were lawyers. The existing law allows them to make a reasonable charge, but it does not specify what a reasonable charge is. There is no way of managing that proposal. Section 23(2) states that Scottish ministers may propose a maximum fee: that would certainly put an end to the rather restrictive practice of some bodies.
I should say that a very small minority of charities was unwilling to provide information. Therefore, I think that it is already established that charities have an obligation to provide such information to anyone who requests it. Irrespective of OSCR’s role in collecting and providing such information, that principle must be right, as charity is a public matter in Scotland. Views have been expressed that charities are private bodies but, in our view, a body that has the privilege of calling itself a charity and accruing tax benefits has a responsibility to make such information available to whoever asks for it.

12:00

Mary Scanlon: I think that we have got the message and I would like to move on.

We have discussed charities that are managed or controlled wholly or mainly outside Scotland, so perhaps we should not go into this matter in too much detail, but has the correct balance been struck on the issue? Is there a regulation and accountability gap that could be exploited by charities outwith Scotland? Do you think that there is a loophole for charities that operate with a significant presence in Scotland? I refer to a contractual presence, office premises or whatever.

Martin Sime: I did not think so until the earlier discussion on whether an organisation that is engaged in contractual work would be captured by the provisions. My assumption is that it would. If that assumption is correct, I do not think that there is a loophole. It is difficult to draw the line—

Mary Scanlon: I should correct you. I think that I simply asked about a local authority carrying out contractual obligations in Scotland, but it was not established that carrying out a contract in Scotland meant that there was a significant presence in Scotland.

Martin Sime: My assumption is that carrying out a contract in Scotland would mean that there was a significant presence.

Mary Scanlon: Even though the company did not have premises in Scotland.

Martin Sime: Many different forms of charitable activity do not necessarily involve office or shop premises. Perhaps we need to consider that matter.

Mary Scanlon: When you talk about carrying out a contract, do you mean providing a service as opposed to simply fundraising in Scotland?

Martin Sime: I would have thought that both are covered, particularly if the fundraising involves individual approaches to members of the public. That OSCR should be notified in that respect and the organisation should have at least in-principle regulation with OSCR is absolutely correct. Such an organisation should fit in with the regulatory requirements. The subsequent degree of regulation north and south of the border is a subject for the regulators to discuss.

When we considered the issue, we tried to exclude things that are simply impossible to regulate in the same way, such as national TV advertising and the internet. However, we think that face-to-face operations in Scotland would amount to substantial activity.

Mary Scanlon: So there could be a loophole in television advertising and advertising in national daily or weekly newspapers.

Martin Sime: We think that that is inevitable.

Linda Fabiani: Chapter 4 of the bill is on the supervision of charities. It proposes the powers that OSCR and the Court of Session will have to investigate charities and to act in the case of wrongdoing. Is the sector fairly content with the bill in that regard?

Margaret Wilson: There is general concern about the distinction between misconduct and mismanagement, which the first panel discussed. What will be most effective? I do not think that criminal proceedings will be helpful. They would reduce the number of people who want to come forward and would not necessarily stop people making mistakes. People make mistakes because they do not know something, are mistaken about something or whatever, and criminal proceedings will not necessarily stop such things. There is a concern about the proposals being too harsh and about there needing to be a distinction between deliberate misconduct involving somebody embezzling funds or using a charity for their own purposes and somebody making a mistake.

Norrie Murray: We very much agree. Trustees will be volunteers and there are already concerns about the impact of regulation in its broadest terms. Yesterday, we had stories about the perceived impact on volunteering levels of the Protection of Children (Scotland) Act 2003. Potential trustees look at their situation and, as any other reasonable person would do, weigh up the advantages and disadvantages. We are worried that, if the scales are tilted too much in one direction, that might impact on the number of people who are willing to volunteer as charity trustees.

Linda Fabiani: I want to move away a wee bit from individual trustees and talk about the powers that will be given to OSCR and the Court of Session.

Martin Sime: I have a comment on the bill’s genesis. One reason why we are considering the bill—which my organisation is pleased about—is
precisely because in at least one recent case, and perhaps in another, a person sought to defraud a charity for their personal benefit. There is a widespread view in the sector that, to sustain and increase public trust in charities, proper regulation is required and that the full force of the law should descend upon those who seek to abuse charity. There is no ambiguity among our membership that, in cases of deliberate misconduct and defrauding of charities, the law ought to be put in place as swiftly and as effectively as possible. In the two cases that were brought to public attention recently, that was not possible because, as a result of technical issues, the law was not strong enough. People had found ways to gain significant personal advantage and the law was unable to act. Our members have no difficulty with the aspect of the bill that deals with those issues.

Linda Fabiani: You are broadly content with the proposals.

Martin Sime: Yes, but important points were raised earlier with the previous panel of witnesses about the need to distinguish between misconduct and mismanagement. The vast majority of charity trustees are volunteers who are trying to make a contribution to their community and they should be encouraged, enabled and supported. Where mistakes are made, they should be picked up and the people should be offered guidance and support to help them to proceed. If we get the balance right in dealing with misconduct and mismanagement, we will do well.

Linda Fabiani: So you are generally content with the powers of inquiry that OSCR and the Court of Session will have, but you raise the issue of how trustees are dealt with.

OSCR's post-inquiry supervisory role is covered in section 31. Are you generally content with that provision? Given that OSCR will act and refer to the Court of the Session in broadly the same way as it will before an inquiry, you have probably covered the issue. Are you happy that the process is to be speeded up and that the issue will be much more clear-cut than before?

Martin Sime: We understand entirely why the court should be encouraged to act swiftly to protect charitable assets in prima facie cases of misconduct. However, one problem is that it will be difficult for a charity to re-establish itself, even if the inquiries are subsequently proven to be inaccurate or if it is established that the case was a result more of mismanagement than of misconduct. That is why we feel that cases should not go on for long and that OSCR should publish its final verdict. A big weakness with the Scottish Charities Office was that people never found out what it had discovered.

Linda Fabiani: So it is important that that is included in the bill.

Martin Sime: It is important that such information is made available publicly. The measure follows good examples from the Charity Commission, which publishes a digest of cases to show what it found in its examination of charities. That information gives charities confidence to progress and their supporters confidence that the charity has been given a bill of health—although that bill of health may not be absolutely clean and issues may need to be addressed, the information is in the public domain and everybody is comfortable with that. When such information is not in the public domain, there are lots of whispers about whether certain charities are bona fide, which is difficult for the charity trustees. Charities are completely undermined by semi-public inquiries and they suffer badly as a result.

Linda Fabiani: So you are happy with the provisions on inquiry reports.

Maureen Harrison: It is also important that other charities can read the report of the inquiries so that they can see if there is something that they need to do to ensure best practice.

Linda Fabiani: I want to ask about registered social landlords being exempt. How do you feel about fragmentation of the regulatory role and the possible extension of that under the bill?

Martin Sime: Despite SCVO having a few registered social landlords and the Scottish Federation of Housing Associations among our members, we are rather puzzled by that exemption and suspect that there has been some special pleading. We do not think that registered social landlords should be excluded from primary regulation by OSCR because that will create an unhelpful precedent. We think that there are other organisations and charities that are subject to dual regulation and which could well come to the committee and ask, "Why them, but not us?" We think that it is wrong that the exemption is included in the bill because it is not a principle. The principle is that all charities ought to be regulated. Subsequent discussion about how they are regulated is the way in which to sort out the issues that relate to registered social landlords.

We know that the bill emanates from the Development Department and that the Development Department is also responsible for Communities Scotland, so we can only suspect that the provisions have been created as a result of lobbying—they have not been the subject of widespread consultation. That does not mean that we support onerous dual regulation on registered social landlords or anyone else; it is simply that we do not think that special cases ought to be made in the bill.

Linda Fabiani: For the sake of clarity, we should state that not all RSLs are charities, so the bill covers only some of them.
Donald Gorrie: I want to ask about smaller charities and their accounts. Do you think that some smaller charities do not need to do too much accounting or do you think that the bill is going in the right direction, in so far as it seems that there will be a graduated system that ministers can set out and which will ensure that small charities can have simpler accounts than bigger charities? Would it be possible to have only one set of auditing and to have OSCR regulate charities on a basis such as that which colleges use in relation to college activities, for example?

Margaret Wilson: It is a good idea to use graduated instruments to ensure that a charity that has £10,000 or less is not treated the same as one that has £10 million or less.

The principle of producing accounts that show how money has been spent is important. If regulation is reduced too much, a slapdash attitude is encouraged. Human nature being what it is, people will say that they will not do something because they do not have to. However, it should be a first-principle assumption that if public money has been received, whether through donations or grants, it should be accounted for. There might be a temptation to lop the lower-level charities off the list on the basis that such small sums of money do not matter much, but they matter a great deal to the communities that are involved. Mismanagement and misconduct happen in smaller charities as well as in larger ones so there should be as much protection as possible for the public money that is involved. That is why I think the graduated approach is best.

Maureen Harrison: I endorse that. The abiding principles of transparency and proportionality are important. If I remember correctly, at one stage in the bill reference group’s discussions—I was a member of that team—we examined proposals from south of the border that would have meant that audited accounts would not be required for lower-level charities. We felt that that was not at all appropriate because it is important to ensure that public money is properly accounted for.

Martin Sime: Three variables have to be considered. One is the level at which an audit by a qualified auditor, rather than an accountant, is required. Another is the content of accounts and the extent to which charities have to keep accounts in different formats; for example, charities are required to produce a statement of financial activities and the level at which that kicks in is important. The third variable is, of course, the turnover of the charity. Those matters, which are the subject of regulations associated with the bill, ought to be the subject of pretty wide consultation in order to ensure that thresholds are right so that charities account appropriately but smaller charities are exempt from the more onerous provisions. We must not have the same regime for a charity that has £10,000 as we have for one that has £10 million. There is general acceptance of that principle, but we need to create consensus about where the different thresholds should be located.

We must also regularly update thresholds. One problem with the current accounting regulations is that they are largely ignored because they were introduced more than a decade ago and have fallen into disuse. When OSCR examined compliance issues in its recent pilot monitoring programme, it found that many charities ignore the regulations. That is not the right climate. Compliance must be associated with reasonableness.

12:15

The Convener: Linda Fabiani has a question.

Linda Fabiani: I was away on another train of thought.

What do you think about the new form of Scottish charitable incorporated organisations? Everyone seems to think that it is a good idea. Do you share that view?

Margaret Wilson: Yes, but, no level for liability is specified; it may not be possible to include that in the bill. Will liability be the same—£1—as the liability that currently exists for companies limited by guarantee? Will there be guidance on that? That is our query about the proposal. In general it is welcomed as a sensible step forward.

Linda Fabiani: Perhaps one of you can deal with a query that occurred to me when I examined the bill but which I forgot to have clarified. The bill states that only two trustees are required for a Scottish charitable incorporated organisation to be formed. What is the situation for trustees who enter into a company limited by guarantee or a friendly society? Will only a few be liable?

Martin Sime: I cannot answer in respect of friendly societies, but it is possible to establish a company limited by guarantee with only two members. I may be wrong, but I think that the provision is very similar.

Linda Fabiani: I will check the matter.

Martin Sime: The key issue is that unincorporated associations can establish themselves as they please, with any number of members, and can adopt any constitution. However, there is no protection in terms of liability for the actions of the organisation. The new legal personality of the Scottish charitable incorporated organisation is seen as a very good news story. Its creation will enable charities to take on more responsibilities and to have a legal form that
meets their needs, without their needing to become a fully blown company limited by guarantee.

Linda Fabiani: Would many SCVO members voluntarily switch to the new model?

Martin Sime: It is difficult to predict the extent to which organisations will change. SCVO, which is a company limited by guarantee, will consider the new form for itself. We expect that, over time, there will be a gradual migration to the form as the preferred legal personality for charities in Scotland.

Norrie Murray: To us, it sounds like a volunteer-friendly policy, so we are very supportive of it.

Patrick Harvie: I was interested by Martin Sime’s comment that he does not believe that special cases should be made on the face of the bill. That comment was made in the context of RSLs, but do you have the same thoughts about designated religious charities?

Martin Sime: The very short answer is yes. SCVO has tried to work its way through the issue. Sometimes it is difficult to build consensus in the voluntary or charitable sector because we are a population of special interests. However, we see the bill as an opportunity to establish some broad-brush principles. Our view is that, unless there are compelling arguments, those principles should stand. I have not yet heard a compelling argument for why designated religious bodies should be subject to a lower level of inspection and scrutiny than other organisations. They may have a compelling argument, but it has not yet been put.

Patrick Harvie: I will seek the views of other members of the panel in a moment, but do you think that, in general, there is a case for saying that certain charities are big enough, sufficiently long established and sufficiently trusted by the country to receive a different level of regulation, which could be suspended by ministers or by OSCR if necessary?

Martin Sime: It is difficult to sustain the idea of one law for the rich and established and a completely different law for everybody else. That is not a charitable principle at all.

Patrick Harvie: I ask only because the attachment of the exemption to charities under paragraph (c) instead of paragraph (a) or (f) or whatever in the list of charitable purposes would seem to be one way of levelling the playing field. However, if the simple existence of any kind of exemption is a problem for you, that is a different matter.

Martin Sime: There is a problem with exemptions that have not been earned and been seen to be earned, which are two different things. In terms of SCVO’s broad-brush approach, we are here after a 10-year campaign for a charity law bill. I hope that in 10 years’ time we do not have to do the exercise again, so we need to ensure that everything that is established under the bill will be sustainable. We need the bill to be robust and based on the right principles, which requires equity of treatment across charitable bodies.

Patrick Harvie: Do other panel members have comments?

Margaret Wilson: I do not see why it should be presumed that because an organisation is religious it is more trustworthy. They have tax benefits, people give them gift aid and they collect money from the public. Why should people not have the chance to scrutinise that? I know that many churches publish their accounts and make them available to church members, which you can say means that they are available to the public, if you like, but I do not accept their case for being out of the loop. Regulation will not be so onerous that it will cost them thousands of pounds. I do not see why they would have a problem—although maybe they do not. Perhaps the problem is something else. I agree with Martin Sime that if an organisation is charitable and it is in Scotland, it should be regulated in Scotland.

Maureen Harrison: If there are going to be exemptions they will have to be monitored.

Scott Barrie: You have already touched on — and perhaps answered in your response to Linda Fabiani—the question that I was going to ask about the mismanagement versus misconduct debate that we had earlier. Do you have anything to add?

I will take the silence as a no.

Christine Grahame: I seek your comments on chapter 10, on “Decisions: Notices, Reviews and Appeals”. First, I may get this wrong—because I am paraphrasing the evidence of a clutch of solicitors—which would be unforgivable, but I got the impression that section 70 is overly complex, listing as it does the various sections under which orders can be made. Should there be a general power for OSCR to make orders, rather than having to go through the list in section 70, in case something is missed? Secondly, will you comment on the appeals procedure and the fact that third-party rights are not part of the process? Thirdly, will you comment on the discretionary award of expenses to the appellant following the regulator’s decision?

Martin Sime: It is difficult for us to comment on the first question because it is a drafting question.

Christine Grahame: Certainly. Delete it from the record.

Martin Sime: In general terms, SCVO supports the proposition that there should be some third
party or independent right to appeal decisions of OSCR. If the situation is completely open ended it will open the floodgates of possible appeals, which would be beyond the scope of the proposed mechanism to deal with. That would not be in anyone’s interests.

On the other hand, charitable status or public benefit propositions that are rejected or accepted by OSCR ought to be subject to some form of public interest appeal. In other words, we feel that who is or who is not awarded charitable status is a matter of public interest and that an interested member of the public should be able to establish that information.

As I am not a lawyer, I find it difficult to suggest a form of wording that would ensure that the appeals panel will not be swamped. I certainly think that, in public interest appeals to the panel, appellants should bear their own costs. In any case, it is important that members of the public be able to challenge OSCR on the matter.

Christine Grahame: Should appellants bear their own costs if their appeals are successful?

Martin Sime: On the general principle of appeals to the appeals panel being accepted, I think that the panel should have the power to award costs to the charity or the person concerned. It should not always be the case that costs are awarded to people or organisations whose appeals are successful. Instead, the panel should use its judgment. Costs should be awarded against OSCR, because that would place an added burden on the regulator to get things right. As this morning’s earlier discussion highlighted, such checks and balances would be helpful.

Christine Grahame: I understand that in most court processes there exists discretion to award, or not, costs in part or in whole. Do the other witnesses concur with Mr Sime’s view?

Maureen Harrison: Yes.

Christine Grahame: Part 2 of the bill, which concerns fundraising, is terribly interesting because it involves situations in which the public come face to face with tin rattlers, shops selling certain material and so on. People are concerned about whether such activities are being carried out properly and for proper charitable purposes. Do the proposals in part 2 allow for sufficient transparency and accountability so that people can maintain their trust in charities that have street collections or sell material in shops?

Maureen Harrison: The most important aspects are that contracts will be required for all involvement with professional fundraising activities and that there will be regulation not only of public charitable collections but of public benevolent collections, which will include the giving of pledges for regular donations. Unauthorised fundraising will be prohibited and there will also be a clear requirement for fundraisers to be authorised by a charity. Such provisions will give the public a great deal of confidence.

Christine Grahame: Are there any gaps with regard to OSCR’s role in this particular area?

Maureen Harrison: Our written submission makes it clear that licensing of public benevolent collections is a particular gap. The bill does not give OSCR a strong role in the process and we are concerned about local authorities’ capacity and ability to oversee that area. It is important that OSCR should have a role in guiding and monitoring the work of local authorities.

Christine Grahame: You mentioned guidance. In your submission, you say that such guidance is currently floppy and that it should be statutory in order to give it clout.

Maureen Harrison: That is right.

Christine Grahame: Do the rest of the witnesses have other views on the bill’s proposals on fundraising?

Martin Sime: We need to strike a balance in making such a complex area subject to more statutory regulation. After all, there are so many different ways of raising money from the public, and charities are always inventing new ones. A formal agreement between the charity and the professional fundraiser will be important for charities’ direct and indirect fundraising activities. It is also important that OSCR should have the power to determine what ought to be in such agreements.

Secondly, SCVO broadly supports the emphasis on self-regulation. It is not in the bill, but we should look to the Scottish fundraising community to regulate itself—obviously with appropriate support—and to develop codes of practice and training on self-regulation. The fundraising community must recognise the vital role that fundraisers have because they enjoy the public’s trust and confidence, and it must acknowledge the importance of getting its approaches to the public right and weeding out bad practice, so that it can be seen to be in control of its own house. That will be just as important as the regulatory framework. If the two aspects can be made to work together, we will have created the right regime in Scotland.

12:30

Christine Grahame: Is there guidance for small charities on how they should go about fundraising and collecting? Good-hearted people sometimes do the wrong thing. If such people were caught under the bill’s provisions they might be found guilty of misconduct, although their fault would...
simply be ignorance of how they ought to handle taking cash.

**Martin Sime:** Currently there is no law on the matter, which is part of the problem.

**Christine Grahame:** People could be prosecuted under common law for fraud, even though they might have been acting out of ignorance. The fact that there is no statute does not mean that people cannot be prosecuted.

**Martin Sime:** Yes, but there is a distinction between misconduct or fraud and mismanagement through ignorance.

**Christine Grahame:** Is there any guidance that people can use when they are collecting, on which we might build?

**Maureen Harrison:** The Institute of Fundraising produces codes of practice, which have been developed through consultation with the fundraising sector and the wider voluntary sector in Scotland and throughout the UK. The codes of practice are available to everybody. However, very small charities might not be aware of the codes, which is why self-regulation will be important. Whereas statutory regulation is—to an extent—stuck in one time, self-regulation is capable of modernisation and constant updating, as are the codes of practice. Self-regulation will grow out of the codes of practice. The Institute of Fundraising has had discussions with stakeholders north and south of the border to work towards self-regulation, which will lead to much greater public confidence. However, considerable funding will be needed if we are to ensure that everybody is aware of the scheme.

**Margaret Wilson:** There are local byelaws, which confuse the issue, although some of them might have been repealed—or whatever we do with byelaws. It can be difficult for charities to know where they stand and what they should do. For example, there is a big debate about whether a shopping centre is a public place and whether someone is okay if they stand at the entrance to Asda but not if they stand outside the store and so on. Such matters confuse people. There are some weird and wonderful byelaws that have never been enacted. For example, it is illegal to charge entry to a jumble sale, but a charge can be made for the tea and coffee—

**Christine Grahame:** So that is why people do that. I had never worked it out.

**Margaret Wilson:** People fall foul of such weird rules because they do not know about them, as you said. It is very difficult to keep up with everything.

**Maureen Harrison:** There are huge disparities between the approaches of different local authorities in Scotland to public collections, which are difficult to understand.

**Mary Scanlon:** What are the witnesses’ views on sections 92 to 94, which comprise part 3 of the bill, on the investment powers of trustees? We discussed the matter earlier with the lawyers.

**Martin Sime:** As I followed the debate, I thought that it was a moot point that was being raised about whether trustees would have the power to delegate responsibility—that is a lawyer’s term—for their investments to other organisations or professional advisers. Ultimately, trustees are always liable for the activities under their control, so delegation needs to be considered quite carefully. However, as I understood the debate, it would be perfectly possible for trustees to delegate their investment power, which would be widely considered to be good practice. It could be that, in some instances, the charity’s constitution does not allow that, in which case it ought to change its constitution.

Having said all that, the business of charity investment ought to be left to charity trustees and the state should not intervene with too many regulations. The Trustee Investment Act 1961 was largely a matter of second-guessing charity trustees, patronising them slightly and saying that the state knew best about how charities ought to invest their resources. SCVO would like there to be much more creative investment of charitable resources in, for example, cause-related investment—there is significant potential for charities’ assets to be invested to support other charities—so we would prefer to have a completely liberal regime that recognised that charities were best able to manage their own affairs in the way that they see fit.

**Mary Scanlon:** If trustees delegate responsibility for investment to so-called experts, do they also delegate some of their accountability? How can they be held accountable for a decision that is made by someone else to whom they have delegated the responsibility in good faith? Is that a problem?

**Martin Sime:** Ultimately, the trustees are accountable to the members of the charity for all the actions that they have taken. I would say that a member of the public would entirely understand that, if trustees recruit a professional adviser or investment company and the results are not as anticipated, the trustees are ultimately liable.

**Mr Home Robertson:** We have a new regulator—OSCR—and we will have a new body of legislation. Understanding and adapting to living within that new environment will inevitably pose some difficulty for individual charities and voluntary organisations throughout the sector. The umbrella organisations will be aware of the burden that that will involve. Do they foresee any specific challenges for the charitable and voluntary sector in adapting to the new framework that is presented in the bill?
Martin Sime: Two points occur immediately. First, we need to ensure that the regulator is smart—in other words, that it does only what is necessary to restore public confidence and does not get involved in chasing points that are of no importance with individual charities. We need to get that balance right. Recent experience and OSCR’s pilot monitoring have revealed that OSCR was casting its net much too widely.

Mr Home Robertson: We have picked up that message.

Martin Sime: I hope that, when the bill is passed, we get a regulator that can intervene at the minimum level to sustain public confidence.

Secondly, once the bill becomes law, there will need to be a significant initiative to upskill governance in charities and promote good governance in them. SCVO is keen that that should happen, because we have all struggled on that matter in the past. Perhaps up to 50,000 people have volunteered to give their time to help to run charities, and they are the ones whom the new framework captures. They are the ones who are responsible for the operation of the charities, but, until now, little effort has been made to sustain, support and promote good governance in the sector.

There is a need for us to get our act together, and we must start by working to resource and support the charity trustees who volunteer to run Scotland’s charities. There are many ways in which that can be done, and there are some difficulties—people volunteer their time to run charities and it is difficult to persuade them to go on training courses—but that is where the energy should go once the bill is passed.

Maureen Harrison: From the point of view of the Institute of Fundraising, I concur with the challenges that Martin Sime has mentioned, but I would add the challenge of self-regulation. We need to be able to implement that quickly and to develop a scheme in which the public can have great confidence and which will facilitate the working of charities. There will be challenge in ensuring that that self-regulation scheme is inclusive and that it reaches far and wide to large and small.

The bill also presents a significant challenge to local authorities to take on the extra work of the new licensing schemes that will come into force.

Margaret Wilson: One of our concerns about the bill is that parts of it almost legislate against charities using the bill to improve practice and make them better at what they do. There is the issue of payment of trustees, and there is nothing in the bill that says that a member of staff cannot be on the committee of a charity. CVS Scotland promotes best practice and it is best practice not to have members of staff on the committee and for trustees not to be paid, because they are volunteers who do the job because they want the job to be done. I do not think that the bill helps in that regard, because it does not specify that staff should not be on the board. That is one of the areas in which the bill might cause problems for charities.

Mr Home Robertson: Are you suggesting that those provisions should be included in the bill?

Margaret Wilson: Councils for voluntary service are clear that such provisions should be included in the bill and that staff should not be eligible to serve on the board of their charity.

In general, the sector has received the bill very positively. Charities want to be seen to be doing a good job and they want the support that allows them to do a good job. CVSs would like to be able to support the idea of improving governance. There are not many committees that say, “We want to do the job badly”; they want to do the job well and they need to be supported to do that. CVSs are well placed to do some of that work, but at the moment—you would expect me to say this—we do not have the resources; I thought that I had better get that in. CVSs are already doing that and the bill will mean an additional burden of inquiries from new and existing organisations that want to explore, for example, whether they should become incorporated.

The way in which the sector has accepted the bill augurs well for the future. However, we need to get the support mechanisms right for the sector.

Norrie Murray: Volunteer Development Scotland endorses all that has been said, but I will pick up on a couple of points. Margaret Wilson made a point about payment of trustees. The bill needs to be improved in that regard, so that if trustees are carrying out their normal duties and functions as trustees, they should not be paid. If they are doing extra duties beyond that, payment is fair. We agree that the issues surrounding members of staff need to be clarified as well. It is inappropriate for staff to be on boards and that is currently seen as bad practice.

For us, the trustee issue is important. Substantial numbers of people are coming forward. Martin Sime quoted the figure of 50,000. We did a piece of research recently in which we asked people about volunteering. It appears that about 10 per cent of people who volunteer say that they are involved in committees. By our reckoning, that makes the figure 170,000. I guess that there are statistics and statistics, but a substantial number of citizens are participating actively by being trustees and committee members. We see it as essential to good practice that those people are well supported in those roles. Some people will not
need support, but others will and it is important that we are able to tailor that help. The principle of proportionality comes through in that regard, and if we do not get it right, we run the risk of individuals finding it irritating. It is crucial that people get the support to help them to deal with the new legislation, so that the charities can be as effective as possible.

Mr Home Robertson: Thank you. I think that there are a few charity trustees around this table, so we might endorse what you are saying.

The Convener: I thank the panel members for coming and for their written submissions. I know that members have found the submissions and this morning’s session useful. Since most of you have taken an interest in the bill for quite some time, I am sure that you will continue to do so. If you believe that there are any issues to which the committee’s attention should be drawn, please do not hesitate to contact us in writing or less formally.

Meeting closed at 12:45.
SUPPLEMENTARY WRITTEN EVIDENCE FROM TURCAN CONNELL

Supplementary note regarding third party control in terms of Section 7 (3)(b) of the Charities and Trustee Investment (Scotland) Bill

When I gave evidence to the Communities Committee on 15th December, I drew attention to the issue of third party control in terms of the charity test contained in Section 7 of the Bill. This note is designed to provide additional information regarding the third party control issue for the Committee to consider.

National Collections Institutions

Section 7(3)(b) of the Bill states that a body will not meet the charity test if its constitution expressly permits a third party to direct or otherwise control its activities. There is a concern that the constitutions of the National Collections Institutions which allow for a mechanism of appointment of Trustees through the Scottish Executive could prevent the National Collections Institutions meeting the charity test. For instance, the Royal Commission on the Ancient and Historic Monuments of Scotland operates under Royal Warrant. The Royal Warrant provides that the Commissioners are to be appointed by The Queen with the approval of Ministers.


Local Authorities

There are a number of charitable trusts which perform a wide range of functions such as local museums, local art galleries and village halls. The Trustees of many of these charitable trusts are appointed by virtue of holding office as Councillors. Some of these trusts were set up hundreds of years ago when it was felt that this ex officio mechanism for appointing Trustees was the most appropriate method. This method was simply intended as a mechanism to appoint Trustees rather than a means to allow third parties to control a charitable trust. The terms of Section 7(3)(b) mean that these bodies may no longer retain charitable status. We understand that there are hundreds of these bodies across Scotland.

Grant Making Trusts

Many private charitable trusts which are set up by philanthropic benefactors may also be caught by the provisions of Section 7(3)(b). It is quite normal for the trust deeds of these charitable trusts to allow the benefactor (or ‘Settlor’) to act as a Trustee and to retain the power to appoint additional Trustees. The wording of Section 7(3)(b) could treat these types of arrangements as third party control, thus removing charitable status from these very important grant-making trusts.

Each of the bodies referred to above could potentially be caught by the terms of Section 7 (3)(b) and therefore fail to meet the charity test as set down in the draft Bill. It is difficult to believe that the intention in drafting the Bill had been to deprive these types of bodies of charitable status.

The constitutions of bodies which allow the appointment of third party Trustees are usually intended purely as a mechanism for appointing Trustees rather than to give a third party control of the body.

Section 65 of the Bill places duties on Trustees to act in the interests of the charity and to seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes. I would suggest that Section 65 is sufficient to deal with any negative impact of ‘third party control’.

For the reasons outlined above, may I suggest that an amendment might be considered which would simply remove Section 7(3)(b) altogether.

Douglas Connell
Joint Senior Partner
Turcan Connell
21 December 2004
FURTHER SUPPLEMENTARY WRITTEN EVIDENCE FROM TURCAN CONNELL

Note of Further Comments by Turcan Connell

We previously submitted comments on the draft Bill (as introduced) in advance of our appearance before the Committee on 15th December.

We understand that the Committee will be considering the terms of Clause 7(3)(b) shortly.

Discussion of this part of the Bill has included consideration of the position of charitable bodies, such as the national collecting institutions, and other non-departmental public bodies, where central government controls the appointments process. Consideration will also be given to the position of charities to which local authorities appoint members.

It occurs to us that the provisions of this paragraph may give rise to difficulties in a substantial number of privately endowed foundations or charitable trusts. It is very commonly the practice in private family trusts that the settlor/truster retains the power to appoint new trustees. However the settlor rarely retains power to remove trustees from office.

This practice of retaining the power of appointment of trustees is regularly extended into the deeds establishing privately endowed charitable trusts (also sometimes described as foundations).

On examining Clause 7(3)(b) we have a concern that the retention by the settlor of the power of appointment of new trustees might be seen as expressly permitting “a third party to direct or otherwise control” the activities of a charity. If the mere power of appointment of trustees may (as appears to be the case in connection with government-appointed trustees) cause a charity to fail the “charity test” then we have a concern that the retention of a power of appointment by a private individual (who may or may not be the major funder of the charity in question) might also cause such a body to fail the charity test.

We would be grateful for confirmation that either:-

(i) the draft legislation is not intended to be interpreted in that way; or

(ii) it is intended that the legislation will be amended to remove any such threat; or

(iii) a reasonable time will be allowed after implementation of a relevant section of Act to enable appointments processes in privately funded charities to be adapted to meet the requirements of the new legislation.

Should you require any further commentary on this topic we would be pleased to provide it.

Turcan Connell
24 January 2005

SUPPLEMENTARY WRITTEN EVIDENCE FROM ANNE SWARBRICK, ANDERSON STRATHERN

The Charity Test (s 7-9)

The charitable purposes (s 7(2)).

The Westminster Charities Bill now includes a number of additions in the first part of the Westminster Charity Test. The promotion of religious or racial harmony or equality and diversity has been added as an additional charitable purpose, as has the saving of life. These are purposes which will struggle to justify charitable status in terms of the current Scottish Bill.

The Westminster mechanism for extending the scope of charity by analogy will, as recommended by the Westminster Joint Committee, provide that purposes which are “within the spirit” of the list of charitable purposes are to be regarded as charitable as well as those that are analogous. This will
widen the scope of the Westminster definition beyond the scope of the Scottish purpose (m). All three of these additions widen the gap between the Scottish and Westminster definitions still further.

The public benefit test (s.8)
The Government response to the Westminster Joint Committee on the draft Charities Bill report expresses a degree of wariness about including a list of “non-exclusive criteria” in the Bill as these provisions might tend to be interpreted restrictively as time goes by. It would therefore appear that, for England and Wales, there will be no criteria such as appear as in s.8 of the Scottish Bill. It should be remembered that in England this concern is being expressed against a background where the common law has not been repealed. The Scottish proposal is, of course, that the common law will be repealed and thus, the concern about the content of s.8 becoming prescriptive over time becomes compounded, with the effect that the Scottish public benefit test would become much narrower than that proposed by Westminster.

Third Party Control (s 7(3)(b)
Concern has been expressed by a number of witnesses before the Communities Committee about the effect of s.7 (3) (b). These concerns are well founded. A number of examples have already been given of charities which will encounter difficulties with this provision because of the way that their trustees are appointed. There would be others. For example, it is very common for charities, especially umbrella bodies, to have constitutions which permit other bodies, which may or may not be themselves charities, to appoint members of their board of charity trustees. All of these organisations may be said to fall foul of this provision because other bodies have the power to hire and fire their trustees. It may even be that the difficulties will extend to charities where trustees are appointed because of the positions that they hold elsewhere. Such trustees are known as ex officio trustees and are very common throughout the charitable section. There are valid governance reasons for appointing both of these types of trustees to charities, and to remove the ability to do this would cause difficulties, as well as further reducing the pool of trustees. The real question in this regard must surely be how trustees behave once appointed.

Guidance on the public benefit test.
The Charity Commission have now indicated that in applying the public benefit test within their jurisdiction they will apply the principles already established by certain charity law cases. The repeal of the case law in Scotland would mean that those very principles would no longer form part of Scots Law. The Charity Commission will form their guidance by reference to the existing law, but OSCR’s guidance would have no such foundation and would be open to attack in court because of the lack of any legal basis. Far from being authoritative, no-one (including OSCR) will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session.

Designated Religious Charities
The committee raised with me the question of designated religious charities. I note that this matter is now covered admirably by the papers prepared by the Scottish Churches Committee and The Church of Scotland. The latter paper also explains that Church’s constitutional position and makes several points about the effect of the third party control provision ( s.7 (3) (b)). Similar questions in relation to third party control under s7(3) (b) of the Bill may also arise in relation to other churches in Scotland. For example, each of the Roman Catholic Dioceses in Scotland are recognised as separate Scottish charities, but ultimate control over the appointment of Bishops lies with the Vatican. If OSCR were to suspend a Roman Catholic Bishop from his position of management or control of a diocese as a charity, he would nevertheless remain a bishop validly appointed by the Roman Catholic Church. The Vatican is a sovereign state and as such beyond the control of both OSCR and the Scottish Courts.

Similarly, the point made by the Churches Committee in relation to the terms of S.64(3)(b) is a good one. The present provision covers the body itself and any “structural or component element of the body”. This wording was chosen to allow the entire activities of the religious body in question to be treated as one entity for regulatory purposes. To do otherwise would create unnecessary regulatory complications without any apparent purpose or benefit.

It is unclear how any organisation which is established for religious worship alone will be able to demonstrate any tangible public benefit. Many religious bodies may provide pastoral care and support
in addition to their religious activities, but these activities are not necessarily of the essence of religion. Religious worship, contemplation and prayer are, by their very nature, subjective, private activities which bring about public benefit in intangible ways. Similar considerations will apply to any charity which encourages contemplation or meditation. How will such activities be measured by OSCR? The question becomes particularly acute with the proposed repeal of the common law.

**Office of the Scottish Charity Regulator**

*Should OSCR be given objectives?*

It has been suggested that OSCR should be given a duty to discharge its functions in a manner that will protect or enhance the integrity and assets of the sector and also encourage public confidence in the sector. Both of these suggested objectives would essentially be focused upon the interests of the charitable sector and this would tend to suggest that this is the only issue for OSCR, but of course, it is not. OSCR has wider responsibilities to the public, to donors, to beneficiaries, to those who complain about charities and to taxpayers in relation to the reliefs granted to charities. At present these are encompassed in the requirement that OSCR act in the public interest. If OSCR is to be given objectives, they must be balanced and reflect the full range of OSCR’s responsibilities.

**Appeals**

Further to paragraphs 4.1 to 4.4 of my original submission on the general principles of the Bill, there have now been developments in relation to the Charity Appeals Tribunal for England and Wales. The Westminster Joint Committee had expressed concern that the range of decisions that could be taken to the English tribunal was too narrowly drawn and that the grounds on which those decisions could be challenged were inadequate. Schedule 4 to the Westminster Bill has now been radically overhauled to extend the range of issues that can be appealed to that tribunal. The Government has also inserted a power to award costs against the Charity Commission on the grounds of its conduct in making the decision that was successfully challenged, and against an appellant who is considered to have acted frivolously, vexatiously or unreasonably in bringing the case to the tribunal. These amendments emphasise the substantial differences between the Scottish and the Westminster appeal provisions.

**Reorganisation of Charities**

The Bill proposes that Sections 40 and 41 should apply to the reorganisation of charities only. Sections 10 and 11 of the 1990 Act would continue to apply to public trusts which wish to reorganise because of their outdated purposes and transfer their funds to a charity with similar purposes which is active and thriving. One of the main difficulties with the provisions of section 10 has been that it prohibits the transfer of funds from public trusts to charities which are incorporated. The effectiveness of the provisions of section 10 of the 1990 Act could be greatly improved if its provisions were amended to remove that prohibition. This would make it easier to recycle those assets.

Anne Swarbrick, Associate
Anderson Strathern Solicitors
24 January 2005

**SUPPLEMENTARY WRITTEN EVIDENCE FROM THE LAW SOCIETY OF SCOTLAND**

The Charity Law Sub-Committee (“the Sub-Committee”) has considered the Draft Charities and Trustee Investments (Scotland) Bill and has the following comments to make:

**Section 1 – Office of the Scottish Charity Regulator**

The Sub-Committee has the following observations to make:

a) There is an issue about entrenching the independence of OSCR. The McFadden Commission recommended an Independent regulator. Although some clear attempt has been made to confirm the OSCR’s independence as a non ministerial department, the Sub-Committee believes that it would be
better if the independence from government were more clearly set out and that OSCR should be a Parliamentary Commission appointed by the Scottish Parliament.

b) The following amendment is suggested:

**Section 2 – Annual Report**

Page 2, line 12, leave out <But>

The Sub-Committee questions the use of this word in the context of the new subsection.

**Section 3 – Scottish Charity Register**

The Sub-Committee is of the view that the Register should consist of 3 parts; part 1. current, active charities, 2. foreign based charities, and 3. defunct charities. This suggestion flows from the comment in the Consultation paper (page 12) that “OSCR will be under a duty to keep the register under review and remove charities when they no longer fit the definition or if they cease to exist”. Having an accessible list of defunct charities will be a service of great importance to potential donors.

**Section 4 – Application for Entry in the Register**

The Sub-Committee notes that the Financial Memorandum indicates that OSCR would charge no fees for applications for entry in the Register, although the administration of such applications might cost as much as £2,000. This could result in difficulties for some small charities.

**Section 5 – Determination of Applications**

No comment.

**Section 6 – Applications: Further Procedure**

No comment.

**Section 7 – The Charity Test**

The Sub-Committee, in comparing this section with clause 2(2) of the Charities Bill introduced into the United Kingdom Parliament questions why section 7(2)(j) and (k) were framed as they are?

In the Sub-Committee’s view, the Charities Bill provision at clause 2(2)(j) is preferable and accordingly suggests the following amendment:

Section 7, page 4, line 28 leave out subsections (j) and (k) and insert <(j) the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage and includes the provision of accommodation or care to such persons.>

The Sub-Committee is also of the view that the following provisions from the Charities Bill for England and Wales should be applied to the Scottish bill by making the following amendment:

section 7, page 4, line 34 – add at end –

<a) paragraph (d) includes the prevention or relief of sickness, disease or human suffering;

b) paragraph (e) includes –

i) rural or urban regeneration, and

ii) the promotion of civic responsibility, volunteering, the voluntary section or the effectiveness or efficiency of charities, and

b) in paragraph (g) “sport” means sport which involves physical skill and exertion.>
The Sub-Committee is also of the view that pre-existing charity law and charities recognised under that law should be acknowledged and specified in the bill. This will enhance certainty as to a charity's status and promote consistency with charities operating under English and Welsh law. The Sub-Committee proposes the following amendment:

Section 7, page 4, line 32, add at end –

<(m) any purpose not within paragraphs (a) to (k) of this subsection but recognised as charitable purposes under existing charity law>

The Sub-Committee has concerns about section 7(2)(m) which included in the definition of charitable purposes "any other purpose that may reasonably be regarded as analogous to any of the preceding purposes". In the view of the Sub-Committee this could inhibit the development of charities because of the difficulty of defining what might be analogous to any of the preceding purposes. There are potential new strands in charity development and it is important to ascertain whether or not charitable purposes which are analogous would not be subsumed into the issue of public benefit under section 8.

The Society’s Pensions Law Sub-Committee has also queried whether a pension scheme would quality as a charity?

**Section 8 – Public Benefit**

The Sub-Committee is unanimously of the view that section 8(2) was difficult to interpret. There was considerable discussion about how to interpret section 8(2), particularly the issue of “benefit” and “disbenefit”.

**Section 9 – Guidance on Charity Test**

The Sub-Committee agrees with this section, although it foresees difficulties in OSCR issuing guidance especially in relation to the question of public benefit.

**Section 10 – Objectionable Names**

The Sub-Committee is of the view that it is important for determination of a charity's purposes to consider the charity’s constitution. Accordingly, the Sub-Committee has the following amendment to propose:-

section 10, page 6, line 3 – after <its> insert <constitution or>

**Section 11 – Change in Name**

The Sub-Committee has no comments to make except that time limits within the section may not be consistent with those for EGM limits under company legislation.

In relation to a company which is a charity, a special resolution (involving 21 clear days' notice to the members) has to be given in relation to a resolution to change the company's name. If notice is given to OSCR 42 days before the date set for the EGM/AGM in question and OSCR does not respond within the 28 days allowed under ss(3), the effect of deemed consent is lost, since it will then be too late to issue 21 days’ notice of the resolution.

**Section 12 – Power of OSCR to require Charity to change its Name**

No comment.

**Section 13 – References to Charitable Status**

No comment.
Section 14 – Exception to Certain Bodies not in the Register

No comment.

Section 15 – References and Documents

No comment.

Section 16 – Changes which require OSCR’s Consent

The Sub-Committee has comments on sub-section (6)(b) where, unless OSCR within 28 days from the date on which notice is given under sub-section (4), directs the charity not to take the action for a period of not more than six months specified in the direction OSCR is to be taken to have consented to it. The Sub-Committee is concerned that this period of six months was too long, especially in insolvency terms.

Section 17 – Notification of Other Changes

No comment.

Section 18 – Removal from the Register

The Sub-Committee recommends that charities removed from the “Active Charity” category should be placed in a “Defunct Charity” category and that the Charity Register should be structured to that effect.

Section 19 – Removal from the Register: Protection of Assets

No comment.

Section 20 – Co-operation

No comment.

Section 21 – Public Access to the Register

The Sub-Committee is of the view that there should be a duty on OSCR to publicise voluntary and forced removals from the Scottish Charity Register.

Section 22 – Power of OSCR to obtain Information from Charities

The Sub-Committee is concerned at the nature of the powers for OSCR to require by notice any charity to provide to it any document or copy of or extract from any document and other explanations or information. The Sub-Committee is concerned that there is no defence if it were not physically possible to comply with such a notice or if a period of time had elapsed where it was not reasonable for the documentation to be held. Comparing this section with section 45(2) and 26(2) (offence provisions) the Sub-Committee was of the view that there should be more latitude built into section 22.

Section 23 – Entitlement to Information about Charities

No comment.

Section 24 – Disclosure of Information by and to OSCR

No comment.

Section 25 – Removal of Restrictions on Disclosure for Certain Information

No comment.
Section 26 – False or Misleading Information

No comment.

Section 27 – Disclosure of Information: Entitlement under other Enactments etc.

No comment.

Section 28 – Inquiries about Charities, etc.

No comment.

Section 29 – Power of OSCR to obtain Information for Inquiries

The Sub-Committee’s comments regarding the production of information upon notice with reference to section 22 also apply to section 29.

Section 30 – Removal from Register of Charity which no longer meets Charity Test

The Sub-Committee is of the view that a) OSCR should require to be “reasonably satisfied” prior to exercising these provisions; and b) that the charity should be given an opportunity to make representations regarding the proposed exercise of the powers.

Section 31 – Powers of OSCR following Inquiry

The Sub-Committee has concerns about the nature of these powers and is of the view that a) OSCR should require to be “reasonably satisfied” prior to exercising these provisions; and b) that the charity should be given an opportunity to make representations regarding the proposed exercise of the powers.

Section 32 – Suspensions and Directions: Procedure

No comment.

Section 33 – Reports and Inquiries

No comment.

Section 34 – Powers of the Court of Session

The Sub-Committee agrees with the terms of section 34 subject to the following points:-

a) that the Court of Session should be reasonably satisfied of misconduct in the administration;
b) that the charity or other body in terms of section 34(1)(i) or (ii) should be given the opportunity to make representation prior to the application in terms of section 34(1) being granted; and
c) that the powers of the Court should include a power to require ultra vires payments by the charity to be recoverable.

Section 35 – Transfer Schemes

The Sub-Committee agrees with this section subject to the following comments:-

a) the charity or other body affected by the transfer scheme should be given right to make representations in respect of an application by OSCR;
b) any regulations made by Scottish Ministers in terms of section 35(1) should be subject to consultation; and
c) third parties who have views on amalgamations of charities should be entitled to make representation.
The Sub-Committee questions whether the Court of Session would be the appropriate venue for exercise of powers under either sections 34 or 35 because of the expense and possible delay of taking cases to that Court. It might be more appropriate for the Sheriff Court to deal with some of these issues.

**Section 36 – Powers in relation to English and Welsh Charities**

The Sub-Committee has the following comments to make:-

What constitutes “information” provided by the Charity Commissioners for England and Wales? The Sub-Committee is also concerned about the restriction of section 36(1) to relevant financial institutions or other persons who hold “moveable property”.

**Section 37 – Expenses**

The Sub-Committee is of the view that expenses should only be awarded against a charity trustee of the charity if there has been improper acting by the charitable trustee. This would be in keeping with the Scottish Law Commission recommendations in respect of trustee powers and liabilities.

**Section 38 – Delegation of Functions**

The Sub-Committee questions why OSCR’s functions should be exercised by Scottish Ministers in relation to a) charities which are registered social landlords b) bodies controlled by any such charity and c) persons acting on behalf of a such charity or body. In the Sub-Committee’s view OSCR maintains the requisite independence to be able to function effectively as a regulator whereas Scottish Ministers and Community Scotland are interlinked and do not have sufficient independence.

This provision will also create asymmetry of regulation and it could be potentially confusing to members of the public.

**Section 39 – Bodies Controlled by a Charity**

The Sub-Committee questions whether the phrase “or through one or more nominees” was appropriate and whether the word “indirectly” would be more fitting.

**Section 40 – The Organisation of Charities: Applications by Charity**

The Sub-Committee is of the view that OSCR should deal with re-organisation schemes without the requirement for payment of the fee. For many small charities this will be important to enable their continued survival. The Sub-Committee is also of the view that Scottish Ministers should consult on the regulations in terms of section 40(2).

**Section 41 – The Organisation of Charities: Applications by OSCR**

The Sub-Committee notes that these applications require to be made to the Court of Session. The Sub-Committee is of the view that the Sheriff Court would be an appropriate forum for determining re-organisation applications. The Sub-Committee is also of the view that the provisions of section 9 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 relating to *cy pres* schemes in the Sheriff Court should be implemented.

**Section 42 – Approved Schemes**

The Sub-Committee questions whether this matter should be discretionary. The Sub-Committee is particularly of the view that if the re-organisation of a charity was on the application of OSCR in terms of section 41 the charity should have no discretion about implementing the re-organisation.
Section 43 – The Organisation: Supplementary

In respect of section 43(3)(b), the Sub-Committee is of the view that this sub-section should take account of ongoing obligation which will be continuing notwithstanding the transfer of the property of the charity to another charity. Any ongoing obligations should similarly be transferred.

Section 44 – Endowments

No comment.

Section 45 – Accounts

The Sub-Committee is of the view that in terms of section 45(1)(c) the independent examination or audit of the statement of account of a charity should be carried out by a “suitably qualified person” which would reflect the terms of section 46(2).

Section 46 – Failure to provide a Statement of Account

The Sub-Committee is of the view that in terms of section 46(2) the charity should be given a reasonable opportunity to prepare a statement of account and only if it fails to do that having been a reasonable opportunity should OSCR be entitled to appoint a suitably qualified person to prepare the account.

In relation to section 46(4), the Sub-Committee is concerned that making charity trustees personally liable joint and severally for costs incurred by OSCR and the expressly appointed person it may act as a disincentive for people to be prepared to accept appoints as charity trustees. The Sub-Committee is of the view that this particular provision should be re-considered.

Section 47 – Dormant Accounts of Charities and Section 48 – Dormant Accounts of Charities: Procedure and Interpretation

The Sub-Committee has no comment to make on either section except that Scottish Ministers should consult relevant interests on regulations made under section 48.

Section 49 – Scottish Charitable Incorporated Organisations

The Sub-Committee is concerned about Section 49(2)(c) which requires an SCIO to have two or more members.

In the Sub-Committee’s view it should be sufficient that there should be one or more members. There is no reason in principle why an SCIO should not be able to have a single member. Examples exist where companies limited by guarantee, recognised as charities, have a corporate body as their sole member. The requirement to have two members may not, of itself, deliver any safeguards; in practice, it would be simple to circumvent the position (as was done at the time when single-member companies were prohibited) by having a "token" extra member who had undertaken formally to vote in accordance with the dominant member's instructions.

Section 50 – Constitution

Section 50(1)(c) should be deleted as a consequential amendment.

In relation to section 50(2)(b), leave out <one or more persons> and insert <more than one person>. This provision avoids some of the complications which might be introduced if there were a sole charity steward and he or she died or became incapacitated.

Section 51 – General Duty of Members of SCIO

It is not clear why members of an SCIO should be under the duty contemplated here, given that the members of a charitable company or voluntary association would be under no such duty. It is also extremely unlikely that the members (as distinct from the charity trustees) would be in any position to have direct impact on the actings of the charity.
Section 52 – Name and Status

No comment.

Section 53 – Offences etc.

No comment.

Section 54 – Applications for Creation of SCIO

The Sub-Committee is of the view that in respect of section 54(1), any one person should be able to apply to OSCR for an SCIO to be constituted. Having regard to the considerations referred to in our comment on s49(2), the Sub-Committee sees no reason why a single individual should not be entitled to apply for an SCIO to be constituted; also, it is difficult to see why a corporate body or bodies should not be entitled to apply.

Section 55 – Entry and Register

In relation to section 55(3)(c), see comments on section 54.

The Sub-Committee is concerned at the terms of section 55(7) which provides that “if a SCIO ceases to be a charity, it ceases to be an SCIO”. The Sub-Committee questions what status then the former SCIO had. Should it be effectively wound up at that point?

Section 56 – Conversion of a Charity which is a Company or Registered Friendly Society

The Sub-Committee is of the view that section 56(2)(b), which prohibits applications for conversion by companies having only a single member, should be deleted.

The Sub-Committee is also of the view that other organisations such as Trusts and Voluntary Associations should be able to convert to charity status.

While the Sub-Committee understands the technical issues associated with conversion of a voluntary association to an SCIO as regards property interests etc, it suggests that provision could be made for a charitable trust to convert (and with s57(5) applying in relation to such conversion), providing the SCIO contained the same or similar objects to those set out in the trust deed; and that could be reinforced by a provision to the effect that this would be competent irrespective of the wording within the trust deed. That would be an extremely useful facility, and would significantly reduce the incidence of applications for consent to reorganisation schemes.

Section 57 – Conversion: Supplementary

No comment.

Section 58 – Amalgamation of SCIOs

The Sub-Committee notes that resolutions in respect of amalgamations in terms of section 58(5)(a) should be passed by a two-thirds majority. The threshold for comparable resolutions in the case of a company is 75% of the votes cast. These suggest that the same threshold should apply.

Section 59 – Amalgamation: Supplementary

No comment.

Section 60 – Transfer of SCIO’s Undertaking

No comment.
Section 61 – Third Parties

No comment.

Section 62 – Amendment of Constitution

In relation to section 62(2), the threshold for comparable resolutions in the case of a company is 75% of the votes cast. These suggest that the same threshold should apply. Also, in the case of a single-tier SCIO, there will be no general meetings (i.e. meetings of members) so, in that case, the reference should be to a meeting of the charity trustees.

Section 63 – Regulations relating to SCIOs

The Sub-Committee has no comment to make, other than the fact that Scottish Ministers should be required to consult with relevant interests in respect of these regulations.

Section 64 – Designated Religious Charities

The Society notes that section 64 retains the concept that religious bodies which can comply with certain criteria may be exempted from certain regulatory requirements. This is an amended form of “designated religious body” status as introduced by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

However in the case of Designated Religious Charity (DRC) status, there is the safeguard that such status will only be accorded to those denominations which can show that there is supervision and discipline functions in place with respect to congregations and that there are accounting and audit requirements corresponding to those required of other charities. To be a DRC therefore it will be necessary to demonstrate that there will be adequate regulation.

Along with other charities, DRCs will come under new reporting requirements in regard to the Scottish Charity Register and the submission of information to OSCR in the form of annual returns and accounts. In terms of the 1990 Act, DRBs had wide exemptions from accounting requirements secured in recognition of the fact that their income derives almost entirely from their members and not from public fundraising. However, the Sub-Committee is of the view that religious charities must operate as transparently and openly as other charities.

Section 65 – Charity Trustees: General Duties

In respect of section 65(1) a charity trustee should be required to “act in what he or she considers to be the best interests of the charity” rather than the attempted objective obligation currently framed in terms of section 65(1).

In respect of section 65(1)(a) the Sub-Committee is concerned at the extent of the duty on a charity trustee to seek “in good faith to ensure” that the charity acts in a manner which is consistent with its purposes. In the view of the Sub-Committee it would be more appropriate for the charity trustee to be under an obligation to use his or her reasonable endeavours to ensure that the charity acts in such a manner.

In respect of section 65(4) which relates to breaches of the duties under sub-sections (1) or (2) the absolute nature of such breaches being automatically treated as misconduct in the administration of the charity is too severe. In the Sub-Committee’s view there should be some room for explanation of minor breaches which would not amount to misconduct and accordingly the Sub-Committee suggests the following amendment:-

Section 65, page 35, line 15 – leave out <is> and insert <may>.
Section 66 – Remuneration for Services

The Sub-Committee is of the view that this provision is welcome, but does not go far enough to guard against conflict of interest. The charity trustees should be required to obtain advice on the terms of the agreement or should state in terms that they have chosen not to obtain such advise.

Section 67 – Remuneration: supplementary

The Sub-Committee is of the view that “civil partnerships” should be included in subsection (2)(a) at the appropriate point.

Section 68 – Disqualification

The Sub-Committee is of the view that section 68(2) should be extended to cover other crime which might be relevant – for example, assault or abuse might be relevant to disqualifications relating to charities responsible for children, schools, the elderly, or victims of domestic violence. In that connection, it may be appropriate for certain charity trustees to be subject to screening under Disclosure Scotland procedure.

Section 69 – Disqualification: Supplementary

No comment.

Sections 70 – Decisions

No comment.

Section 71 – Notice of Decisions

No comment.

Section 72 – Effect of Decisions

No comment.

Section 73 – Review of Decisions

The Sub-Committee is of the view that completion of the review in terms of section 45(3) should take place within 28 days of the date on which OSCR received the request to carry it out. The Sub-Committee is also of the view that OSCR should be under an obligation to publish its procedures in respect of review within six months of this provision coming into effect and that there should be a provision for review of those procedures in the light of experience.

Section 74 – Scottish Charity Appeals Panel – and Schedule 2

The Sub-Committee is of the view that Scottish Ministers should have an obligation to provide staff, property and services to the panel. The Sub-Committee also believes that Scottish Ministers should be obliged to consult on the rules of procedure with appropriate stakeholders.

Section 75 – Appeals to Scottish Charity Appeals Panel

The Sub-Committee is of the view that section 75(4) which provides that the panel may not award expenses to OSCR or to any person who appeals a decision should be deleted. There is no logic to depart from the rule that expenses should follow success.

Section 76 – Reconsideration of Decision remitted back to OSCR

The Sub-Committee is of the view that the provision for reconsideration by OSCR should have 28 days to take place rather than 14.
Section 77 – Appeals to Court of Session

No comment.

Part 2 – Fundraising for Benevolent Bodies

No comment.

Part 3 – Investment Powers of Trustees

The Society’s Charity Law and Pensions Law Sub-Committees welcome the extension of trustee powers of investment. It is noted that the provisions of section 92 do not apply to pension trustees and other excepted categories of trustees. The Sub-Committees note that the Pensions Act 1995 contains wide range investment powers and are of the view that the exception is justified. However, the new power could apply to self-invested personal pensions which are written on the basis that the member takes the investment decisions in relation to the fund and the trustee simply holds the assets and follows the member’s instructions.

The Sub-Committees are of the view that the regulation in section 94 should be subject to Scottish Ministers having an obligation to consult.

Part 4 – General and Supplementary

No comment.

Michael Clancy
Director
The Law Society of Scotland
28 January 2005

SUPPLEMENTARY WRITTEN EVIDENCE FROM INSTITUTE OF FUNDRAISING IN SCOTLAND

Impact of loss of charitable status for National Institutions

The Institute of Fundraising in Scotland represents some four hundred individuals drawn from a wide range of Scottish voluntary and community organisations, among them, fundraisers working for Scottish National Institutions.

These Institutions have raised significant sums of money from private sources over the last few years, funds that would not have been forthcoming from statutory sources.

The Museum of Scotland has raised £10 million, the National Galleries of Scotland £13 million for the Playfair Project, while the National Libraries of Scotland need £6.5 million to acquire the John Murray collection for the nation.

In all of these cases, charitable status has proved vital, in part because the public understand that these institutions are no longer able to maintain their world-class status on the back of statutory funding alone and in part because of the significant tax breaks that charitable status brings with it.

National Institutions in England and Wales are competing for funds from the same major donors that support their Scottish fellows. These Institutions are supervised by the Department of Culture, Media and Sport while retaining their charitable status. Major donors, the most significant source of funds for these organisations, see tax-based enhancements of their gifts, of money, of shares, of heritage assets or corporate donations as an essential element in determining the scale of their gift; without charitable status, this incentive would be lost. Removal of charitable status would immediately place Scottish National Institutions at a competitive disadvantage with their peers throughout the rest of the United Kingdom.
The additional income derived from charitable status (National Museums estimate £1.2 million in charitable reliefs alone) is considerable and it is unlikely that its loss would be made up from statutory sources.

Equally, these organisations represent a massive national asset for Scotland: it is surely right that they should be accountable to and subject to the scrutiny of the Scottish Parliament.

We do not believe that removing charitable status from National Collections Institutions would be in the public interest, nor do we believe that it would represent a significant cost saving for government.

We believe that it is important for the public to understand that support for these institutions comes from both the government and directly from the public and that their dual status reflects that. It is for that reason that the Institute of Fundraising wishes to see the Charities and Trustee Investment (Scotland) Bill amended to allow for a similar structure to that which exists for England and Wales.

Fiona Duncan
Chair
Institute of Fundraising Scotland
C/o Capability Scotland
11 January 2005

SUPPLEMENTARY WRITTEN EVIDENCE FROM SCOTTISH COUNCIL OF VOLUNTARY ORGANISATIONS

SCVO submission to the Finance and the Communities Committees of the Scottish Parliament on Section 7 (3) (b) of the Charities and Trustees Investment (Scotland) Bill as it pertains to the National Collections of Scotland

SCVO understand that under the Charities and Trustee Investments (Scotland) Bill as drafted the National Collections, as Non-Departmental Public Bodies (NDPBs), would be able to choose to remain as NDPBs or as charities but not as both. This is for two reasons:

a) For several of these NDPBs their constitutions or other founding documents do expressly permit Ministers to direct their actions

b) Even when Ministerial involvement is limited to the appointment of trustees there is a legal argument that this in itself is a form of direction and is certainly a way of otherwise controlling the body

SCVO acknowledges that the bodies concerned are adamant that both NDPB and charitable status are fundamental to their effective operation and to lose either would be hugely damaging for a number of reasons, which they have set out in their evidence to both the Finance and the Communities Committees of the Scottish Parliament.

In its response to the Scottish Executive consultation and its written submission to the Communities Committee SCVO advocated dealing with the question of NDPBs by adopting Recommendation 5 of the Scottish Charity Law Review Commission 2001 (the McFadden Commission):

‘We recommend that where an organisation has been established by local or central government, such an organisation should not be accorded the status of Scottish Charity if the constitution of that

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157 'A body… does not… meet the charity test if its constitution expressly permits a third party to direct or otherwise control its activities’ Charities and Trustee Investments (Scotland) Bill, Section 7 (3) (b)

158 ‘The legislation (that founded NMS) also provides that NMS may be subject to Ministerial direction.’ Written Evidence to the Communities Committee of the Scottish Parliament from National Museums of Scotland 19 January 2005

159 ‘…under the Bill as I read it, it could be stated that an organisation such as the National Galleries of Scotland, whose trustees are appointed by the First Minister, is under Government control.’ Oral evidence to the Communities Committee of the Scottish Parliament from Douglas Connell of Turcan Connell 15 December 2004
organisation allows more than one third of the trustees to be directly or indirectly appointed by the establishing organisation.’

SCVO suggests that adopting the McFadden approach may provide a resolution for the National Collection NDPBs. SCVO does not have access to all the detail of the relationship between the Scottish Executive and these NDPBs but based on what we do understand of their status we submit that:

- Both charitable status and a meaningful link to government could be maintained while ensuring the degree of independence of governance crucial to the integrity of charitable status and the ‘charity brand’.
- As charities the constitutions of these bodies could contain whatever relevant provisions were required to retain public and donor confidence such as restrictions on powers of acquisition and disposal.
- They would continue to be eligible for government indemnity insurance, as we understand this to rely on the existence of a substantial dependence on government funding rather than the proportion of government appointees on the board.
- Appropriate conditions of grant or contract funding arrangements would allow a high level of accountability to Ministers with respect to the expenditure of public funds.
- The Executive could commit under TUPE to transferring and protecting identical staff conditions and benefits (including pension schemes).

For example, the board of the National Library of Scotland currently has a minority of board members appointed by central or local government and this does not appear to compromise the ability of the body to enjoy the major advantages of NDPB status.

SCVO commends this approach to the Finance and the Communities Committees as a means of not only resolving these few cases but of doing so without excepting organisations from the sound principles of independence and public benefit contained in the ‘charity test.’

Andrew Jackson
Scottish Council of Voluntary Organisations (SCVO)
24 January 2005

SUPPLEMENTARY WRITTEN EVIDENCE FROM VOLUNTEER DEVELOPMENT SCOTLAND

Volunteer Development Scotland’s Response to the call for evidence on the Charities and Trustee Investment (Scotland) Bill.

Volunteer Development Scotland, the national centre for volunteering, welcomes the opportunity to contribute to the work of the Scottish Parliament Communities Committee.

Our primary interest is in how the Bill might impact on volunteering at both an individual and organisational level. Some of what we have to say will link directly to the Bill but some will have more relevance if the Bill becomes an Act.

Specific comments on the Bill
We welcome the Bill’s recognition of volunteer leadership as a defining characteristic of a charity. According to research we undertook approximately 170,000 people have said they are involved as volunteers on the committees or boards of voluntary organisations and community groups. This significant number represents around 10% of the volunteer “workforce”.

We believe that a charity’s ability to mobilise citizens to become involved in its work as volunteers is an indicator of the degree of relevance the charity’s work is to the community of place and/or interest in

\[160\text{ ‘NLS is governed by a Board of up to 32 Trustees appointed as follows: 5 are appointed by the Scottish Executive… 2 by COSLA…’ }\]

Written Evidence to the Communities Committee of the Scottish Parliament from National Museums of Scotland 19 January 2005
which it is active. We also believe charities should consider volunteer participation in all aspects of its work to include management, delivery of services, advocacy and fundraising. A wide base of volunteer participation might better enable charities to grow new trustees from within. For example yesterday’s volunteer mini-bus driver might be today’s volunteer care worker who might become tomorrow’s volunteer trustee. This “ladder of participation” could be a route for those people with little or no organisational management experience to gain confidence, and a knowledge about a charity’s operations to then progress into Trusteeship and exercise power and decision making hopefully informed by their grassroots or shop floor experience of the charity.

We believe the Bill needs to be amended in Part 1 Chapter 2 Section 7(2), The Charity Test. We call for the phrase “civic responsibilities” in point E to be replaced with the term “citizenship”. In our view this would achieve two things. Firstly we believe the term citizenship implies a fuller more balanced concept of both rights and responsibilities, and in turn could be interpreted as including the promotion of volunteering. Secondly this change would mean convergence between the English and Welsh Bill and the Scottish Bill.

We call for mutual aid and self help groups to be allowed to apply for charitable status. Mutual aid is one of the four classifications of volunteering adopted by the United Nations, as is an important area of volunteering in Scotland.

We do not support trustees being paid for undertaking the functions and duties of a trustee. That said we believe trustees should be supported in their roles. They should not be out of pocket through volunteering. Failure to re-imburse expenses would be a very real financial barrier to some people’s ability to volunteer to be a trustee. In order to make participating as a trustee as inclusive as possible trustees should, like any other volunteer, be able to access any required care expenses that they may need to pay in order that a cared for relative would be looked while they carried out the duties of a trustee. Other aids and adaptations should also be made available. As a society we recognise the need to provide this help to people who want to participate in the paid labour market. We believe this help should be extended to include those people who want to participate in the unpaid, voluntary market. These are key practical arrangements which give meaning to the term “inclusive volunteering”. For those individuals who are trustees and do not wish to reclaim expenses simple arrangement could be made for them to claim expenses and then donate them back to the charity. This is important as it helps to ensure expenses budgets are set as the next trustee might not be in a position to donate back.

We believe the Bill needs to better recognise the differences between trustee mismanagement and trustee misconduct. The Bill outlines punishments for trustees if they are found to have behaved in certain ways. While we fully endorse proper accountability for trustees we are concerned that trustees could quite readily make honest mistakes without intent to cause harm. Keeping a sense of proportion is key here – we cannot afford a situation which gives rise to a common perception that being a trustee involves more risk compared to the benefits of participating. Unfortunately there is anecdotal evidence that some volunteers are reluctant to be in positions of being in sole charge of children as they think this exposes them to potentially very high risks.

We do not support the paid staff of a charity also being a trustee of the same charity and the Bill needs to be clear on this. The key issue here is the dangers of a conflict of interests. The legitimate role of paid staff is to support trustees in their work and to ensure they have the full information available to them in order to make informed decisions.

We welcome the policy intention to extend mandatory rate relief to Community Amateur Sports clubs. This is a significant area of volunteering in Scotland and the money freed up from payment of rates could be used to further develop volunteering in this activity which has so many connections to other policy areas.

Recently we have heard that some organisations in the field of heritage are concerned that the Bill as it stands might result in them losing charitable status which in turn they believe could lead to a reduction in peoples willingness to volunteer with them. We believe this needs to be looked at in terms of possible impact assessment of the Bill.
Finally if there is to be a training programme if the Bill becomes an Act we would call for that training to include training for trustees on how to go about developing a strategy for volunteering for the charity as well as looking at issues such as governance, employment law etc. In many cases volunteers are the largest single contributor to charities, especially the smaller ones. Evidence suggests that a thought through approach to volunteering not only helps the charity to increase its effectiveness but also gives the volunteers are more rewarding and meaningful experience.

This is an area where SCVO and VDS along with local Volunteer Centres and Councils of Voluntary Service could co-operate to provide a comprehensive training package.

Norrie Murray
Policy Team
Volunteer Development Scotland
25 January 2005
12 January 2005, (1st Meeting, Session 2, (2005))

WRITTEN EVIDENCE FROM THE SCOTTISH COUNCIL OF INDEPENDENT SCHOOLS (SCIS)

In response to the above Bill, SCIS would like to reinforce the key points made in its response to the draft Charities and Trustee Investment (Scotland) Bill in August 2004, as reproduced in the attached paper.

SCIS welcomes the Bill, as published in November 2004 and agrees that Scotland needs a robust, effective and transparent regulatory framework for the charity sector. Independent schools are already closely monitored and well regulated through bodies such as HMIe, the Scottish Care Commission, the Inland Revenue, Companies House, the SORP for Charities and their own auditing procedures. The independent sector welcomes the provisions in the Bill, such as:

- the establishment of OSCR
- the creation of a Scottish Charity Register
- the list of charitable purposes
- the principle of a public benefit test for all charities
- guidance from OSCR on meeting the charity test
- direction, if required, from OSCR on how to meet the charity test
- the general duties on charity trustees
- the transitional arrangements
- the proposed appeal system

The focus of the debate on independent schools has centred on the issue of public benefit. As bodies that exist for the advancement of education, independent schools have always enjoyed charitable status and will now have to demonstrate that they meet the ‘charity test’ as stated in the Bill. This is not likely to pose difficulties as the schools have an in-built tradition of providing public benefit, which accords with their ethos and founding principles.

The new element in the Bill, as published in November, is the setting out of public benefit criteria. Guidance on public benefit will be welcome and was expected either through the Bill and/or through guidance issued by OSCR. The criteria adopted in the Bill appear to give charities and the Regulator a degree of flexibility which is welcome, given the diverse nature of charities in Scotland and, in the case of independent schools, the diversity of schools within the sector.

The public benefit criteria in the Bill are, however, not easy to interpret, even as set out in the Explanatory Memorandum:

The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body’s functions compared to the benefit to the public. The second criterion covers the extent to which any condition restricting persons from obtaining the benefits from a body’s functions may be unduly restrictive if only a section of the public can receive those benefits.

On the above basis, consultation and guidance will be needed on how the criteria are to be interpreted and on how each aspect is to be applied in determining whether a body meets the charity test. Whilst it is understood that these are principles, the interpretation of which will depend to some extent on how they are put into practice, SCIS is of the view that most, if not all, independent schools will satisfy a charity test. For example:

- The benefit gained and likely to be gained by the public is significantly higher than the benefit gained by the charity or by ‘members of the charity’ in both fiscal/quantitative and non-fiscal/qualitative terms.
- ‘Disbenefit’ incurred by the public is not seen as a relevant or appropriate factor for schools committed to the education of children and young people.
• The schools are open to children of a broad range of academic ability, to children with different talents, to those who have special educational and additional support needs, to children of different faiths, ethnic groups and cultures, rather than to children of a particular ‘section of the public’.

• Many of the parents of the children now at an independent school did not themselves attend an independent school and may also have children at a local authority school; local authorities themselves fund places for pupils at independent schools, usually where specialist support is provided.

• Access is not restricted to children whose parents can afford the fees, as demonstrated by a long history of providing financial assistance to parents who cannot otherwise meet the fees. This assistance alone is worth around three times more than the local taxation benefits received by the schools through their charitable status.

• In addition to the funds disbursed in terms of financial assistance, the significant value of the public benefit activities of the schools to their local communities and to the wider public has to be taken into account, even though it is not always quantifiable in monetary terms.

• The Bill refers to any ‘condition on obtaining the benefit’ that might be ‘unduly restrictive’. Guidance on how this might apply to charities will be needed. The Policy Memorandum on the Bill cites charges for a service as an example of such a condition. In the context of independent schools, whilst each school sets its own fees, given the overheads that have to be met the levels of fees are not unreasonable and are broadly comparable to the cost of educating pupils in the public sector.

It is important to point out that the schools are run as charities, that they do not make profits, that any surplus made is used for the benefit of the education of the pupils, that no Head, teacher or other employee is making a profit from working in the school and that those who serve on the school boards as governors do so in a voluntary capacity.

Education remains a pathway for social mobility, particularly for children who are disadvantaged. The independent schools foster a positive ethos of learning and teaching and pride themselves on their high standard of education, academically and in terms of developing the whole child. The schools have a keen sense of citizenship, which they promote and develop in their communities. The sector welcomes the opportunity to demonstrate the public benefit it provides, in return for the tax relief it receives and SCIS hopes that the legislation will increase awareness of the sector’s contribution to public benefit, encouraging schools to do even more in that direction.

Independent schools receive support and are an integral feature of the education system in many countries throughout the world. Although the independent sector is relatively small in Scotland, it provides a choice of school to a significant number of parents in Scotland. The independent schools make a worthy and significant contribution, not only to the education system and to the teaching profession in Scotland, but also to society at large.

Judith Sischy
Director
Scottish Council of Independent Schools
6 January 2005

Charities and Trustee Investment (Scotland) Bill

Response from Scottish Council of Independent Schools

The Sector

SCIS is itself a charity, as are most of the 75 member schools. The sector is responsible for over 31,000 pupils (broadly equivalent to the 7th or 8th largest education authority in Scotland) and 6,500 teaching and support staff. Each school is independently constituted, in accordance with its own foundation, history and constitution. Many were founded to provide education to children who did not at
that time have access to education. Those schools have remained faithful to the ideals of their founders by welcoming children from a wide and diverse spectrum of social backgrounds and by supporting families who cannot afford the fees.

Most schools have substantive, voluntary fund-raising programmes to provide financial assistance for such families. In some cases the families may be from a deprived area; in others the children may have lost a parent or parents; some may be refugees and in need of support; some may be on low incomes; there will be various kinds of special circumstances to take into account. For many of the schools, providing financial support is an integral part of their ethos, which reflects their history as charitable foundations. Other families are making considerable financial sacrifices to support their children at an independent school and all parents, whose children attend independent schools, also contribute towards the education authority provision through payment of their national and council taxes. With over 18,000 secondary pupils and 13,000 primary pupils in the independent sector, the extra cost to the government to educate these children in the public sector would be around £155 million per year.

The sector itself is diverse. It includes schools that offer pre-school and primary education, secondary education and all-through education from age 3 to 18. Most schools are co-educational, but there are also single-sex schools, schools which offer both co-education and single-sex education, schools that offer boarding provision, specialist schools and schools for children with special educational needs. Most schools are non-denominational and include pupils from a range of religious and cultural backgrounds, whilst some have a religious affiliation. The children who attend the schools are from a heterogeneous social group, representing different income brackets, a wide range of occupations at different levels, ethnic minorities and a mix of political, cultural and religious backgrounds.

Many of the 31,000 children are in large city day schools, whilst others are in boarding schools (3,500 boarders) in primary schools or in smaller rural schools. With more secondary (18,000) than primary (13,000) pupils, the sector also represents a significant proportion of pupils presented for SQA qualifications, with around 10.5% of Higher presentations and 14% Advanced Higher presentations coming from the independent sector. Widely known for its high academic standards, the sector makes a significant contribution to the education system in Scotland, both quantitatively and qualitatively.

The Schools
Everyone working in the sector is dedicated to the advancement of education, both within their schools, their local community and society at large. The schools are non-profit making and any surplus they generate is used by the schools for the benefit of the education provided.

The schools are ‘independent’, that is, they are not funded or managed by education authorities or by central government. They therefore have to charge for the education they provide. This makes the purpose for which they exist no less worthy or worthwhile. A place in an education authority school is not free, as all Council taxpayers know, and the fees for an independent school are not dissimilar to the cost of educating any child in Scotland. The main element of expenditure in any school is teachers’ salaries and teachers in the independent sector tend to be paid according to national scales or, on average, up to 6% above the scales. The schools try to keep their fees as low as possible, whilst maintaining a high standard of teaching, a diverse curriculum and excellent facilities. In the majority of cases, the fees are paid from family income (the average day school secondary fee is £6,000 per annum), with help being given in most schools in the form of scholarships and bursaries, to provide fully or part-funded places for pupils whose parents qualify for financial assistance.

The teachers are highly qualified and work hard to maintain high standards, developing an ethos of achievement and encouraging pupils of all abilities. They have chosen their profession because they want to work with children and young people and they believe that a good education will give pupils a sound foundation for the future. No person is working for ‘profit’ or for personal or commercial gain, their motivation being the education of young people in their schools.

Although independent in terms of funding, governance and management, in educational terms the schools are part of the Scottish education system. From age 3 to 18, most schools are offering a curriculum based on national pre-school guidance, on the 5-14 programme, Standard Grade and the national qualifications offered in Scotland. Some schools also offer GCSE and ‘A’ level examinations. The sector actively participates in and contributes to educational developments in Scotland, through its
involvement in SEED initiatives, the SQA, Learning + Teaching Scotland, the General Teaching Council for Scotland and other such bodies.

The contribution made by independent schools to education in Scotland extends well beyond the academic. The schools encourage pupils to become active members of their community, within school and within their local environment, to be independent, to give to those less fortunate than themselves and to develop a spirit of citizenship. When they leave school, they are prepared, through the education they have received, to make a contribution to national life and to society in many ways. They will be encouraged to develop a sense of civic responsibility and actively to put that into practice for the benefit of the wider community. This is demonstrably seen in the careers they follow, covering all political persuasions and careers across society.

Charity and Public Benefit
SCIS supports the view that charity regulation should promote the five key principles set out in the consultation paper and that to be effective, it must be independent, proportionate, accountable, transparent and consistent. The Regulator has a key role in promoting good practice and in safeguarding the public from misuse of charitable status.

The 13 charitable purposes seem to be widely accepted as appropriate for the definition of charity and do not present difficulties for the independent sector. All schools in the independent sector exist for the advancement of education and, in so doing, may also promote the advancement of other charitable purposes such as religion, health, civic responsibility, the arts, science and sport.

SCIS supports the need to modernise charity law and accepts the proposal that charities should be required to show that they provide public benefit, as well as fitting within one of the 13 charitable purposes. It seems sensible for the definition of charities and for the interpretation of public benefit to be similar north and south of the border. SCIS schools accept that they have a responsibility as charities to provide public benefit, which is an inherent part of their ethos and tradition. The Governors, Heads and staff working in independent schools would not expect otherwise.

In welcoming the establishment of OSCR, the independent sector is keen to see a system that can regulate public benefit in a way that is independent, non-party political, not overly bureaucratic, transparent and consistent. It is important to have in place a robust and accessible appeal mechanism.

The independent sector believes that the education it offers is, and should be, affordable to a significant proportion of parents in Scotland, many of whom did not attend an independent school themselves, to those parents who choose to make sacrifices to meet the fees and to those who receive assistance, in full or in part, towards the fees on the basis of financial circumstances and/or personal disadvantage. The charges made by independent schools are reasonable and bear direct comparison to the cost of providing education for children in education authority schools in Scotland.

Conclusion
SCIS believes that independent schools will meet any reasonable test of public benefit. Independent schools are not run for profit or for personal gain. They are committed to the advancement of education and have a long-standing tradition of voluntary and community service to the wider public.

Scottish Council of Independent Schools
January 2005

Charitable Status and Financial Benefits
See Annex A

Independent Schools and Public Benefit – Summary
See Annex B

This paper comprises key extracts from the SCIS response to the draft Charities and Trustee Investment (Scotland) Bill as submitted to the Scottish Executive in August 2004.
Annex A

Independent Schools in Scotland

Charitable Status and Financial Benefits

- It would cost the government an extra £155 million per year to educate the 31,300 independent school pupils in Scotland. Parents with children in independent schools also contribute to state education through payment of Council and other taxes.

- Independent schools do not make profits. Fee levels are structured in order to cover running costs, (75% of which are accounted for by the salary bill in any school), and bear direct comparison to the costs in education authority schools. Any surplus has to be used for the benefit of the school, for example to cover scholarships and bursaries or to pay for development projects.

- In financial terms, all schools would regret losing charitable status. The benefits conferred by charitable status are difficult to quantify as the position differs from school to school. SCIS research suggests that, on average, the benefits from charitable status are worth around 3% of a school’s turnover, although this percentage may be less in some schools and higher in other, possibly smaller schools.

- The main elements of financial benefit from charitable status for independent schools are:
  - rates relief – 80% relief
  - relief from corporation tax – applicable only to tax on investment income or on surpluses that might be made
  - tax relief on gift aid and covenants
  - relief from tax on capital gains – applicable only to schools that make capital gains on shares or on other assets
  - exemption from inheritance tax on gifts received

- It is difficult to evaluate precisely the fiscal benefits that the independent sector derives from charitable status because of the diverse nature of independent schools, the complexity of the benefits and the variations that occur from year to year. The main benefit is in terms of rates relief, which amounts to around £2.5 million a year for the sector. The amount distributed by schools in scholarships and bursaries to families who cannot afford the fees, amounts to around £7.5 million a year, that is three times the financial benefit that independent schools derive from local tax relief. This, together with the schools’ charitable activities and the direct savings of educating over 31,000 children (£155 million per year), far outweighs the benefits received.

- Most independent schools in Scotland do not have endowments and have only modest investment income. They are dependent on fee income to cover salaries and running costs as well as, in many cases, to provide scholarship and bursary funds. Some schools may have funds separately allocated for scholarships and bursaries in accordance with their foundation and charitable purposes. Most schools raise funds themselves to create and enhance bursary funds.

- The precise value of the sector’s contribution to the education system in Scotland, to the economy, to employment, to sport, the arts, voluntary activities etc is difficult to quantify but must be taken into account when defining and evaluating the indicators of public benefit.
Scottish Council of Independent Schools

Annex B

Independent Schools as Charities and Public Benefit: Summary

Accessibility
The schools operate equal opportunity policies in relation to gender, race, religion and disability. Within the resources available, they offer places to children from families who cannot afford the full fees.

Accountability
The schools are dedicated to the advancement of education for children aged 3 to 18. They are subject to the regulations governing charities; all are registered with the Scottish Executive Education Department and subject to inspection by HM Inspectorate of Education. Most of the schools will also be registered with the Scottish Care Commission. The schools are managed with integrity, are properly regulated and are fully accountable.

Buildings
Many of the schools are housed in historic buildings of note. Most also have up-to-date IT and other resources, facilities for music, drama and the arts, playing fields and sports facilities on site or nearby. The historic buildings are open to the public and most of the schools are able to make their facilities accessible to local community groups in the evenings and during the school holidays for a variety of activities. Several schools have raised and received funds for sports centres and facilities which are open to members of the local community throughout the year.

Citizenship
The schools have a keen sense of civic responsibility and community development, as demonstrated through their studies, their extra-curricular activities and their vocational programmes. As pupils and former pupils, they contribute to society through social work, politics, the arts, culture, sports, education, health, science and every way of life.

Diversity
The schools operate a socially inclusive policy within their own sector and offer an alternative to the provision offered by the education authorities. The pupils come from a wide range of socio-economic backgrounds, from different countries, cultures and religions and cover a wide spectrum of ability, from the most able and gifted to those with additional support needs.

Economy
The schools are major employers, especially in those areas where they have a significant presence. As such, they contribute significantly to the local economy and generate considerable benefits for the wider community. In addition to the academic staff, maintenance of the buildings and playing fields creates employment opportunities for local firms, as does the provision of ancillary services. The direct employment of around 6,500 staff and the trade generated by the schools in their local communities are of direct benefit to the economy.

Ethos
The schools have a strong tradition of high academic achievement for children of differing levels of potential, sound moral and ethical codes and a commitment to a wide view of school life embracing extra-curricular activities, outdoor education and community service. They offer a high quality of education within a framework where the focus is on the development and care of the individual.

Governance
The schools are governed by Boards on a voluntary basis. The Governors give of their time and expertise to support the schools in order to give the children they serve an education of high quality. They receive professional guidance and up-to-date advice from national and local bodies. The schools are effectively governed by men and women with professional expertise in many walks of life and operate in close partnership with parents.
Innovation
Independent schools have the freedom to innovate and to maximise their strengths, within a framework of national inspection and professional support. They can adapt to changing circumstances and respond to new initiatives; they can use their resources to meet particular needs and to provide facilities which meet the requirements of modern day standards. Their survival as high quality centres of education, sometimes over centuries, attests to their spirit of innovation and flexibility.

Overseas links
Children from Europe and from countries across the world are welcome into the school communities as boarders and also as day pupils. The boarders are from as many as 55 different nationalities. Links with overseas are important in attracting families and business investment to Scotland. Many of the pupils remain in Scotland for their higher education.

Parents
The parents are closely involved with the education of their children on an individual basis and often through the school board or parent association. They support fund-raising and other voluntary activities and are sympathetic to the efforts of the schools to maintain their charitable ethos. Whilst accepting that independent schools by their nature cannot be universally inclusive, parents support efforts by the schools to make their communities as inclusive as possible.

Special Needs
The schools have learning and teaching provision for pupils with special educational needs. Some independent schools are specialist and cater for specific special needs, covering physical disabilities or specific learning difficulties.

Teaching
Teachers are comfortable working in an independent school because, as a charity, it has a social purpose, is not for profit and is dedicated to education. The attraction of teaching in an independent school helps to recruit and retain teachers in the profession. Independent schools help to train a significant number of student trainees and a significant number of probationers spend their induction year in the independent sector. SCIS offers an extensive CPD programme for teachers in conjunction with key educational bodies in Scotland.

Values
Independent schools seek to promote a broad, balanced, challenging education for all the pupils. In seeking to develop the full potential of every child, they focus on promoting values and citizenship in their communities. As their former pupil records reveal, pupils often develop a keen sense of citizenship and a sharp social conscience: perhaps that explains why so many enter – and succeed in – politics.

Voluntary Activities
Voluntary activity in the local community to help those less fortunate is a feature of the schools as can be seen in some of their mottos e.g. ‘Ex corde caritas’ and ‘I distribute cheerfully’. The schools encourage young people from an early age to contribute to the good of the community and to the betterment of society, raising awareness amongst pupils of their civic responsibility and their role as members of the wider community. Community service is promoted in many ways – by visits to local hospitals, homes and charities, by fund-raising, by helping local churches and other religious communities, by overseas aid and contributions to worthy causes. The schools behave as charities should, giving back to the good of the community and contributing to voluntary and charitable activities.

WRITTEN EVIDENCE FROM NUFFIELD HOSPITALS

Context
Nuffield Hospitals welcome this opportunity to submit evidence to the Communities Committee in relation to its inquiry and is grateful for the opportunity to give oral evidence.

Members of the Committee are kindly requested to note that this paper is a preliminary submission which covers a number of key issues in relation to the Bill. It is preliminary due to the fact that this matter is relatively new to us as we were not party to the consultation exercise in relation to the Draft
Bill. However, in order to assist the Committee in this inquiry as fully as possible, in addition to this preliminary paper, we will in due course also submit formal written evidence to the Committee which will provide our more detailed comments on the Bill.

**Introduction**

Nuffield Hospitals is the leading group of charitable hospitals in the UK with an income of over £400m in the calendar year of 2003. We operate 44 hospitals in the UK of which one is located in Glasgow, Scotland.

In 1972 Nuffield Hospitals was invited to incorporate the McAlpin Clinic into the group. The McAlpin Clinic was a long-standing charitable clinic providing medical and surgical facilities in an old hospital building in the centre of Glasgow.

One of the conditions of the transaction agreed by Nuffield Hospitals was that it was to build a replacement hospital in order that the existing Hill Street site in the city centre could be closed. The new hospital, known as The Glasgow Nuffield Hospital, sited in Kelvinside in the west end of Glasgow, opened in 1974 with 48 single bedrooms and one operating theatre. Over 50% of the total costs were funded by public subscription, the local fundraising committee having been chaired by Sir Hugh Fraser.

The hospital underwent major upgrading in the mid 1980s when the current theatre suite and pathology laboratory were added. Structurally the hospital remains largely unaltered since then but major innovations were introduced subsequent to that with the commissioning of a Magnetic Resonance Imaging Services (the first independent unit in Scotland), a purpose built Assisted Conception Unit (the only one in Scotland) and CT Scanning.

In 1999 Nuffield Hospitals purchased the Glasgow Homeopathic Hospital from the local NHS Trust when homeopathic services were transferred to an NHS site. The unit was upgraded and converted for use as a specialist outpatient musculo-skeletal centre at a total cost of £2.4m.

Recently a Health Screening Centre was opened at Edinburgh Park, Edinburgh.

We set out below our details of the number of patient admissions to the hospital in the last three years together with other important data.

<table>
<thead>
<tr>
<th></th>
<th>2002</th>
<th>2003</th>
<th>2004 (estimated)</th>
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<tr>
<td>Total surgical patients</td>
<td>5275</td>
<td>5306</td>
<td>5330</td>
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<td>Total NHS surgical patients</td>
<td>305</td>
<td>555</td>
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<tr>
<td>Total outpatients</td>
<td>63,473</td>
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<td>3539</td>
<td>2567</td>
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</tr>
<tr>
<td>Total Assisted Conception Service patients</td>
<td>1279</td>
<td>1394</td>
<td>1750</td>
</tr>
</tbody>
</table>

Total Capital Investment 1997 – 2004 = £8.75 million

Average Hospital Charge (excluding Consultants and Anaesthetists fees) = £1157

We welcome the Bill. Nevertheless we do have some concerns about a number of provisions in the Bill which might lead to a divergence in the definitions of charity in Scotland and in England and Wales. These are presented below.

**Definition of Charity**

The definition of charity has been the same on both sides of the border for generations. Any difference in the definition on each side creates a risk that what is charitable in one part of the United Kingdom will not so be in another.

We believe that one of the key objectives of the regulation of charities is the maintenance of public confidence. We would respectfully submit that the creation of that risk would in itself damage
confidence in the system. The public must feel confident that organisations they support as charities are charitable without any doubt or qualification: a system of regulation in the UK in which an organisation may be both charitable and not charitable will undermine confidence. It may attract criticism and the more so because that result would follow the current position in which no such discrepancy exists.

Moreover the Bill would appear to create the possibility that an organisation could not only be charitable and non-charitable in different places in the UK but also, because the Inland Revenue applies the English test, charitable for Inland Revenue purposes in Scotland and at the same time not charitable for OSCR purposes.

We fully recognise that this is a matter for the Scottish Parliament to decide. However, for the sake of all charities in the UK, we submit that the correct approach is for the Scottish Parliament and the Westminster Parliament to agree common terms for (at least) the definition of charity and public benefit.

Registration of Charities

There is a profound and vital difference in the principle upon which the Bill is based compared with the Westminster Bill.

In England and Wales the present law defines a charity by reference to the purposes for which it is established. This is vital for the protection of the public interest. An organisation is, therefore, a charity regardless of whether it is registered as such. The Court, and in England and Wales, the Charity Commission can intervene with their protective powers even where the entity is not registered as a charity. This would continue to be the position under the Westminster Bill but in Scotland the position would be radically different because the organisation would not be a charity until it was registered as such.

We note that the question of whether an organisation is admitted to the Register is a subjective question for the OSCR: Section 5 (1) provides that an applicant is to be entered in the register only if the OSCR considers that the applicant meets the charity test. This section should be recast to oblige the OSCR to register every applicant that satisfies the conditions of the charity test. Although, as drafted, the decision is subject to the appeal procedures, it would seem that the appeal could only be about what the OSCR considered to have met or not to have met the test rather than whether as a matter of law the test was met. Moreover the trustees of every organisation that meets the test should (as in England and Wales) be obliged to submit to the regulation of the OSCR by applying to be registered.

Public Benefit

We are concerned about the public benefit test in section 8 of the Bill. The provisions of sub-section (2) represent a change in the existing law and, more importantly, will amount to a different test from that proposed in relation to the Westminster Bill.

We respectfully submit that the provisions of sub-section (2)(b) are unclear and will lead to confusion and an undermining of confidence in the regulation of charities. The reason is that the concepts of a benefit to the public and a section of the public in that sub-section are both open to wide and differing interpretations but they do not feature in the Westminster Bill and it seems inevitable that they will over time lead to a different meaning for public benefit in Scotland compared with England and Wales.

It would be better to leave the question of what amounts to public benefit to the existing and evolving case law as is proposed in relation to the Westminster Bill.

Dual Registration

We note that by virtue of Section 14 (b) if Nuffield Hospitals wishes to refer to itself as a charity in Scotland it would be required to register as a charity in Scotland, separately from its registration with the Charity Commission in England. However, if a charity in the same position did not refer to itself as a charity in Scotland, there would appear to be no need to register.
In relation to charities that are registered on both sides of the border we would urge that the most serious consideration should be given to justifying more onerous regulation by the OSCR than by the Charity Commission, e.g.

- amalgamating with another body (Section 16 2 (b))
- winding up or dissolution (Section 16 2 (c))
- give 42 days’ notice of certain actions (Section 16 (4))
- change of name only with OSCR consent (Section 11 (1))
- the power to require any documents or information in relation to a charity’s entry in the Register (Section 22 (1))

Remuneration of trustees

As in relation to the Westminster Bill we welcome the proposal to allow trustees to be remunerated for services provided to the charity. However, in the case of the very largest charities such as ourselves we feel that the duties imposed on trustees are sufficiently onerous that there is a case for extending the remuneration provision in respect of these charities to allow payment to trustees for acting in that role. We feel that this would be an aid to trustee recruitment and retention.

Conclusion

We welcome the Bill as filling an important legislative gap.

In general we believe that the interests of charities in the UK will be best served by creating a body of law and regulation that minimises the scope for differences in treatment or duplication of compliance on each side of the border. That is not to say that the Westminster Bill should be taken as the solution but a common approach should be taken in order to maintain and enhance public confidence in charities in the UK.

Nuffield Hospitals
7 January 2005

WRITTEN EVIDENCE FROM THE SCOTTISH INTER FAITH COUNCIL

The Scottish Inter Faith Council welcomes the opportunity to give evidence on the Charities Bill to the Communities Committee. The Scottish Inter Faith Council is a body which aims to “advance public knowledge and mutual understanding of the teachings, traditions and practices of the different faith communities in Scotland, including awareness both of their distinctive features and of their common ground, and to promote good relations between persons of different religious faiths.” The following major faith communities are represented on the Council:

Baha’i
Buddhist
Christian
Hindu
Jewish
Muslim
Sikh

Although the Scottish Inter Faith Council has a policy of not formally speaking on behalf of faith communities or its member groups we did consult with our members on this Bill and wish to comment as follows:

The Charity Test (Sections 7-9)

We agree with the changes to charity law as outlined in the Bill which states that bodies will only be given charitable status if its purposes consist of one or more charitable purposes and it provides public benefit in Scotland and elsewhere. We support the advancement of religion as a charitable purpose
and agree that no body should call itself a charity unless registered with the Office of the Scottish Charities Regulator.

However, the Council has concerns regarding the removal of the presumption of public benefit and we are not clear how this will impact on religious organisations. Some members feel that the presumption of public benefit should be retained in the case of organisations which have the advancement of religion as their purpose. There is a concern that the public benefit test may be used by opponents of any particular religion or religion in general to attempt to remove charitable status.

There is concern for some religious organisations about meeting public benefit test. While the organisations are clear that they provide public benefit, it is not clear how the test will be applied. We understand and accept the reasons for not defining public benefit on the face of the Bill. However, it does leave people in some confusion. For example, it is unclear whether the public benefit test criteria will be met by faith communities which have as their primary or sole activity religious worship or contemplative prayer.

We welcome the inclusion of broad principles governing the public benefit test. However, we still have concerns about how these principles will be applied in practice. It would be helpful to have guidance from OSCR on how they plan to interpret the public benefit test at the earliest opportunity. We would welcome the opportunity to be involved in any consultation on this guidance.

If public benefit is to be defined in terms of benefit to the general public or a sufficient number of members of the public, what constitutes a ‘sufficient number?’ Worship services are often open to anyone, not just people of that particular religion. Where they are for members of a particular faith community, we would like an assurance that small gatherings are not going to fall foul of a numbers game in demonstrating public benefit.

One of our members brought to our attention that the public benefit test may contradict OSCR’s pilot Annual Return 2004 Question D (Beneficiaries – who are they?) pages 4/5 which says: “mark only the groups your charity specifically sets out to help – do not mark a group just because your activity tries to include such people in its work as part of a broader range.” This is restated in the accompanying guidance notes. Some clarity on this would be helpful.

The Council welcomes the new criteria which it has been decided to add to the Bill. The Council believes that the criteria should include a statement that regard can also be given to other relevant factors in determining whether a body provides public benefit. We share the concerns of the Scottish Churches Committee that no reference has been made to the possibility of public benefit being non material, for example, spiritual or moral benefit.

A statement that it is not the intention of Parliament to remove charitable status from any religious organisation which currently enjoys charitable status would be welcome.

The potential of having different criteria for the charity test in Scotland, than in England and Wales is also a cause for concern.

We would like some clarity on how OSCR is to define “religion” for the purposes of meeting the charity test. The Council is particularly concerned that such a definition should not exclude multi-deity or non-deity religions. We recognise a statutory definition would be likely to be problematic, however it is not clear how OSCR will seek to tackle the issue of definition of religion, and we would welcome an assurance that OSCR will utilise criteria which is inclusive of single deity, multi-deity and non-deity religions.

**Designated Religious Charities (Section 64)**

We support the extension of the status of designated religious charities to those bodies which meet the criteria set out in the Bill and agree that such bodies should be subject to regulation within their own structures but accountable to OSCR. Due to the different structures of the various faith communities in Scotland it is unlikely that any, outside the Christian faith, would at present be able to meet such criteria, but we welcome the extension of this status.
Scottish Charitable Incorporated Organisations (Sections 49-53)

The Council supports the proposal to establish a Scottish Charitable Incorporated Organisation as a positive development and a simpler mechanism for charities to reorganise.

Remuneration for services (Section 66)

In some religious bodies there are charity trustees who are also paid members of staff. In light of this, it would be helpful to have clarification that there is no suggestion of any wrong-doing where this applies. Clarification on this point would be welcome.

Vanessa Taylor
Policy and Equalities Officer
Scottish Inter Faith Council
5 January 2005

WRITTEN EVIDENCE FROM THE SCOTTISH CHURCHES COMMITTEE

The Scottish Churches Committee is grateful to the Communities Committee for its invitation to give evidence on the Bill. The Committee is a body which was set up “to enhance the temporal and patrimonial interests of the Churches in Scotland and inter alia to monitor, so far as possible, the policy and legislation of Her Majesty’s Government.” The following denominations are represented on the Committee:-

- Church of Scotland;
- The Roman Catholic Church in Scotland;
- Scottish Episcopal Church;
- The Methodist Church in Scotland;
- The Baptist Union of Scotland;
- The United Reformed Church, Scottish Synod;
- The Free Church of Scotland;
- The United Free Church of Scotland;
- The Free Presbyterian Church of Scotland;
- The Associated Presbyterian Churches of Scotland.
- The Salvation Army.

The Charity Test (Sections 7-9 of the Bill)

Whilst the Committee of course welcomes the retention of the advancement of religion as a charitable purpose and also the expansion of the previous fourth head of charity to set out a number of new specific charitable purposes, it has concerns that there are potentially to be different “charity tests” north and south of the border and indeed a different approach to the use of previous precedents. The Scottish Bill adopts a “clean sheet” approach by repealing all the existing law and with it apparently the ability of the Courts to refer to and apply existing case law. This is of concern to the Committee. In contrast, the Westminster Charities Bill (clause 2 (4) (a)) specifically treats as charitable purposes those recognised as being charitable in terms of pre-existing charity law. The Committee fears that this different approach, coupled with the different wording of some of the charitable purposes, will cause great uncertainty as to what charities may subsequently be removed from the Scottish Charities Register by OSCR as not complying with the new charity test. In addition however a lack of a common UK test could lead to considerable public confusion and the possibility of some charities qualifying for tax benefits without being regulated by OSCR.

For example, without the benefit of prior case law, how is OSCR to determine the meaning of “religion”? This is a matter which has evolved through case law over a long number of years and the scope of religions which are recognised as charitable has become progressively wider from being initially solely the “established” churches, then other Christian denominations, and now embracing other faith communities. However a statutory definition would be very difficult indeed to formulate and it would seem self-evident that reference to existing case-law should be permitted. It is submitted that
the position in terms of the Bill gives too much discretion to OSCR whose officials may lack the necessary specialised theological knowledge to make a valid judgement.

Public Benefit

The Committee is opposed to the removal of the presumption of public benefit in relation to the current first three heads of charity. In this view, the Committee does appreciate that it is somewhat “swimming against the current tide”. The Joint Committee of the House established to scrutinise the draft Westminster Bill took extensive evidence in relation to the public benefit test and received conflicting advice as to whether or not the removal of the presumption would make an appreciable difference. The Joint Committee in fact concluded that only a small number of institutions would, as a result, lose charitable status.

However, the Committee remains unclear as to how the removal of the presumption may affect religious denominations and indeed how OSCR will operate the public benefit test. It fears that those who are opposed to religion may campaign to attack the charitable status of particular denominations on the basis of the public benefit test. At present, public benefit is interpreted on a case by case basis and different standards are required for different charitable purposes. For example, under existing Scots law, the hurdle of public benefit is higher for the advancement of education on the basis that the scope for manipulation for private benefit under this head is the greatest. This and other common law tests will be lost if the Bill is enacted as currently framed. The Committee would regret that and again prefers the Westminster approach where public benefit is simply defined in terms of the existing common law.

The Committee is not overly impressed by the new criteria which it has been decided to add to the Bill. It does not feel that they add much clarity to the position or improve in any way on the common law which is to be replaced. The Committee would urge that the criteria should state that regard can also be given to other factors deemed relevant in determining whether a body provides public benefit. It is in particular disappointed that no reference has been made to the possibility of public benefit being non material – for example spiritual or moral benefit.

The Committee would welcome assurances that it is not the intention of Parliament in enacting sections 7 to 9 of the Bill that there should be a sudden or indeed gradual erosion of the charitable status of religious organisations. (Given the terms of Articles 9 and 14 of the European Convention on Human Rights coupled with section 13 of the Human Rights Act 1998, a denial of charitable status would potentially in any event be a breach of human rights given the effect on property rights as protected by Article 1of the First Protocol to the Convention.) However, the Committee would be heartened if it could be confirmed that the public benefit test will equally be met by faith communities which solely promote religious worship, as well as those which encourage missionary outreach by their members and those which additionally seek to meet social needs within a Church context, such as by the provision of care for the elderly.

Designated Religious Charities (Section 64)

Section 64 retains the concept that religious bodies which can comply with certain criteria may be exempted from certain regulatory requirements. This is an amended form of “designated religious body” status as introduced by the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Some, but not all, of the members of the Committee would anticipate qualifying as designated religious charities (“DRCs”) (as was the case with designated religious body status in terms of the 1990 legislation) and they welcome the inclusion of section 64.

The Committee appreciates that there will be those who may question why certain religious organisations should be accorded a special status and who may feel that they should be treated identically to other charities. However, there are significant and fundamental distinctions between religious bodies on the one hand and other charities (large and small) on the other. The constitutional position of the Church of Scotland (a detailed explanation of which is contained in the annexation to this submission) requires the State not to involve itself in the exercising of control over the internal management of the Church nor to interfere as to who may hold membership or office within the Church. The Church of Scotland is unique in being the only religious body in the UK to have specific legislation recognising its exclusive jurisdiction in spiritual matters (the Church of Scotland Act 1921).
However other denominations would also firmly assert this right and indeed section 2 of the 1921 Act acknowledges the rights of other churches in this regard. The Church’s own Declaratory Articles, whose lawfulness the 1921 Act acknowledges, seek to distinguish carefully between its own jurisdiction and that “of the authority of the civil magistrate within his own sphere” – a type of “render unto Caesar approach”. Designated religious body status was formulated as a compromise to avoid the obvious potential difficulties which could result for example by a purported removal of a minister of religion from his office within the Church. However, in the case of DRC status - as was the position under the 1990 Act- there is the safeguard that such status will only be accorded to those denominations which can demonstrate that their internal organisation is such that there is supervision of and discipline functions in place with respect to “component elements” i.e. congregations and the like and that there are accounting and audit requirements corresponding to those required of other charities. To be a DRC therefore it will be necessary to demonstrate that there will be adequate self regulation. In addition, there is the fall back position that such status does not shield DRCs from investigation and that the highly effective sanction exists of removal of designated status which then opens up the religious body to the full range of regulatory measures contained in the Bill.

The Committee is not aware of any great groundswell of opinion against the concept of DRCs nor that there was ever concern on the part of the Scottish Charity Office as to the workings of the 1990 Act in this area. Akin to other charities, DRCs will come under new reporting requirements in regard to the Scottish Charity Register and the submission of information to OSCR in the form of annual returns and accounts. In terms of the 1990 Act, DRBs had wide exemptions from accounting requirements secured in recognition of the fact that their income derives almost entirely from their members and not from public fundraising. However, the Committee recognises that the position of the Churches in society has greatly changed over the years and that, as a quid pro quo of the tax and other benefits which charity status affords, they must operate as transparently and openly as other charities. The Committee therefore accepts the new obligations which the Churches will have in these areas and has already met with OSCR’s Head of Regulation and Compliance to discuss the most effective way in which such information can be provided.

The Committee was grateful that a number of amendments relating to DRCs were incorporated into the Bill as a result of the pre-legislative consultation process. However, there are a number of provisions about which concerns remain. These are :-

(a) Change of Name – section 11

Given OSCR’s powers to “ban” objectionable or misleading names (sections 10 & 12), the requirement for OSCR to approve a change of name by a charity seems unnecessary. The Church of Scotland further considers this power “crosses the line” and affects a matter it considers to be within the Church’s jurisdiction. It will complicate the reappraisal of congregations as when congregations unite, a new name is adopted. Given the exemption of DRCs from the requirement to seek OSCR’s approval of actions falling within sections 16(2) (b) to (d), there should be exemption also from section 11.

(b) References in Documents (Section 15)

The scope of this enabling provision and the possibility that any document “issued or signed on behalf of” a charity could potentially in future require to refer to its charity status causes the Committee some concern. Whilst it would be easy enough to identify items signed on behalf of a charity – letters, cheques etc, - it is felt that the term “issued” is less specific and could potentially cover an extremely wide range of documentation. In the context of the Churches, there has been debate as to whether for example hymn books and hymn sheets handed out at church services, communion cards and ministers’ “calling” cards would be “caught”. The fear is the introduction of what will certainly seem to many unnecessary bureaucracy and the likelihood of inadvertent breaches of the legislation occurring. The Committee would therefore ask that consideration be given to exempting DRCs from this requirement.

(c) Removal from the Register: protection of assets (Section 19)

These provisions should not apply to “component elements” of DRCs. Congregations are separate charities and if they are dissolved, their assets are applied for other purposes of the denomination. The Church of Scotland would submit that it is for the General Assembly of the Church to determine the use to which such assets are to be put rather than OSCR or indeed the Court of Session, this being a matter of the internal government of the Church. (In this the Church would however distinguish
cases involving third party trusts (bequests, gifts etc) where the jurisdiction of OSCR and the Courts in regard to reorganisations is fully accepted.)

(d) Powers of Court of Session – Section 34 (4)
Although the Bill disapplies parts of Section 34 (4) in the case of DRCs, the Court is still empowered to:

- interdict the charity or body (whether temporarily or permanently) from such action as the Court thinks fit [s34 (4) (a)]
- order any relevant financial institution or other person holding property of the charity or body …not to part with the property without the court’s consent [section 34 (4) (f)]; and
- make an order restricting the transactions which may be entered into or the nature or amount of the payments which may be made, in the administration of the charity or body without the court’s consent [section 34 (4) (g)]

These are potentially very wide ranging powers which the Church of Scotland considers could re-open the Church/state controversies which arose in the past and would certainly innovate radically on the current constitutional position. It is hard to imagine powers which could potentially interfere more with matters relating to the government of the Church of Scotland than these. Indeed use of them would undoubtedly rapidly prevent the Church from continuing to function at all. The Committee accordingly urges that these sub-sections should also be disapplied in the case of DRCs.

(e) Designated religious charities - Section 64 (3) (b)
The Committee submits that the subsection should be amended to follow the wording of the existing legislation (the 1990 Act) by the addition, after the word “component” of the words “or structural”. It is unclear why this innovation is proposed and why, as a result, statutory corporations such as the Church of Scotland General Trustees, should not potentially benefit from DRC status.

Other General Issues

Scottish Charitable Incorporated Organisations (Sections 49-53)
The Committee very much welcome the proposed introduction of SCIOs. At present, many congregations which decide to set up Outreach projects either alone or in conjunction with other community groups do so through the medium of a Company limited by guarantee to have the benefit of limited liability. However, company legislation does not offer an appropriate form of regulation and the legislative requirements can be daunting for lay people to cope with.

Duties of Charity Trustees (Section 65)
Whilst the Committee considers it helpful to have a statutory definition of what the duties of a charity trustee are, it regrets the decision to brand any breach of any such duty as being misconduct and to attach criminal sanctions to certain failures to comply with the Bill – even to matters which could arise through inadvertence such as failure to notify OSCR of a change to the charity’s name. It feels that this is disproportionate. The Churches are well served indeed by their volunteers and the Committee is concerned that these provisions will be a source of worry to honest and diligent office bearers and indeed may prejudice the work of the charity sector generally by deterring people who might otherwise agree to act as charity trustees. Surely the sanctions available under existing criminal law are sufficient to deal with any cases of deliberate dishonesty?

Remuneration for services (Section 66)
The Committee appreciates the reasons why is has been decided to include this section. However it wonders whether the section may have unintended consequences for religious bodies in terms of whose constitutions and structures the priest, pastor or minister of religion will be a charity trustee but will generally also be in receipt of a stipend payment. Given the large number of charity trustees in any particular body, there is also a fear that there could be inadvertent breaches of the section. For example the Church of Scotland has over 40,000 elders, many of whom may be asked to provide services in a professional capacity without those seeking these services being necessarily aware of their status! The Committee would hope therefore that consideration could be given to exempting
religious charities from the section which failing that appropriate wording be added to clarify that it is not to apply to priests and ministers of religion.

**Control of Fundraising (Sections 83-91)**

On a “seasonal-ish” note, it would appear that, under the proposed legislation, carol singing where money is collected will be classed as a “public benevolent collection” and require local authority consent. Whilst accepting that this is not a major matter, the Committee would hope that to avoid what it would see as unnecessary red tape, consideration might be given to exempting fund raising by carol singers where the collection is carried out under the aegis of a church congregation, subject perhaps to there being a requirement to inform the local authority of the event in advance. Since such events can be organised relatively spontaneously, it is submitted that advance notification of less than 2 months would be appropriate. It is suggested that a period of say 14 days to enable the local authority to check the *bona fides* of the church congregation concerned would be reasonable.

**Cross-border issues**

A number of religious denominations operate on a UK-wide basis. From discussions which they have already had with officials of OSCR, it is their hope and expectation that their plea has been taken on board that all possible steps will be taken to minimise the potential burden of dual registration/monitoring.

Janette Wilson
Secretary
Scottish Churches Committee
30 December 2004

**Note on the Constitutional Position of the Church of Scotland**

The Church of Scotland has a unique constitutional position, further information about which can be found in the ‘Stair Memorial Encyclopaedia on the Laws of Scotland’, Volume 3, “Churches and Other Religious Bodies” Paragraphs 1501 to 1504, & Volume 3 (Re-issued), “Constitutional Law” 618 to 639, Cox’s ‘Practice and Procedure in the Church of Scotland’ and Weatherhead’s ‘The Constitution and Laws of the Church of Scotland.’

In the Church of Scotland Act 1921 (“the 1921 Act”), Parliament recognised that there are certain areas which are exclusively and, as of right, appropriated to the Church and that within these areas the civil authority, including Parliament and the judiciary, has no jurisdiction. Accordingly, it is accepted that the Church courts are the appropriate fora for adjudication of all matters of ecclesiastical law, including matters relating to discipline, government, membership and office in the Church, the constitution and membership of its courts, the mode of election of office-bearers and the definition of the boundary of the spheres of labour of its Ministers and other office-bearers.

The Church of Scotland’s constitutional position arises from the history of tension and conflict between it and the State. The decision to embrace the reformed faith and reject the authority of the Pope was a political one taken by the Scottish Parliament in 1560 without the approval of the Sovereign and, indeed the Parliamentary Acts of Reformation did not receive Royal approval until after Mary’s abdication in 1567. Further Church/State tensions emerged during the reign of James VI and his two successors, all of whom had Episcopalian sympathies and endeavoured to control the Church by the imposition of Bishops. The Covenanting Wars ensued. Eventually, the Revolution Settlement of 1690 established the Church of Scotland as Presbyterian and provisions for its protection were “entrenched” in the Treaty of Union. This, notwithstanding, conflict persisted. The patronage system in terms of which legislation gave land owners the right to present ministers to vacant congregations was a particular bone of contention and was a significant factor in the secession of considerable numbers of Kirk ministers and members in the 18th century to set up denominations which ultimately became the United Presbyterian Church. The Disruption in 1843 when over one-third of the Kirk’s ministers left to form the Free Church was triggered by the enacting by the General Assembly of legislation concerned with internal Church administration which was subsequently challenged in the civil courts and struck down as being allegedly *ultra vires* of the General Assembly. Faced with such a denial of the Church’s right and freedom to manage its own affairs, the Disruption was inevitable.
In 1900 the United Presbyterian Church and the Free Church united to form the United Free Church and in 1929 the United Free Church and the Church of Scotland were re-united to form today’s Church of Scotland. (The two bodies nowadays known as the Free Church and the United Free Church comprise a small remnant of congregations that declined to enter one or other union). The 1929 re-union was made possible through the abolition of patronage, the removal of the Kirk’s right to have certain churches and manses maintained at the expense of third parties and the adoption by the Church of Scotland of its Declaratory Articles which achieved a resolution of the Church-State question by their reference to the Church, not as “established”, but as “a national church, representative of the Christian faith of the Scottish people”. Those entering the union from the United Free Church side who might be nervous of any suggestion of a state church were reassured firstly by the inclusion in the Declaratory Articles of the declaration that the Church has “the right and power, subject to no civil authority, to legislate and to adjudicate finally in all matters of doctrine, worship, government and discipline in the Church.” Secondly, prior to the union taking place, the Westminster Parliament enacted the Church of Scotland Act 1921, a copy of which is appended, to which the Declaratory Articles were annexed as a Schedule. The Act itself, in accordance with the statement in the Declaratory Articles above quoted, does not purport to give the Church its constitution or to grant it spiritual independence but instead declares the Declaratory Articles as drawn up by the Church to be lawful and to prevail over all State statutes or laws then in force affecting the Church. By the 1921 Act, Parliament accordingly explicitly recognised that there exists an area where its writ does not run, namely the government of the Kirk in matters spiritual through the Courts of the Church, the Act being therefore a unique legislative recognition of a limitation on the sovereignty of the UK Parliament (and by extension the Scottish Parliament).

At the time of enactment by the Westminster Parliament of the Law Reform (Miscellaneous Provisions (Scotland) Act 1990 (“the 1990 Act”), representations were made by the Church pointing out that some of the matters which were the subject of the proposed legislation were matters which fell within the exclusive jurisdiction of the Kirk and that, if the legislation were passed in the form proposed, there would inevitably be cases involving dispute where neither the Church nor the State was willing to accept the jurisdiction of the other.

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

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

The representations submitted on behalf of the Church of Scotland and other Churches were accepted in principle by the Government and negotiations with officials of the Scottish Office followed, resulting in the formulation of what is Section 3 of the 1990 Act relating to designated religious body status.

**The Church of Scotland Act, 1921**

[11 & 12 Geo.5]

*Chapter 29*

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

[July 28, 1921]
Whereas certain articles declaratory of the constitution of the Church of Scotland in matters spiritual have been prepared with the authority of the General Assembly of the Church, with a view to facilitate the union of other Churches with the Church of Scotland, which articles are set out in the Schedule to this Act, and together with any modifications of the said articles or additions thereto made in accordance therewith are hereinafter in this Act referred to as "the Declaratory Articles":

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

s 1
The Declaratory Articles are lawful articles, and the constitution of the Church of Scotland in matters spiritual is as therein set forth, and no limitation of the liberty, rights and powers in matters spiritual therein set forth shall be derived from any statute or law affecting the Church of Scotland in matters spiritual at present in force, it being hereby declared that in all questions of construction the Declaratory Articles shall prevail, and that all such statutes and laws shall be construed in conformity therewith and in subordination thereto, and all such statutes and laws in so far as they are inconsistent with the Declaratory Articles are hereby repealed and declared to be of no effect.

s 2
Nothing contained in this Act or in any other Act affecting the Church of Scotland shall prejudice the recognition of any other Church in Scotland as a Christian Church protected by law in the exercise of its spiritual functions.

s 3
Subject to the recognition of the matters dealt with in the Declaratory Articles as matters spiritual, nothing in this Act contained shall affect or prejudice the jurisdiction of the civil courts in relation to any matter of a civil nature.

S 4
This Act may be cited as the Church of Scotland Act 1921.

Schedule

Articles Declaratory of the Constitution of the Church of Scotland in Matters Spiritual

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

Para II
The principal subordinate standard of the Church of Scotland is the Westminster Confession of Faith approved by the General Assembly of 1647, containing the sum and substance of the Faith of the Reformed Church. Its government is Presbyterian, and is exercised through Kirk-sessions, Presbyteries, Provincial Synods, and General Assemblies. Its system and principles of worship, orders, and discipline are in accordance with "The Directory for the Public Worship of God," "The Form of Presbyterial Church Government," and "The Form of Process," as these have been or may hereafter be interpreted or modified by Acts of the General Assembly or by consuetude.
Para III
This Church is in historical continuity with the Church of Scotland which was reformed in 1560, whose liberties were ratified in 1592, and for whose security provision was made in the Treaty of Union of 1707. The continuity and identity of the Church of Scotland are not prejudiced by the adoption of these Articles. As a national Church representative of the Christian Faith of the Scottish people it acknowledges its distinctive call and duty to bring the ordinances of religion to the people in every parish of Scotland through a territorial ministry.

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

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

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

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

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

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

FURTHER WRITTEN EVIDENCE FROM THE SCOTTISH CHURCHES COMMITTEE

The Charity Test

The Committee would made the following additional comments on the above topic.

Section 7 (3) (b) of the Bill provides that a body would not “meet the charity test if …..its constitution expressly permits a third party to direct or otherwise control its activities”. ‘Third party’ is defined in the Bill as any person who is not a member of the body or who would be a charity trustee if the body was a charity. Presumably it will follow that the third party can be a natural or legal person (i.e. an individual or another body). In many cases however the legal person could be a charity in its own right.

This section could have serious repercussions for many Church bodies.

Take for example the Church of Scotland Trust. Its members are appointed by the General Assembly of the Church of Scotland, a separate body (and separate charity) distinct from the Trust and, therefore, potentially a third party. The General Assembly also has power to remove any member of the Trust, appoint the Chairman and Vice-Chairman etc. The General Assembly does therefore have an element of control of the Trust and this could result in OSCR removing the Trust from the Scottish Charity Register. There are numerous ‘Church’ trusts where trustees are appointed by the General Assembly, a Board of the Church or another church related charitable trust which could be struck at by this provision. For example, congregations often wish to carry out outreach projects involving members of the wider community. Alternatively, they may wish to share Church premises with other community groups and to give them “a say” in how the premises are managed. To facilitate this, a new charitable body may be set up with representatives both of the congregation and the community as the Charity Trustees but with the congregation retaining the right to appoint a majority of the Trustees. Again, the Committee is concerned that such arrangements may be struck at.

The Committee would point out that it is one of the criteria for designated religious charity status that the internal organisation of the charity exercises supervisory and disciplinary functions with regard to the charity’s “component elements”. However, it is the nature of the structure of many religious organisation that most if not all of these component elements will currently be separate charities. Since they would fall within the category of being directed or otherwise controlled by a “third party”, they would potentially lose their charitable status.

It would be better to remove any possible ambiguity and this could be done by an amendment to the sub-section in the following terms:

“its constitution expressly permits a third party, unless that third party is a charity, to direct or otherwise control its activities”.

Janette Wilson
Secretary
Scottish Churches Committee
11 January 2005
Charities and Trustee Investment (Scotland) Bill: Stage 1

10:19

The Convener: Item 2 is consideration of the Charities and Trustee Investment (Scotland) Bill. I welcome our panel of witnesses. We are joined by Judith Sischy, the director of the Scottish Council of Independent Schools; Janet Allan, the principal of Donaldson’s College for the Deaf; John Stoer, the headmaster of St Aloysius’ College; Margaret Fowler, the bursar of Edinburgh Rudolf Steiner School; and David Mobbs, the chief executive of Nuffield Hospitals. Thank you for joining us this morning. I am sure that, like some members of the committee, some of you have had a difficult time getting here and we are grateful to you for making your way to Edinburgh. Members of the committee have a number of questions for you, so I will get started.

I am interested to know whether you think that the Executive’s consultation was inclusive and comprehensive and whether sufficient consideration has been given to the responses. The committee has met a number of the organisations that are represented here, but I note that the written evidence to the committee from Nuffield Hospitals expresses dissatisfaction with how it has been involved in the process, so I would particularly like to hear from David Mobbs.

David Mobbs (Nuffield Hospitals): It was unfortunate that we became aware of the process only on 8 December. Although we are happy to be here to help the committee in its consideration of the bill, we have had only a short time to prepare.

John Stoer (St Aloysius’ College): I was at the committee’s meeting in Perth, which was a good meeting in that we were given a very fair hearing. It was clear that the committee members who attended the meeting wanted to understand our perspective and I was pleased with the quality of the hearing that we received.

The Convener: Did the Scottish Executive engage with you during its consultation and its preparation of the bill?

Judith Sischy (Scottish Council of Independent Schools): On behalf of SCIS, I can say that we were very satisfied. We were part of the Scottish charity law advisory forum, which existed prior to the preparation of the draft bill. It was extremely helpful to hear the general debate on charities, to share ideas—almost with a carte blanche—and to have the opportunity to comment on the draft bill as it emerged. The Executive was willing to meet us if we did not understand
something. There has been a good, democratic exercise.

Mary Scanlon (Highlands and Islands) (Con): As you know, it is proposed in the bill that the Office of the Scottish Charity Regulator should become a statutory body, in the form of a non-ministerial department that would report and be directly accountable to the Scottish Parliament. Do the proposals for OSCR ensure the office’s independence in the areas that you represent?

Judith Sischy: Our knowledge of the matter is probably limited. I am not 100 per cent sure how a non-ministerial department works. However, I exchanged e-mails with OSCR on the matter and received reassuring responses that the office would be independent. Our main worry is that OSCR must be non-party political. I do not fully understand to what extent ministerial involvement will impinge on the workings of OSCR, but given the Nolan procedures and the other criteria that exist, a regulatory body must be independent and non-party political. We must rely on the structures to create such a body.

Mary Scanlon: OSCR will certainly have to follow the normal public appointment procedures. I do not have the information in front of me, but I picked up from our most recent evidence-taking meeting that ministers would be able to make directions and advise on the annual report. Would that cause the witnesses concern?

John Stoer: The problem that I had when I read through the information that was available to me was that we are all on very new ground. Some of the challenges will relate to definitions of what we understand by “public benefit”. Independence is important, but the bill was introduced by the Scottish Executive and is being considered by the Scottish Parliament. Therefore, it would seem that they have reasonable rights to guide the process, but there must also be mechanisms to preserve the independence of the regulatory body.

Mary Scanlon: That will all be known about in time through guidance, regulations and so on. Should objectives for OSCR be included in the bill and should part of OSCR’s statutory duties be to provide advice to the sectors that you represent on good governance as well as on adherence with the law?

Judith Sischy: I have read all the evidence that has been given to the committee, and the question whether OSCR should be about compliance, regulation, advice or support and whether a line should be drawn between compliance and advice is interesting. Our sector would certainly appreciate any advice and support that the regulatory body could give about how charities should best be governed and managed. We think that we do pretty well, but it would be nice to have a nationally acceptable framework within which to operate.

Mary Scanlon: So you would like OSCR to have an advisory capacity on matters other than adherence to the law.

Judith Sischy: As a sector, we would.

John Stoer: I certainly support that. I am involved with teaching children. It is not good enough to tell a child that they have not passed something—what they must do to improve must be explained to them. That is part and parcel of our job. Someone simply regulating without giving advice about good practice seems to be missing an opportunity.

Mary Scanlon: That sounds reasonable.

I have a final question. Is there any sense that OSCR’s powers, directions and authority would unduly interfere with your charitable status or the workings of your organisations?

John Stoer: That is a difficult question to answer in the abstract, but I am not unduly worried by what I have heard and read so far.

David Mobbs: From our perspective, the issue comes down to consistency between what happens in England and Wales and what happens in Scotland. There could be difficulties for us if there is no consistency. In our written submission, we have pointed out a number of areas in which the proposals for OSCR seem to go much further than the current proposals for the Charity Commission for England and Wales.

Mary Scanlon: I think that those points will be covered later by my colleagues.

Christine Grahame (South of Scotland) (SNP): Mr Mobbs, in your evidence to the Joint Committee on the Draft Charities Bill at Westminster and in your written evidence to us, you stressed the fact that one of the reasons for Nuffield Hospitals having charitable status is your role as a custodian of property for the public benefit. Do you think that that criterion should be included in the charity test in section 7(2)?

David Mobbs: The point that we were trying to make is linked to the organisation’s purpose. The issue has arisen through my advisers and is a technical issue in which I do not have expertise. We have a purpose and have said that legislation should exist to ensure that all our property, including our assets, continues to be applied for that purpose. That was the point that we were making as opposed to specifically identifying the need to protect property itself.

Christine Grahame: So you are saying that you are content with section 7(2) as it stands.

David Mobbs: That is correct.
Christine Grahame: You also state that section 5(1) "should be recast to oblige the OSCR to register every applicant that satisfies the conditions of the charity test" in order to make the Scottish situation consistent with that in England and Wales. Is it feasible for OSCR to be aware of every organisation that meets the criteria?

David Mobbs: Again, the issue comes down to the purpose of the organisation. If that purpose is to provide public benefit through the activities that it provides, it is setting out to be a charity and should therefore be registered as a charity so that the legislation can protect all its assets and property in order that they can continue to be applied for the purpose of that organisation. Therefore, it should be registered. The issue comes down to whether it is onerous to have an inconsistency between the two approaches. If registration were automatically recognised from one to the other, that would—

Christine Grahame: We are talking about the perceived discrepancies between England, Wales and Scotland, with which I have no problem. We may have better legislation. Do you concur that it is in the interest of the public to know that charities require to be registered?

David Mobbs: Yes, I do.

Donald Gorrie (Central Scotland) (LD): Some changes were made between the draft bill and the current bill, many of which have been welcomed. What is your view on identifying public benefit criteria, which is dealt with in section 8(2)? Is that section as well set out as it could be? In particular, how might it impact on fee-paying schools and fee-paying hospitals? It seems to suggest on the plus side that if you are educating or healing people, that is good, but on the minus side the people who pay the fees may be getting an undue benefit, and the public at large may in some way be suffering a disbenefit, because there may be a counter-effect on the education system or the health system as a whole. Is that a reasonable approach to take towards the hospital and school issues? How could it be done better?

Judith Sischy: Perhaps I could start. I am sure that everyone will have something to say. Defining criteria for public benefit is invidious and difficult, but the bill makes a bold and complex attempt to do so. We could spend many hours discussing how one interprets section 8. We found it difficult to work out what it means, and we are only looking at it from our selfish point of view. I suppose that every charitable organisation will do the same. I found it difficult to unpick section 8. It invites you to weigh up section 8(2)(a)(i) against 8(2)(a)(ii), then the whole of section 8(2)(a) against 8(2)(b), which is not easy to put into practice. However, in principle, having a framework of public benefit is good.

There are various steps to go through, such as drawing up guidance with OSCR and putting it into practice. There will be lots of questions and things to be put right. It will probably all work out in practice. It is not unreasonable to examine and try to quantify public benefit against disbenefit, although some of us are puzzled as to what disbenefit means. However it is interpreted, such a measurement can be made. Part of the problem is that a lot of public benefit is intangible because it is intangible. Section 8 is a good attempt and we can work with it, but it needs a lot of work.

John Stoer: I understand the problem—I think that everyone does. The supporting papers that I have read listed three models, ranging from having no definition to nailing it down quite tightly. It is an interesting issue, because defining "public", let alone "benefit" and "disbenefit", is a problem.

I will try to answer anecdotally. I have been teaching for 27 years, all bar one term of which has been in the maintained state sector. As a head teacher of an independent school, my aims now are the same as they have been throughout my teaching career. What my colleagues—not just in school but in the profession—and I have done has been for public benefit. I find it hard to understand how good education—in whatever context—could be a disbenefit, because good education is to the public benefit. I have struggled with the issue and have tried to see how one could define "education" in a way that could not be construed as being to the public benefit. While I understand what is being attempted in section 8, I have a philosophical problem with any definition of good education, because axiomatically it is to the public benefit.

The confusion arises where the bill says "unduly restrictive", which is to do with access. That introduces a different concept into the debate about public benefit that is not strictly relevant to trying to understand what public benefit is.

David Mobbs: Donald Gorrie’s question had a number of parts. The first was about the definition of public benefit in section 8. As our written submission states, we think that that is unclear and we would prefer that the definition of public benefit continued to be the one that is used in the existing and evolving case law, which is the view that has been adopted in England and Wales. Like my colleague, we, too, find it difficult to understand the concept of disbenefit.

I am sorry to keep bringing this up, but we are also concerned about the consistency of approach...
between Scotland and England and Wales to the definition of public benefit. It appears from the drafting of the bill that the two will diverge and that the divergence could grow over time because of interpretation, which could cause problems, particularly for charities that are registered in England and Wales but not in Scotland. That will raise questions about what a charity is and when a charity is not a charity, which will raise issues of public confidence and might conflict with the bill's overall objective, which is to protect and develop the charity brand. We have concerns about that.

Section 8(2)(b) states that the service must not be "unduly restrictive". That provision may relate to charities that provide services and charge fees. If the clear intention is to alter the situation for charities that charge fees to provide services, we would prefer the bill to state that, so that we can work early on to resolve the issue. Donald Gorrie has already alluded to the fact that we charge fees.

Donald Gorrie: Do the representatives from Donaldson's College for the Deaf and the Edinburgh Rudolf Steiner School have any comments?

Janet Allan (Donaldson's College for the Deaf): I agree whole-heartedly that we must show what public benefit we provide. However, I am slightly concerned about various issues. Does the term "the public" mean everyone in the public or a sector of the public? My school benefits a small section of society hugely—it is a section that no one else in Scotland is capable of educating. However, I guess that Joe Bloggs in the street may not even know that we exist. There is a problem with what the term "the public" means. Do we have to benefit a certain proportion of the public? There are dangers when we start trying to quantify benefit and disbenefit. I am uneasy with any artificial quantification of something because that gives a pseudo-truth. Charities contribute qualitatively to society. I give a warning about trying to measure artificially things that are unmeasurable.

Margaret Fowler (Edinburgh Rudolf Steiner School): At the Edinburgh Rudolf Steiner School we see the provision of education as having public benefit. However, we offer something different and we think that we have widened the choice. We give parents a choice that is not available in the state-maintained sector. I am a bit puzzled about what the disbenefit could be. How could education possibly be viewed as a disbenefit? By widening the choice, we provide a benefit to all parents. We try to keep our fees as low as possible to provide access to people who would normally not be able to afford an independent education. That must be a benefit.

Patrick Harvie (Glasgow) (Green): It would be a shame if we discussed the issue without asking for your views on one of the arguments in favour of the concept of disbenefit. For me, smaller schools such as the Steiner schools that have sought public funding and have not been able to access it and independent schools that charge very high fees are in markedly different situations. The argument is that to provide the opportunity for a separate system of education that is easily accessible to people who are very wealthy and that is not easily accessible to people who are not very wealthy results in the public experiencing a disbenefit because the articulate, influential and powerful parents of children in that system have no vested interest in having a well-maintained state sector. How does the panel respond to that argument?

Margaret Fowler: At the Edinburgh Rudolf Steiner School, we have very few very wealthy parents. The parents of our pupils make huge sacrifices.

Patrick Harvie: I take that on board. I re-emphasise that, for me, the calculation that is to be made with smaller schools, especially those that wish to access state funding but are not yet able to do so, is different from that which is to be made in relation to larger schools that charge very high fees.

Judith Sischy: It is difficult to answer that question quickly, as it raises many issues for debate. A lot depends on John Stoer's point, which was about how we define "public benefit". We do not accept that the definition of public benefit relates only to the state education system; we think of public benefit as something that relates to the whole nation. Most of us are teachers who are trained to teach children and young people, regardless of where they come from, who they are and whether they are poor or wealthy. We are all happy to be working in the independent sector. It might sound naive to say so, but we are not in the independent sector to make money or to gain profit; we are there to educate children and young people. That is what our training is about. That is why we think that what we do provides a public benefit. Our intention is not to harm the state sector; it is to provide as good an education as we can at a reasonable charge. All that we are doing is charging an economic cost to provide that education.

Patrick Harvie: I do not think that anyone would accept that there is a profit motive involved. That would disbar charitable status.

Judith Sischy: That is the problem with the word "disbenefit"—it is a negative word.

Patrick Harvie: Can I take it that you completely reject any suggestion that an incidental effect—in
other words not something that you are motivated by—of what schools that charge very high fees do is that there is a knock-on impact on the state sector?

Judith Sischy: We are a very small sector; we cater for 4 per cent of the population of schoolchildren in Scotland.

Patrick Harvie: A highly influential 4 per cent.

Judith Sischy: One must discuss why the independent sector is influential. My point is that the issue is complex. I think that the intentions are important.

Patrick Harvie: I will let someone else answer.

Janet Allan: I will speak on behalf of the 12 or so special schools within the SCIS network. I took my school into SCIS because, as a single school in a highly specialised area, isolation is a huge problem for us. We are not part of a local authority network. One of the benefits that we have gained from the SCIS organisation is access to good continuing professional development for our staff. Through interaction with other schools, we can get experiences for our youngsters and some degree of staff training across the sector. That has been highly beneficial to a small school such as mine, which would just float on the waves if there was not some sort of structure to help it.

Linda Fabiani (Central Scotland) (SNP): I want to ask about public benefit, on which I am finding it difficult to understand where the sector is coming from. I am talking about mainstream independent schools rather than specialist schools such as Donaldson’s.

Ms Sischy said that public benefit was “intangible”. Although I have a certain sympathy for that view, in your submission you state clearly that your organisation believes that “The benefit gained and likely to be gained by the public is significantly higher than the benefit gained by the charity or by ‘members of the charity’ in both fiscal/quantitative and non-fiscal/qualitative terms.”

What do you mean by that? Will you give us some key examples of how large independent fee-charging schools offer public benefit?

Judith Sischy: Our submission contains pages of examples of the different kinds of public benefit that the schools contribute to society.

10:45

Linda Fabiani: Will you summarise the key benefits that you give to the public?

Judith Sischy: If you would like me to read through the submission—

Linda Fabiani: No, I would just like you to give me some key points off the top of your head.

Judith Sischy: We are there for the advancement of education. Between us, we educate more than 31,000 children, not for personal profit or gain but to try to give those children the best education that we can. The children are from hugely diverse backgrounds. They are not all wealthy, and even if they were wealthy, they would still be entitled to a good education.

Linda Fabiani: What I am trying to get at is how that public benefit is different from the public benefit that any school would give. You say that teachers like working in an independent school because, as a charity, it has a social purpose, it is not for profit and it is dedicated to education. However, mainstream, public-funded, ordinary schools have those same benefits.

Judith Sischy: With all due respect, I have not said that that does not happen in mainstream public schools. Most of us have taught in those schools—of course it is the same. Who would argue that it was not?

Linda Fabiani: I still cannot get where the public benefit is of schools such as this as opposed to state-funded education.

Judith Sischy: John, you try.

John Stoer: The point that you are making is exactly my point. There is no perfect definition of the purpose of education, but if we were to define it, it is to develop a young person to be a responsible citizen—which all schools would try to do—to think clearly, to be able to express themselves clearly and to have consideration for others. Education is not just about learning in the academic sense; there is a community aspect to it as well. That is what we are in the business of and that is what a state school is in the business of. The dilemma that you are putting to us is exactly the right dilemma. The question, however, is whether we can make a distinction between people who, for one reason or another—and not necessarily because they are wealthy—wish to send their children to an independent school rather than go on holiday or have a new car every so many years, and people who do not. Can we make a distinction between people who choose to send their children to independent schools and those who do not, and say that such schools do not therefore have a public benefit? That is the problem that I have. The purpose of education is one—it cannot be divided up. We cannot say that there is a difference between paying for it and not paying for it.

Linda Fabiani: With respect, it is a different kind of education. I have seen the results of that many times.

John Stoer: I have taught in both sectors. It is exactly the same education.
Linda Fabiani: I guess that that is another argument. What I am trying to get at is the justification for charitable status by the proof of public benefit. In very simple terms, how can you justify the public benefit of fee-paying schools?

John Stoor: I would want to put it back to you and ask how you cannot justify it. If we are to say that education is one, it is just a case of parents wanting to pay for it by different means. All parents pay for education. Some people choose to spend their money in a particular way. A colleague asked whether, if all parents had a vested interest in the maintained sector, that would raise the standard of the maintained sector. It might—that is certainly a legitimate argument to be had in this debate. Another side to that, though, is to ask whether it is anti-libertarian to say to people—

Linda Fabiani: We are getting into deep philosophical stuff about whether we agree with private education. All I want you to do is to give me your opinion—which I think that you have now done—about the public benefit of fee-paying schools.

Janet Allan: Could I express an opinion on choice for parents? I have worked for most of my career at the more disadvantaged end of the market, if you like, but I have also worked for a number of years in a mainstream independent school other than Donaldson’s. What is clear to me as a professional is that 95 per cent of the job is the same wherever one works and whether the kids one teaches are three or 18; good teaching is good teaching. One of the differences in the independent sector is the independence of its head teachers to meet the needs of their client groups. In most of the independents—I do not have access to all of them—there exists the capacity to educate in ways that meet the needs of their children.

I am not for one minute saying that the state does not do that, but there are kids from all parts of society who do not fit into the mainstream. The kids for whom I happen to be responsible are an extreme example; nearly all of them have failed in the mainstream before coming to us. However, I know that other independent schools have niches for youngsters who are struggling. In a utopia, the state might be able to provide everything, but at the moment it does not. Parental choice and involvement are important in all sections of education, whether state owned or independently owned.

Linda Fabiani: You have understood better than the other witnesses what I am trying to get at. You are saying that, collectively, independent schools benefit society. I would have a problem if that benefit was related purely to privilege. Others will comment on these issues.

Margaret Fowler: The Edinburgh Rudolf Steiner School is involved in a couple of initiatives to take the education that it offers into the state sector. We are involved with a local primary school in a future learning and technology project that is funded by the Executive. We exchange ideas and teaching methods and there are pupil and teacher exchanges. The project is working well for both parties; we learn from them and they learn from us. We both take new ideas and methods back to our schools.

We are also involved in an initiative with the City of Edinburgh Council to set up an alternative non-academic curriculum. Much Steiner education is based on hands-on activities such as handicrafts, woodwork, metalwork and arts-based activities. We are setting up a curriculum that would allow state-maintained schools to send children to us one day a week for eight weeks to access those activities. I am talking about children who do not fit into the academic structure. Surely that must be a benefit.

Scott Barrie (Dunfermline West) (Lab): I will keep my question brief, as I am sure that we will return to this point. We can all accept that the educational aims of the independent and state sectors are the same. However, like other members of the committee, I am struggling—from some of the answers that we have received so far this morning—to establish why it is necessary for the independent sector to have charitable status to achieve those aims, when the state sector seems to be able to do so without that status. That is the nub of the issue that we are trying to get at in the bill.

Judith Sischy: I do not know why all schools do not have charitable status. That is no doubt related to the fact that state schools are part of local authorities, which have wider duties. In our view, all schools should have charitable status.

Scott Barrie: That point can be turned on its head. Given that the state sector represents the vast majority of education provision, would it not be better for no school to have charitable status, which would mean that there was a level playing field?

Judith Sischy: I disagree. I do not think that such an approach would fit the proposed legislation.

Scott Barrie: It would achieve the level playing field that you seek, according to the answer that you gave to my first question.

Judith Sischy: If state schools were registered as separate entities, they would have charitable status. They do not have that status because they are part of local authorities.
John Stoer: I cannot speak for the law in Scotland, but I was the head of a maintained school in England that was a registered charity and had all the benefits that accrue from that status. I would be happy to be proved wrong on this, but I am not aware that any benefits would accrue to maintained schools from being given charitable status because they already get all the benefits that are associated with that status. As I understand it, the playing field is level.

The Convener: We have strayed from our original line of questioning. I ask Linda Fabiani to finish her questions on schools. Other members who have questions on this area, such as Christine Grahame, may then comment.

Linda Fabiani: I think that I have covered what I wanted to ask about. I think that John Home Robertson was going to come in on the back of my questions.

The Convener: In that case, I invite Christine Grahame to speak.

Christine Grahame: I have made no criticism of panel members in relation to teaching or their dedication to the teaching profession. That is not the issue for me. In saying what follows, I make a distinction between schools such as the Steiner schools and Donaldson’s and schools such as Fettes College, to which my comments will relate.

The issue for me is the elitism of fee-paying schools. The bulk of their pupils are not charitable cases and do not take up assisted places. Their pupils are not always there because of ability; they are there because they can pay—in some schools, they pay a substantial amount. I have no problem with that, if that is the way that society wants things to go, although it might not be the way that I want things to go. What I and the public have a problem with is the fact that those fee-paying schools want to be recognised as charities and to receive the associated benefits. People are astonished to learn that Fettes, Loretto School, Gordonstoun School and so on are charities. People have a clear idea of what charities are for and they do not think that those schools are charities. Not having charitable status would not prevent those schools from providing assisted places or pro bono places, just as solicitors practise pro bono.

Can you see the difficulty that some of us have with the idea that such schools should have charitable status? How can you justify having that status, given the clear view that you are elitist?

Judith Sischy: We have spoken to a lot of you, individually and in groups, so it would be wrong if you thought that we do not understand where you are coming from—

Christine Grahame: I am sure that you do.

Judith Sischy: Of course we understand.

Most of the schools that you mention, whatever they charge now and whoever they educate, were set up as charities. That is their historic background. They were set up to provide education for the needy or for sections of society for whom education was not then available.

Christine Grahame: With respect, that is not the position now. We are looking at the here and now.

Judith Sischy: Equally, you asked a question and I think that it is fair to say that the schools have tried, extremely staunchly—over three or four centuries, in some cases—to adhere to the principles on which they were founded.

These days, everyone has a right to education and, as you say, the state provides most education. However, the schools that we are talking about have continued to exist and seem to provide good education. They have tried not to give up their charitable principles through giving assistance, as far as it can be afforded, to children who cannot afford the fees.

As the law stands, such schools are charities because they provide for advancement of education without personal gain or profit. As they see it, they give back to society more than they receive in terms of public benefit.

Christine Grahame: Do you accept that gaining entry to some of your schools is not necessarily dependent on academic ability but on ability to pay the fee?

Judith Sischy: Every school has its own selection criteria.

Christine Grahame: Are some of your schools like that?

Judith Sischy: None of them takes one approach at all times. They all treat every child as an individual.

11:00

David Mobbs: Much of the debate is focusing on schools. I would like to address some of the points in relation to Nuffield Hospitals. You ask how we can justify our claim to be of public benefit. The submissions that we have provided, including the one that we sent to Westminster, go into some detail on that matter but, in summary, Nuffield Hospitals believes that it provides public benefit intrinsically by preventing and curing sickness, by providing an alternative to the state sector, by providing complementary services to the state sector—we provide some services that the state sector does not—by relieving the pressure on the state sector and by providing confidence and assurance that the things that we do are for those purposes.
Our business model, which you are challenging, is a separate issue. Our organisation’s purpose is to prevent, relieve and cure sickness and ill health and we undertake to do that without distributing any of our surpluses or assets to shareholders. We have a choice about how to operate as a business. We could decide to operate by raising funds and giving away our public benefit, but we believe that no hospitals in the UK operate on that basis. It is impossible to provide high standards of modern health care or to expand services to provide public benefit to other communities by fundraising and operating services in that way. Therefore, we choose to charge fees to provide those services.

The questions are therefore how high fees should be and whether fees are too restrictive. Our fee levels represent an economic charge that recovers cost and provides enough surplus for us to reinvest in operations to continue to provide public benefit and to expand public benefit for other communities. Any surplus that we make is temporary, because it must be applied to the organisation’s purpose—that is why a surplus exists.

The matter comes down to charging fees and the public perception of fees in relation to the issues in the policy memorandum to the bill of aligning the bill with the common public perception of charity and how we protect the charity brand. If the intention is that there should be no charities that charge fees, that should be said outright so that we can think about alternatives that we can put in place. That would not change our organisation’s purpose, which is to provide public benefit and not to distribute its profits and assets; that would continue whatever the situation. Charity law says that if that is the case, the law will protect and regulate that property for the public benefit. The direction in which the bill wants to go must be clear.

We do not see charging fees as being restrictive in our marketplace because people can access our services through insurance, whereby they indemnify the cost of fees over time—a large proportion of the population has insurance—or through cash plans, taking loans or having the state pay for the services that we provide. We provide a significant level of services to help the national health service. If the committee believes that the fee issue is in conflict with the overall charity brand, it must say so.

The Convener: Mr Home Robertson has questions on Nuffield Hospitals. I ask you to start with those, after which you can return to schools issues. That will make it slightly easier for our clerks to keep a record of where we are.

Mr John Home Robertson (East Lothian) (Lab): I am struggling to keep track of the script. I will give Mr Mobbs the opportunity to cover some of the points in his submission. You have referred to the charity brand and your concern that the bill could create doubts and undermine confidence. What difficulties, if any, will the differences between the Scottish and Westminster bills—especially on provision of care to the elderly, financially disadvantaged disabled people or other disadvantaged people—cause the private health care sector?

David Mobbs: That takes us back to the definition of public benefit in section 8(2). If the definitions of public benefit diverge, Nuffield Hospitals could remain registered as a charity in England and Wales, which would protect its assets for the public under that regime, but would not be registered in Scotland. The question of what would happen to our Glasgow hospital and our Scottish operations is confusing. Would they continue in their current form under United Kingdom tax law? Would the organisation be registered as a charity in England and Wales and continue to operate in Scotland but not be called a Scottish charity? What would happen to the Scottish community that we serve? Would it be denied the protective regime that the Office of the Scottish Charity Regulator could provide the operation? That is confusing.

I return to the point that charitable status does not alter the purpose of Nuffield Hospitals, which continues to be to provide public benefit, not to distribute its profits and to reinvest its surplus in continuing to provide that benefit.

The whole situation is very confusing. The Scottish bill could have an impact on independent health care in Scotland, so Nuffield would have to decide what it would do in Scotland. As we are the only charitable hospitals in Scotland, the bill could have an impact on that.

Mr Home Robertson: You are concerned about the difficulties that could arise from discrepancies between the different charity test criteria.

David Mobbs: Yes, and we are concerned about the definition of public benefit as described in section 8.

Mr Home Robertson: We will have to reflect further on that.

I return to schools. Perhaps I should declare an interest; I happen to be a product of the private education system, albeit the English one.

Linda Fabiani: We rest our case.

Christine Grahame: That was unkind.

Mr Home Robertson: Sorry—I missed that comment.

I confess that I would struggle to defend the proposition that there is a public benefit in private
In most cases, the general entrance criteria for OSCR to interpret and to apply the test.

Access to schools is obviously a relevant consideration. There seems to be a lot of evidence to say that much of the conventional private education sector is exclusive and predominantly available only to those who can afford it. You have made something of the fact that scholarships and bursaries are available. What proportion of the 31,373 pupils in 2003 in the sector were in receipt of scholarships or bursaries? Perhaps Ms Sischy can help us with that one.

Judith Sischy: On average, the proportion is a minimum of one in 10, but it is possibly more.

Mr Home Robertson: So about nine out of 10 pupils do not receive scholarships or bursaries.

Judith Sischy: Yes.

Mr Home Robertson: That is a weighty consideration. What were the criteria for the award of scholarships and bursaries and how do they compare with general entrance criteria for private schools?

Judith Sischy: In most cases, the general entrance criteria are considered separately from the application for financial assistance, which is means tested. A fairly detailed form asks for details of family income and all the rest of it and it also takes capital into account. The form is used throughout the UK.

Mr Home Robertson: Are there standard academic entrance criteria?

Judith Sischy: No. That is up to individual schools.

Mr Home Robertson: Am I right in thinking that in order to gain a bursary or a scholarship, pupils need to demonstrate that they are of a pretty high standard?

Judith Sischy: That is not necessarily the case; it depends on whether the school is academically selective.

Mr Home Robertson: What proportion of schools are academically selective?

Judith Sischy: It is difficult to generalise about schools’ admissions criteria. Most schools say that children have to do a test in English and mathematics at senior 1 entry level and be interviewed. They also look at previous school reports and so on.

One or two of the schools say that they are academically selective, but most say that they have a broad academic selection process. Some have big special needs departments and provide additional support needs. Some schools are chosen by parents because they are able to offer additional support, because they are able to deal with specific learning difficulties or because they are able to deal with children from disturbed backgrounds.

Mr Home Robertson: I will return in a second to the point about special needs and disabilities. How likely is it that a child of average ability whose parents cannot afford to pay the fees would get a place in one of your mainstream schools?

Judith Sischy: Very likely.

John Stoer: I speak in the specific context of St Aloysius’ College, which is in the trusteeship of a religious order. As with all religious orders, there is a clear central directive to have an option for the poor. Sometimes that does not sit easily with running an independent school, as you will appreciate.

It is fundamental that no parent who wishes their child to come to our school will be refused on financial grounds alone. People are refused places at the school, but money should never be the issue in the decision. We want to have a policy—it obviously has to be limited, because resources are limited—of being able to offer a place to any child who would benefit from being at St Aloysius’ College, and that benefit is not necessarily academic.

I have been at St Aloysius’ College for only a short time, but I am conscious that the children who come in on bursaries and have all their fees remitted include a number of refugee children who we have taken in because of the nature of our school. Contact is often made through the local Catholic parish, or the police may have made a request to the school. As Ms Sischy said, there is no blanket answer to cover every school. In our context, we look at the matter in a different way and I can say without question that although academic criteria are among the factors that we consider, they are not determinant in any way.

Mr Home Robertson: I have a notion that it would be useful to have some more written information on that issue somewhere down the line, but we can correspond on that. I want to give you an opportunity to say a bit more about access for people with special needs.

Janet Allan: I used to be on the senior management team at George Heriot’s School, prior to going to Donaldson’s College for the Deaf. At Heriot’s, I looked after youngsters who have learning difficulties but also those who are foundationers, in the school’s terminology—the school takes children whose fathers are dead. The criteria for entry in such cases were actually lower than for fee-paying parents; the criteria relate to a child’s benefiting from the education, so the selective nature came out for that particular group.
of children. Not only that, but if we could have filled a place with a very able fee-paying child but a less able foundationer child applied, the foundationer got preference. I cannot generalise on the sector because I do not manage it, but I worked for a long time in the system, so I wanted to throw that example into the pot.

Mr Home Robertson: Who gets access at your present school, which is Donaldson’s?

Janet Allan: Anyone whom a local authority will pay for can have a place. The difficulty in getting into Donaldson’s is much greater for political reasons, in that people have to access the purse strings of their local authority. We have many more applicants than kids who get in because local authorities block the system for financial, ideological or other reasons. However, I think that is probably for a different debate.

Donald Gorrie: I wonder whether you can help us. Our job is not to do what OSCR does, but to set the rules and the framework under which OSCR can operate sensibly. How can we lay down guidance for OSCR to judge whether particular establishments deliver public benefit? Earlier, Janet Allan said forcefully that quantifying particular establishments deliver public benefit? Is it possible to set out aims or general rules by which OSCR can judge each individual school or hospital system, given that—as has been said—they are all different?

Judith Sischy: I am sure that that would be possible. All the schools are different, but they exist within an overall context of similarity in terms of ethos, expectations, objectives, aims and missions. They are all schools: they exist to educate children, to contribute to society and to do the best that they can for their communities in the context of providing education. I am sure that we could draw up guidelines.

Janet Allan: Given the diversity of provision, I envisage that one could establish so many criteria and that a school would have to meet, say, 75 per cent of them. That would allow schools that do a lot of public service to be acknowledged, which is perhaps one way forward.

Donald Gorrie: To be specific, if Donaldson’s could demonstrate, for example, that it allowed community groups to play football on its pitch, would that be a plus? Is it reasonable to ask schools to take that attitude?

Margaret Fowler: Most independent schools open their facilities to the general public at evenings and weekends. We have an agreement with George Watson’s College under which we use its sports facilities and grounds for our summer races. A Scottish country dancing group uses our hall once a week and a sub-group of the Scottish Chamber Orchestra rehearses in our hall. All independent schools do that sort of thing already—we all open our doors to the public.

11:15

John Stoer: It is a challenging task to give particular guidance because the situations are so varied—I am not sure that it is possible. I mentioned at the meeting in Perth that St Aloysius’ College is particularly concerned with the quality of the buildings that we put up. Our school is in central Glasgow, right next to the Glasgow School of Art, which is one of the centrepieces for tourism in the west of Scotland. We have put up two brand new buildings at huge cost to our trustees and the parents of pupils of the school. Both buildings have won awards—the most recent one won an award as the best new building in Scotland. That is a public benefit to the citizens of Glasgow and to all visitors to Glasgow. Any guidance would need to be couched in a way that could be interpreted. Regardless of the educational issues and the issues of access and allowing other people to use the school, we can make a strong case that we provide a public benefit because of our buildings.

Patrick Harvie: I want to follow up an earlier question from John Home Robertson. I do not call into question the descriptions of the schools that members of the panel have talked about, but is the Scottish Council of Independent Schools, in talking about the separate nature of entrance criteria and applications for financial assistance, saying that there is no independent school in Scotland for which an application for financial assistance is dependent on academic criteria? Are such applications dealt with purely through means testing?

Judith Sischy: I am sorry—could you repeat the question?

Patrick Harvie: You described applications for financial assistance as being decided on a means test and said that entrance requirements were possibly academic but possibly something else. Does that mean that there are no independent schools in Scotland for which an application for financial assistance is dependent on academic criteria? Are those applications dealt with purely on the basis of a means test?

Judith Sischy: The trouble with independent schools in Scotland, and anywhere, is that they are independent. I do not know the detail of every independent school.

Patrick Harvie: So you do not know the answer.

Judith Sischy: I cannot answer.

Patrick Harvie: Thank you. I just wanted to be clear.

The Convener: Linda Fabiani has a quick question. I ask her to follow on with any issues
that are still outstanding from questions 13 and 14, which relate to tax and non-domestic rates relief.

Linda Fabiani: I am happy to do that, but first I want to clear up an issue relating to entrance with financial assistance, which Patrick Harvie and John Home Robertson have mentioned. Some schools are academically selective. I know that the witnesses cannot answer for all schools but, generally, does the academic selectivity that applies to those who receive financial assistance apply to those who pay for their education?

John Stoer: Yes; exactly the same criteria apply.

Linda Fabiani: Is that true generally? If someone applies for a bursary or a means test and the school says that the person must sit an entrance test of their academic ability, does the same entrance test apply to a person who pays the full fees for their education?

Judith Sischy: Yes, unless—as Janet Allan said—they are orphans or fall into a special priority category for means testing or financial help. As I said earlier, scholarships may be given to children who have special needs or particular aptitudes. It depends on what the bursary is for.

Linda Fabiani: What I am trying to get at is whether some people can pay to be in a private school regardless of their academic ability, while others who apply for financial assistance may have to meet an academic test.

Judith Sischy: I imagine that there are probably examples of both.

Linda Fabiani: I have a couple of quick questions on the charitable status issue. Apart from tax and non-domestic rates relief, what benefits does charitable status provide to independent schools as a business?

Judith Sischy: As a business?

Linda Fabiani: Yes.

Judith Sischy: As we have mentioned both today and at our meeting with the committee in Perth, the benefits are as intangible as tangible. We have never done a systematic analysis of our parental constituency, but it is interesting that mock elections in our schools and school political societies and modern studies societies suggest that the vast majority of our parents vote Labour. Statistically, that is what one would suspect—

Linda Fabiani: With respect, that is not what I am getting at.

Judith Sischy: Let me continue. In that kind of society, it is important to our parental constituency that the schools are not isolated but part of the local community. The fact that independent schools are charities helps to give parents confidence that the schools are not for personal gain or profit, but are part of the charitable community in Scotland.

Linda Fabiani: A school could operate as a non-profit distributing organisation without being a charity. What are the benefits to independent schools of being designated as charities?

Judith Sischy: Charitable status is an important kitemark for us. It means a lot. As I said, independent schools were set up as charities and see themselves as charities. They do not exist for profit. Being part of the community means a lot to them.

Linda Fabiani: Given that independent hospitals can operate as non-profit distributing organisations, what benefits do Nuffield Hospitals gain from charitable status?

David Mobbs: If I may reinforce Judith Sischy’s point, the charity brand confers significant benefits on an organisation because it gives people confidence and assurance that the resources that they provide will be applied solely for the purposes of the organisation and will not be distributed to shareholders. The charity brand also provides assurance about the regulation and protection of assets.

Linda Fabiani: It might do that once the legislation is put in place.

David Mobbs: That happens under the law as it stands. In addition, previous research that we have done has shown that, where public services are being modernised to give people a choice, people prefer a not-for-profit organisation in exercising that choice. As the charity brand is associated with not-for-profit organisations, people have that confidence and assurance. I think that the issue comes down to perception, quite apart from the tax advantages to which you referred.

Linda Fabiani: Let us move away from perception. What financial benefits does an organisation gain from being registered as a charity?

David Mobbs: As we stated in our written evidence to the Westminster Parliament, the financial benefits can be described under three broad headings: corporation tax relief, rates relief and VAT. Those are the three principal areas of relief for hospital operators, but I do not know whether schools receive the same benefits.

Linda Fabiani: I know that the report of the joint committee down at Westminster suggested that independent schools and hospitals should not be registered as charities but should still be able to receive some tax breaks to help them to operate. What is your feeling on that?
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independent sector for health care, they do their

suggests that, when people choose the

such services?

perhaps give confidence only to those who use

perception about the benefi t of charitable status

and private hospitals are charities. Does the public

of the public do not realise that private schools

receive very few other tax benefits. As we said, we

have always been charities. I do not see what

would be achieved by changing our status.

David Mobbs: It would be possible to establish

another not-for-profit sector that was provided with

the same tax benefits. We made that point in our

evidence to Westminster. If that is the way that the

Government wants to go, it should tell us soon, so

that we can work with it and help it to do that.

However, my earlier point about a divergence

between Scotland and England and Wales comes

into play. If an organisation that can be registered

as a charity in England and Wales must be a not-

for-profit organisation in Scotland, that will

undermine public confidence in the charity brand.

It might also mean that the charity brand is not

modernised. Essentially, it would be saying that

the charity brand could only be about giving away

value and that charities could not charge fees.

Linda Fabiani: I am aware that most members

of the public do not realise that private schools

and private hospitals are charities. Does the public

perception about the benefit of charitable status

perhaps give confidence only to those who use

such services?

David Mobbs: Our research into the market

suggests that, when people choose the

independent sector for health care, they do their

research. Some people choose Nuffield Hospitals

because of the charitable status.

Linda Fabiani: So it is a benefit to those who

choose to use the service.

David Mobbs: Yes.

John Stoer: We are the Scottish branch of a

much larger charity that is based in England and

Wales. No one would assume that we were

anything other than a charity.

Linda Fabiani: If you asked the average person

in the street whether a private school was a

charity, you might be surprised by the answer.

John Stoer: The average person in the street

may not even know who we are. If they were to

know something about the school, even from past

association, they would be hard pushed to think of

us other than as a charity, because of our close

link with the overall work of the religious order.

Linda Fabiani: Perhaps. We do not have the

research to show whether that is the case.

Mary Scanlon: I visited Gordonstoun during the

summer and have papers on the school. I know

that each independent school is unique, but

Gordonstoun is particularly unique.
Judith Sischy: I can try to answer that question, but it is not easy. We have been very modest today, but we have included all our arguments in written evidence. At the committee’s request, we have tried to listen to members’ arguments concerning disbenefit and so on. I trust that members will examine the positive representations that we have submitted in writing and I thank Mary Scanlon for alluding to those.

The Scottish Executive has also found it difficult to estimate exactly how much the independent schools receive through the benefit of having charitable status. The figure of £2.5 million that the Scottish Executive, SCIS and the SCVO came up with must be a reasonably accurate estimate of how much the sector receives through rates relief.

The other benefits are extremely difficult to quantify and are probably non-existent, because capital gains tax will arise only in a few circumstances. The figure of £4 million was probably a guessestimate. The main benefit, other than rates relief, would be gift aid on donations made to the schools. Again, any attempt to put a figure on that would be a guessestimate.

11:30

Mary Scanlon: However, if those financial benefits were to be withdrawn as a result of the loss of charitable status, would the independent sector be more elitist and exclusive or would it still be able to bring in children from families with lower incomes in the way that you have described? Would the loss of charitable status make you more or less socially inclusive?

Judith Sischy: It certainly would not help to make us more socially inclusive. The schools are determined to try to continue to be open and accessible to as wide a section of the public as possible. Assisted places are still helping a minimum of one in 10 of the children who attend the schools. If the schools lost the benefit of the money that they receive as a result of having charitable status, they would either be unable to fund those places or would have to raise the equivalent money from other sources, which would probably be the parents.

Mary Scanlon: I note that, when assisted places were lost, the parents who paid the full fees paid 3 per cent more in order to ensure that scholarships and bursaries could continue to be offered. Are you saying that a similar thing would happen if you lost charitable status? Would those who pay fees have to pay more? I stress that those parents already pay twice, because they pay for education through income tax and national insurance and they pay the full cost of school fees as well.

Judith Sischy: They would have to pay more unless the schools found other ways of raising the funds.

Margaret Fowler: I think that you will find that the bursary funds are ring fenced, so any change would not affect them. The parents who pay the full fees would pay more.

Mary Scanlon: So that would mean that families that could not afford to pay the higher fees or were unable to make the sacrifices that that would require would be excluded.

Margaret Fowler: Yes. Of course, that would put more pressure on the state system.

Mary Scanlon: Of course it would.

David Mobbs: The impact on investment should not be underestimated. If the tax relief is lost, the impact might be not only on fees but on investment. Nuffield Hospitals has invested considerably more than the cash that we have generated in Scotland. If we were unable to make that investment, there would be a considerable impact on our continuing operations.

John Stoer: Similarly, St Aloysius’ College owns nothing; everything is owned by the charity of which we are a part. It has some land that it is considering selling for the sole purpose of building a sports hall on our site. Because the organisation is a charity, all of the proceeds of that sale will go towards building the sports hall. If charitable status were lost, we would be unable to invest in the site. The investment in the site will benefit our pupils but, as a result of negotiations to do with building a sports hall, it will also benefit all the residents of Garnethill, who will have access to the sports hall outwith school hours. The removal of charitable status would have knock-on effects on investment in the school and, by implication, on benefits that might accrue to the local community.

Mary Scanlon: The same situation applies with regard to Gordonstoun.

Judith Sischy: Analysis of our parental constituency reveals that around 40 per cent are what we call first-time buyers, which is to say that they did not go to an independent school themselves. A much larger percentage of the children than was previously the case comes from families in which both parents are working. Every time there is something in the press or a parliamentary report about the schools being for toffs or wealthy pupils, we get a huge number of responses from the parents, saying, “We are not toffs. We are not wealthy. We are hard-working parents who are doing the best, as we see it, for our children.”

Mary Scanlon: The trade union member at our visit to Perth in November made that case very strongly.
Judith Sischy: That is right.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I want to pick up on Mary Scanlon’s point about paying twice. The point came up at the meeting in Perth and I took issue with it. Many of us choose not to use public services but still pay for them. For example, people who do not have any family still pay for the education system through their taxes. The argument about paying twice is very weak.

This morning, we have strayed from scrutiny of the bill and, rather than getting down to the details, we have witnessed some showboating. My colleague John Home Robertson reminded us that it will be for OSCR to decide which organisations—regardless of whether they are schools or small community groups—meet the public benefit test. Let us hope that the committee can be correct about that when it reports on the bill.

I felt that I had to make those points because I have been so quiet on other issues. The committee has to get its head round those points.

Chapter 3 of the bill is on co-operation and the information that will be available through OSCR. An effort will be made to reduce the additional burden of regulation on charities and section 20 requires OSCR to seek to co-operate with other “relevant regulators” and to share information. Will that be useful? Will OSCR be looking for information that you have already given to other organisations, leading to duplication? Will OSCR be asking charitable organisations questions that it would be more appropriate for another regulatory body to ask?

Judith Sischy: It is absolutely right that there should be a public register of charities, so we have no problem with working with, and giving information to, OSCR as a regulatory body. There is no such body at the moment for charities. However, we have on several occasions given evidence to the Parliament’s Education Committee about the fact that schools are hugely regulated and that, in our view, there is enormous and unnecessary bureaucracy and duplication. If there were—we are working with the Executive on this at the moment—an electronic database that all the regulatory bodies could share, that would be sensible, time saving and much appreciated. The lines of accountability are enormous and all encompassing. Somebody should be in the middle to say, “Right, we’re all giving the same information to six bodies in Scotland. Can we not share it?”

I do not doubt that, as a charities regulator, OSCR will need some information that the Scottish Commission for the Regulation of Care, for example, might not need and vice versa. However, we would be happy to co-operate on a system that saves time, effort and money.

John Stoer: Anything to reduce bureaucracy in any institution has to be a good thing. I can always remember receiving, as a head teacher, David Blunkett’s 50-page document on bureaucracy busting. It makes good sense to share, and to give information only once. However, I appreciate that achieving that is another matter altogether.

Cathie Craigie: Judith, did you say you were working with the Scottish Executive?

Judith Sischy: Yes—we are working with the Scottish Executive, the Scottish care commission and Her Majesty’s Inspectorate of Education on that issue.

Scott Barrie: As you may know, the bill indicates circumstances in which a person may be barred from being a charity trustee. One of the criteria is mismanagement, which has been subsumed under the category of misconduct. At previous evidence-taking sessions, a number of organisations commented that they thought it unduly harsh for someone to be barred from serving as a trustee because of simple mismanagement, as opposed to misconduct. Do the organisations that you represent have a view on that issue?

Judith Sischy: SCIS has not really considered the matter. We have certainly considered the need for good management and good conduct in our duties as trustees of charities. There are huge parallels between that issue and the issue of misconduct and mismanagement by teachers. I should have thought that misconduct and mismanagement were very different, but that is just a personal view.

John Stoer: The general principle that the bill seeks to establish is sensible. I do not know how mismanagement would be defined. However, it is crucial for the running of any school or charity that trustees and governors who act on their behalf should be beyond reproach. Guidance on that matter would be helpful.

Christine Grahame: Can you clarify the VAT status of independent schools? Is it the same for them all or is it different for different schools? You did not address that issue in your submission.

Judith Sischy: We did not mention it both because it is extremely complicated—I am not an accountant—and because it is not related to our status as charities. Education is exempt from VAT, which may explain why our situation is different from that of hospitals. The issue has nothing to do with charitable status and is not particularly relevant to this debate.

Christine Grahame: I wondered about the matter because it was raised.
Judith Sischy: Any educational establishment is exempt from VAT because of the European exemption for education.

Mr Home Robertson: I return to an issue that I raised earlier. I understand why you want to emphasise the best examples of public access to private schools. It would be useful if you could provide us with some detailed information. It would be helpful to the committee if you could let us have a note on the number of bursaries and scholarships that are offered by individual schools.

Judith Sischy: We are collecting some case studies, which we hope to have by 24 January. Those may be helpful to the committee.

Mr Home Robertson: Some numbers and a summary of the criteria for access would be relevant to our considerations.

Judith Sischy: That is no problem.

The Convener: I thank the Nuffield Hospitals and SCIS for submitting written evidence to the committee in advance of the meeting. All members found that especially useful. I am grateful to everyone for attending and ensuring that they were able to get here on time in what for many were difficult circumstances.

As you will have gathered from members’ comments, the committee has reached no final conclusions on this matter and there are widely divergent views. Those will all be taken into account during our final deliberations on the bill. I trust that you will continue to view and take an interest in the committee’s discussions in coming weeks.

The meeting will be suspended for a five-minute comfort break, after which we will take evidence from the second panel of witnesses.

11:43
Meeting suspended.

11:52
On resuming—

The Convener: I thank the Nuffield Hospitals and SCIS for submitting written evidence to the committee in advance of the meeting. All members found that especially useful. I am grateful to everyone for attending and ensuring that they were able to get here on time in what for many were difficult circumstances.

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The meeting will be suspended for a five-minute comfort break, after which we will take evidence from the second panel of witnesses.
Something that I found a bit difficult to comprehend was in the declaratory articles, acknowledged in the Church of Scotland Act 1921, which state:

“This Church, as part of the Universal Church wherein the Lord Jesus Christ has appointed a government in the hands of Church office-bearers, receives from Him, its Divine King and Head, and from Him alone, the right and power subject to no civil authority to legislate, and to adjudicate finally, in all matters of doctrine”.

Is the possibility of interference in the church by the state really as bad as your submission states?

Janette Wilson: My submission tries to explain the background and where we are now. The proposal is that we move from designated religious body status to designated religious charity status. When the consultation on the draft bill was published, it seemed to the Scottish Churches Committee that the old powers of the Scottish Charities Office and the Court of Session that had been disapplied in the case of religious bodies were to continue to be disapplied, but that there was to be no disaplication of the new powers that were to be given either to OSCR or to the Court of Session. In some cases, it is difficult to draw the line between matters that are appropriate for civil authorities and those that are appropriate for church authorities, but the Church of Scotland’s view, which the Scottish Churches Committee endorses, is that some aspects of the bill—as highlighted in our submission—cross the line.

We could get into a situation in which neither body will accept the jurisdiction of the other. The Church of Scotland Act 1921 is an interesting legislative animal because the Church of Scotland is the only body that has legislative recognition of its independent spiritual jurisdiction. However, the wording of the act and the declaratory articles assert that other religious bodies in Scotland also claim such a jurisdiction, and that is certainly the view of the members of the Scottish Churches Committee.

Mary Scanlon: So your submission argues that the bill oversteps the mark. It states that the use of the powers of the Court of Session would “rapidly prevent the Church from continuing to function at all.”

Janette Wilson: That is certainly true of section 34(4)(g), under which an order might be made “restricting the transactions which may be entered into”.

The Court of Session will also have the power to “order any relevant financial institution … holding property … not to part with the property”.

Obviously, if the church could not access its bank accounts and pay its ministers and so on, we could not realistically continue to function for long. Therefore, that measure would affect the government and continuation of the church.

Mary Scanlon: Your submission contains a copy of the declaratory articles acknowledged in the Church of Scotland Act 1921, which state:

“Any proposal for a modification of or addition to these Articles” must be approved by the General Assembly of the Church of Scotland in “at least two immediately successive years.”

If a proposal does not receive consent, it must be held back for five years. Given that the bill will have a significant impact on the church, do the measures have to be approved by the General Assembly? Can you give me an idea of the relationship?

12:00

Janette Wilson: The Church of Scotland is a bit like the UK, in that there is no single document that could be called the church’s constitution. There are various documents, many of which are of historic significance, which, taken together, could be said to constitute a constitution. If one is looking for a shorthand version of the constitution, the articles declaratory that were passed in advance of the union of 1929 are the closest that one will get. They declare that it is for the church to amend its constitution and set out a procedure for doing so. Many checks and balances are built into that procedure. The Barrier Act 1697 states that any General Assembly legislation that could be said to impinge on the areas of doctrine and government has to be approved by the presbyteries before coming back to a second General Assembly. Paragraph VIII of the articles declaratory sets out an even tighter provision for a two-stage referral procedure. However, over and above that, it makes it clear that that provision cannot affect the most important part of the declaratory articles, which is paragraph I.

Mary Scanlon: On page 11 of our paper COM/S2/05/1/3, which contains the written evidence, we read that the articles declaratory say that the church receives from “its Divine King and Head, and from Him alone, the right and power … to adjudicate finally, in all matters of doctrine, worship, government, and discipline in the Church”

and that it is in the power of no civil authority to legislate in that regard.

As you say, the legislative background is complex. Are you saying that the church is in a position to challenge or not accept legislation that is passed by the Scottish Parliament?

Janette Wilson: Yes. I think that it is accepted that the 1921 act was an acknowledgement by the
Perhaps the most surprising aspect of the legislation is its impact on the church’s relationship with other religious bodies. The law seems to have implications that go beyond the church’s role as a charity and into areas of ecclesiastical law. In some ways, it could be seen as an extension of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, which attempted to clarify the church’s status as a charity in Scotland.

Donald Dewar made an excellent address to the House of Commons when there was concern in 1990 that there might be a power for Westminster Parliament that there are certain areas within which its writ does not run. By extension, the same thing must apply to the Scottish Parliament. Therefore, if there were a circumstance in which the church said that something was a matter for it to decide on and the Office of the Scottish Charity Regulator or the Court of Session were saying that that was not the case, the courts would be placed in the difficult situation of having to sort out which arena the particular provision fell within. It is of concern to me that the provision that I have highlighted might cross the line. Certainly, it is analogous to the provisions that Westminster exempted in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 for the reason that I have outlined.

Mary Scanlon: That is interesting.

Janette Wilson: Yes, it is. Constitutional and ecclesiastical lawyers find this stuff wonderful.

Mary Scanlon: Deciding whether Jesus Christ or the Scottish Parliament is the leading authority in relation to the provision would be a lawyer’s paradise.

Janette Wilson: Someone rather flippantly asked me whether, since Jesus Christ is the head of the Church of Scotland, he will be a charity trustee. By extension, one might also ask whether Queen Elizabeth is going to be a charity trustee of the Church of England.

The situation shows that, because of their history and the way in which they organise their business, churches have unusual structures and, because of that, rather specialised issues can arise.

Mary Scanlon: I am grateful to you for clarifying the issue.

Janette Wilson: I hope that I managed to make it clear. As I say, it is not an easy area. I think that the issue comes as a surprise to parliamentarians. Donald Dewar made an excellent address to the House of Commons when there was concern about how human rights legislation might impinge on the church’s jurisdiction. He commended the language that was used in the articles declaratory and in the bill with which he was dealing. With no disrespect, I would say that the same standard has not been reached in the bill that we are discussing.

Mary Scanlon: We will come back to that issue at a later date as the number of questions that I can ask today is limited. It is interesting that the church can challenge the legislation of the Parliament.

Cathie Craigie: I am confused. Do the articles declaratory relate to the governance of matters within the church?

Janette Wilson: Yes. They relate to matters of doctrine, worship, government and discipline and state that Parliament should not legislate on areas that might impinge on those areas.

Cathie Craigie: But that is not what Parliament is doing. Further, as a member of the Church of Scotland, I cannot imagine that the church would not accept legislation that was enacted by this Parliament or the Westminster Parliament. I do not think that that is what the articles declaratory say.

Janette Wilson: Perhaps the most straightforward example relates to paragraph IV of the articles declaratory, as approved. After the reference to doctrine, worship, government and discipline, it goes on to talk about "the right to determine all questions concerning membership and office in the Church".

Ministers, elders and so on who are office holders in the church are charity trustees. There was some concern in 1990 that there might be a power for the Court of Session to suspend ministers and other office holders, which would interfere with the church’s right to determine questions concerning membership and office holding in the church.

The Convener: I seek clarification on that point. Would not somebody be suspended only on the ground that they were not suitable to be a charity trustee? They would not necessarily be suspended as a minister of the Church of Scotland or, for that matter, a minister of any religious denomination.

Janette Wilson: If someone is a minister, in the law of the church they are the moderator of the kirk session of the congregation. Clearly, that body is in control of the charity, which is the congregation. How could the minister continue to moderate the kirk session if he was not a charity trustee?

The Convener: That is a matter to which we will have to give further consideration.

Donald Gorrie: I wonder whether we can get Janette Wilson’s views on behalf of the churches and the interfaith organisations as a whole. Changes were made to the draft bill to arrive at the bill that is before us. On the whole, have those changes been helpful? Have there been any changes that are not helpful? In particular, is the endeavour to clarify the public benefit criteria successful, or would you like to suggest any changes to it?

Janette Wilson: I am going to annoy Ms Grahame, but the view of the Scottish Churches Committee is that we prefer the overall approach that Westminster has taken, to continue existing charities as such and not potentially to throw the baby out with the bath water—as appears to be the situation here—by saying that there can no
longer be reference to precedent and the common law in determining definitions and issues relating to charitable status. I also feel that some charities might fall through the net.

Wearing another hat, I am a charity trustee of a garden. Part of the reason why we got charitable status was based on the Recreational Charities Act 1958. Charities that were created under that legislation are preserved in the Westminster bill, but there is no reference to that in this bill. Looking through the list of criteria, I can see categories under which gardens might qualify. However, organisations in the charitable sector will face uncertainty about whether they meet the charity test by coming under one of the charitable purposes that are set out in the bill. The Scottish Churches Committee had a long debate on the subject of whether it would be helpful to have criteria and concluded that they would be difficult to define. It also thinks that the wording in the bill is not awfully helpful.

I hate to say this, but members of the Scottish Churches Committee also do not like the word “disbenefit”. An accountant explained to them that disbenefit is based on a cost-benefit analysis. The committee’s view is that, whatever religious bodies are, they are not businesses—indeed, they could also be said not to be businesslike. How can a body like OSCR be asked to assess religious bodies and other bodies on the basis of a disbenefit test? Will the test be subjective? How will it work in practice? I will be interested to know whether OSCR will go through each and every congregation to analyse what work it does—for example, whether it does outreach in its communities or raises funds for other charities. Will OSCR put ticks in various boxes for each congregation, or will it simply say, “As the Scottish Episcopal Church has passed the test, all of you are in”? There is a lot of uncertainty, which is probably inevitable given the clean-sheet approach that is being taken.

Uncertainty is also created by the removal of the presumption of public benefit. What will that mean in practice? I am aware that the presumption was always rebuttable. There have been very few cases in Scotland, but there have been a few cases in England in which bodies that might have been looked on as being fringe religions failed the public benefit test. That existing English case law could be prayed in aid.

Quite simply, the Scottish Churches Committee feels that the test is too radical and swift a move. It has been said that it is a charter for lawyers—as I am a lawyer, I can say that. Charities will spend a lot of money on trying to get legal advice and help. If they do not make it with OSCR, will they then have to spend a lot of money on appeals? They will not get that money back, and they might have to go all the way to the Court of Session. If we go forward on this basis, the charities sector will have a worrying time.

My other great concern is what might happen if the Westminster definition and the Scottish definition differ radically, which is an issue that other witnesses have mentioned. For example, a number of religious organisations, including the Methodist Church of Great Britain and the United Reformed Church, operate cross border. It would be a ludicrous situation if those churches were defined as a charity in England but not in Scotland.

I fear that we could also get into a situation in which the Inland Revenue feels unable to withhold tax benefits from Methodist congregations in Scotland because congregations in England are in receipt of those benefits. We could see former charities being in receipt of tax benefits but not being monitored or regulated in any way, even in respect of their accounting and other procedures. I am as fervent an upholder of Scots law as anyone is, but we have to be pragmatic. Total confusion will be caused in the long term if we proceed on this basis.

Vanessa Taylor: The Scottish Inter Faith Council’s view is that the guidance on the public benefit criteria is not clear. We welcome the criteria’s inclusion in the bill because, in their absence, we would be even less clear about how to meet the test. Although having guidance is a positive step forward, it is not clear and, as a result, much confusion, uncertainty and concern will be caused about whether certain religious organisations meet the criteria.

I echo Janette Wilson’s concern that, if the public benefit criteria were different to those that will be applied down south, an anomalous situation could be created whereby a body might not be given charitable status in Scotland but would qualify for tax benefits.

Ivan Middleton: It would be helpful at least if some public benefit criteria were made clear. Somebody will have to do that at some time, and it would be best if it were done at the beginning of the process rather than later.

It would be possible still to have an open test, whereby people could say, “Even though we do not meet those criteria, we meet the test on other criteria.” There should be something in the bill for starters, so that people at least know where the debate begins.

12:15

Donald Gorrie: Could there be a problem for organisations such as the Humanist Society of Scotland—I do not know whether it would be
regarded as a religious body—in respect of whether it provides public benefit and helps to improve the moral conduct of the citizenry? Have you given thought to how you would demonstrate public benefit?

Ivan Middleton: Yes, indeed. I draw attention to the 2001 census in Scotland, which showed that 28 per cent of the population—I think that it was 27.9 per cent, to be accurate—said that they had no religious belief. However, they still want to have rites of passage, and they turn to humanists for that. We did more than 1,000 funerals in 2003, and I would imagine that the figure for 2004 will have exceeded that. We also do humanist weddings, naming ceremonies and gay affirmations. There is a public benefit there, at least for the 28 per cent of the population who can turn to us for those services.

I was involved in the national working party that revised the guidelines on chaplaincy, which were brought into effect a couple of years ago. In fact, I am a humanist chaplain, attached to Lothian hospitals. They took the 21st century approach that people want to have reference to people whose set of beliefs they are comfortable with.

We would like the reference in the bill to “the advancement of religion” to have “or belief” added to it. The fact that human rights legislation consistently uses phrases such as “religion or belief” is an argument for that. We think that that would make the position a lot clearer.

The Convener: Before we move on to the next question, I apologise to the witnesses: I appreciate that you are probably having some difficulty with the sunshine behind us. It just goes to prove that we have four seasons in one day in Scotland—that is not an urban myth. The clerks have requested that the blinds be lowered—unfortunately, we are not able to do that manually. I am sorry for any inconvenience that the sun might be causing you.

Janette Wilson: As long as it is not making us look too shifty.

The Convener: Not at all.

Linda Fabiani: It is giving you a halo.

Patrick Harvie: I ask the panel to expand on the question of the public benefit test. One of the difficulties that I had when I was going through the papers last night—unlike Mary Scanlon, I was going through them quite atheistically—

Mary Scanlon: Did you know about my religious beliefs, Patrick?

Patrick Harvie: Similar arguments are put forward by the independent schools and the religious organisations and I experienced the same problems with both. Some of the arguments about schools were discussed earlier in the meeting. The case that is effectively being put by both kinds of organisation is that they provide a public benefit, but do not want to be tested against it. They are convinced that what they are doing is of public benefit, but they are unwilling to be, or are uncomfortable about, being exposed to the public benefit test in the same way as every other charity, despite the fact that the benefits of charitable status are identical. Could you expand on the question whether you provide a public benefit and, if you do, why you feel some difficulty in demonstrating that?

Janette Wilson: Part of the Scottish Churches Committee’s concern is what removal of the presumption of public benefit will mean. As I think I have explained, I believe that that is a rebuttable presumption. Indeed, there have been cases where it has been determined that certain religious organisations are not of public benefit.

I do not believe that any member of the Scottish Churches Committee feels threatened by having to establish that they provide public benefit. They all truly believe that they provide lots of public benefit; the issue is how that is to be measured. Having considered the criteria, as some of the independent schools have said, we are still a wee bit in the dark as to how the system would operate. It was the strong view of the committee that the criteria could be broadened. The example that we gave was that we would particularly welcome the possibility being made clear of “public benefit being non material – for example spiritual or moral benefit.”

The Scottish Executive flagged that up in the original consultation paper, but it is not in the bill.

Churches consider that they provide considerable public benefit and they would feel happy about being tested on it, but they would like to be sure that the test would be reasonable. They are also worried that it will be difficult to judge against the test and that OSCR, which will have a lot of work to do anyway, will have to go right through the charity register and evaluate every charity. How much time will it spend on each of the 35,000 charities? Clearly mistakes might be made, which would be costly to charities to put right. There is an air of uncertainty, which is why we prefer the English approach, which sets a precedent for the kind of test that would be applied and the approach that would be taken.

Patrick Harvie: Do other panel members have a comment on that?

Vanessa Taylor: Yes. Members of the Scottish Inter Faith Council were clear that they provide a public benefit. There was a split in opinion; some people were not particularly concerned about meeting the public benefit criteria, but others were.
That relates to the fact that the public benefit
criteria are not clear and we did not feel that the
guidelines clarified them. Our members are not
worried that they cannot withstand the public
benefit test, but they do not know what the criteria
are. It would be helpful if there were a way to allay
people’s fears. One way to do that would be to
include the statement that public benefit might be
non-material and include spiritual or moral benefit.
That would go some way towards allaying
people’s fears about meeting the public benefit
criteria and about the removal of the presumption
of public benefit.

Patrick Harvie: Would there not then be a
danger of our getting into tortuous arguments
about what constitutes moral benefit and who
defines it?

Vanessa Taylor: I am not a lawyer, so I do not
know how tortuous that would be.

Patrick Harvie: I am not a philosopher, but I
think it would get complicated.

Vanessa Taylor: The guidelines for the criteria
do not make it clear that non-material benefit
would be taken into account, or that if it were
taken into account it would encompass spiritual or
moral benefit. Perhaps that is not the correct way
to word it, but we would certainly welcome if it the
lawyers could come up with something—if it were
not too tortuous—that would reassure people that
spiritual and moral benefit could be taken into
account.

Patrick Harvie: Does the Humanist Society of
Scotland have views on the question?

Ivan Middleton: Yes. I have already addressed
some of those points with Donald Gorrie. We try
positively to encourage people to lead moral and
ethical lives and we share in that with our
colleagues who bring in a supernatural dimension,
which we try to manage without. We are all trying
to promote a more moral and ethical stance in
public and private life.

I was talking to colleagues before the meeting
and there was a feeling that we were negative and
against religion, but the society is about much
more than that; we are positive about people trying
to make the best of this life as we feel that it is the
only one that they are likely to have and it is the
only one for which there is evidence.

To address your question, every charity has to
prove that it provides public benefit, so we cannot
really proceed without the test.

Christine Grahame: This is quite tough stuff. Mr
Middleton introduced an interesting idea about
section 7(2)(c) and whether the words “or belief”
should be added at the end of “the advancement
of religion”. That is a difficult idea, but you might
have stumbled on something when you talked
about moral and ethical purposes.

There is no definition of religion in the bill;
mercifully, perhaps. However, there is a definition
of designated religious charities. There is also a
definition of designated religious bodies under the
Law Reform (Miscellaneous Provisions) (Scotland)
Act 1990. Janette Wilson’s submission says that
section 64 of the bill is

“an amended form of ‘designated religious body’ status”
as introduced by the 1990 act. In what way has
the status been amended? Does it matter that
there are two definitions?

Janette Wilson: As I understand it, designated
religious body status will cease when the
legislation comes into effect.

Christine Grahame: The bill, when enacted, will
repeal that legislation.

Janette Wilson: It is certainly the case that
because of the clean-sheet approach, those
bodies that were designated religious bodies will
have to apply to be designated again and will
therefore have to be given the once-over by
OSCR against the criteria set out in the bill for
being a designated religious charity. Apart from
some tiny differences in the wording, those criteria
are the same as in the 1990 act. However, the
Scottish Churches Committee prefers the 1990
term “designated religious body” because it is the
body, such as the Church of Scotland, that is
designated. The component elements or
congregations that we are talking about are also
charities of course. When the term “designated
religious charities” came out, people started to get
confused and I had a number of congregations
that do not have 3,000 members wondering
whether there was going to be some change.

The designated religious charity will be the
denomination, if I can put it that way, and the
component elements are all the bits and pieces.
Churches are made up of a number of different
legal animals. Obviously the Church of Scotland is
the one that I am familiar with and it is particularly
complicated because it is a series of courts of the
land—kirk session, presbytery and General
Assembly—and there are a number of voluntary
associations in there. There are the central boards
and committees of the General Assembly and over
and above that there are statutory corporations set
up by act of Parliament. Those are all parts of the
component and structural elements of the church.
Above all that, there are a number of trust funds
and different organisations that have been set up
as separate charities.

We might not start again from where we are
now, but whether those individual bits of the
organisation became charities was sometimes just
a matter of luck. Some trust funds or bequests
were left and, for reasons best known to itself, the
Inland Revenue issued them with separate charity
numbers. In other cases, the funds or bequests just formed part of the congregation’s own charity number. There are many different charities contained within the ambit of what will be a designated religious charity.

Christine Grahame: So the Church of Scotland will have many charitable functions and each of those will be required individually to—

Janette Wilson: No. Each congregation is a separate charity with its own charity number. There are also regional and central bodies which have separate charity numbers.

Christine Grahame: I see.

Janette Wilson: The idea of designated religious body status—and probably designated charity status—is a kind of compromise that was invented in 1990 to try and get around the situation in the Church of Scotland.

Christine Grahame: It was to try and get around the multiple things that are done in the Church of Scotland; I understand.

Janette Wilson: I have tried to put the other side of the equation in my paper. Designation can be justified on the ground that a body can prove that it can self-regulate, that it can control all its bits and pieces and make sure that they are all behaving themselves. If the body then falls down, it should lose the status and that would open it up to the full battery of regulatory controls.

Christine Grahame: Mr Middleton, does that also apply to your organisation? Would it be a designated religious charity?

Ivan Middleton: No; not if the word “religious” is there.

Christine Grahame: You would need the wording to be amended.

Ivan Middleton: Yes, or we would just be designated as a charity.

Christine Grahame: The organisation would just be a charity, so section 64 would not apply to you.

Ivan Middleton: I realise your party affiliations, but reference has been made to what is happening across the border. Our sister organisation, the British Humanist Association, is also seeking to have the Westminster legislation include “religion or belief”, and it is having some success with that argument.

12:30

Christine Grahame: I was speaking less from party affiliation than as an ex-Scots lawyer about the individuality of Scots law and trying to make it even more individual.

Ivan Middleton: Right. Some people have said that, if there is no definition of religion, what is the definition of belief? That would open up some difficulties. However, the International Humanist and Ethical Union—IHEU—is a non-governmental organisation that has a seat at the United Nations, which suggests that some tests have already been applied to and passed by secular humanism.

Christine Grahame: I do not know whether I want to ask you to guide us by giving me a definition of a religion or a belief that would qualify, and a definition of one that would not, according to the test. I do not think that I want to tread there, unless you want to tell us. I am basing my assumption on past case law. We are saying that there is a clean sheet, but OSCR and others will pay heed to what has been in guidance previously, if not formally.

Janette Wilson: One would hope so.

Ivan Middleton: But as well as looking back, we need to look forwards. Society is becoming much more complex and people are making different choices. We must try to get the legislation to anticipate some of that, as well as to catch up with where we are now.

Mary Scanlon: I want to ask about the phrase “public worship” in section 64(1)(b). Can you define what public worship is and how you would be able to pass that test?

Ivan Middleton: I will answer that first, to get it out of the way. We would not pass that test because we do not worship anything.

Mary Scanlon: So, you would not qualify—

Ivan Middleton: We could qualify under other criteria.

Mary Scanlon: What is Janette Wilson’s definition of public worship?

Janette Wilson: Some members of the Scottish Churches Committee are not designated religious bodies at the moment, as they cannot meet these criteria. It is important to distinguish between the test for being a charity and the test for being a “designated religious charity” under the bill.

Mary Scanlon: What is Janette Wilson’s definition of public worship?

Janette Wilson: Designation can be justified on the ground that a body can prove that it can self-regulate, that it can control all its bits and pieces and make sure that they are all behaving themselves. If the body then falls down, it should lose the status and that would open it up to the full battery of regulatory controls.

Christine Grahame: I was speaking less from party affiliation than as an ex-Scots lawyer about the individuality of Scots law and trying to make it even more individual.
I would guess that worship would generally be seen by religions that have a god as praising that god or gods. For religions that are non-theistic, I would guess that it would be, for example, veneration of the Buddha by Buddhists. I do not know about the legal status of public worship but, as far as I am aware, it would not be a problem for any of the other faith communities.

**Donald Gorrie:** My question follows on from what has been said. I am not a church expert, but I understand that some churches have a much more decentralised structure and cannot therefore say, "We are a church with 3,000 members." Might there be a problem for those people to qualify under the designation of being one organisation with 3,000 members, whether they are Christian or whatever? I am not sure how organised the other faiths in the country are.

**Vanessa Taylor:** As far as we can see, the "designated religious charity" status relates mainly to accounting provisions. There are no faith communities in Scotland, outside the Christian faith, that would currently qualify. They would meet the first three criteria, but none of the other faith communities in Scotland at the moment would meet the criterion of having a centralised internal structure. However, given that that is not about the designation of a religious body, but about accounting provisions, it is not of particular concern to our membership.

**Ivan Middleton:** I am not terribly comfortable with the designation. It feels like one law for the rich and another law for the poor. How often have we heard about self-regulation over the past few years? It has not always worked. I would have thought that there should be one piece of legislation that applied to all charities.

**Janette Wilson:** I appreciate that point of view, and I have tried to address it in my written submission. One could take the view that if it ain’t broke, don’t fix it. The law has been in effect since the 1990s, and I am not aware that there have been complaints or that the Scottish Charities Office had any particular concerns about the mechanisms of self-regulation that are in place. If there were concerns, the status could be removed and that would open up the charitable body to full regulatory control.

One of the members of our committee, the Baptist Union of Scotland, whose congregations are largely independent and are not supervised to any extent by the centre, was not able to qualify under the 1990 legislation and appreciates that it will not qualify under the bill. I am sure that it would like to qualify, but if the reason for giving this status is partly the fact that the churches can show that they have these provisions in place, perhaps it is difficult to justify it for those religious denominations that do not.

**Patrick Harvie:** I have tried to ask several witnesses about this, including the bill team. Designation as a religious charity seems not only to offer self-regulation, but places some constraints on investigations when there is a suspected problem. If a regulator does not have access to the information, how do they know whether there is a situation in which they need to intervene? It also seems insufficient to say that designation can be withdrawn, as that is simply an additional hoop that the regulator would have to go through—an additional test that would have to be met in order to regulate effectively.

Can members of the panel explain to me why, of all the 13 purposes or any other purposes of charitable status, it is religion rather than science or the relief of poverty that qualifies for such status?

**Janette Wilson:** From my reading of the legislation—and this reflects the 1990 act—I would say that there are no constraints on the regulator in carrying out inquiries on a designated religious body. The provisions are just the same as for other charities, as far as investigation and making inquiries are concerned. Your question relates to the list of charitable purposes. I do not think that I could put it better than it was put in "Private Action, Public Benefit", which was the review of charities that was produced by the Cabinet Office. That document says:

"The retention of advancement of religion as a category of charity underlines the fact that religious faith and worship continue to have a significant role to play in society. Religion also motivates giving to other charitable causes and many religious organisations contribute significantly in a wide range of pastoral activities in the community. And many of the largest and best-known charities have a religious origin."

That encapsulates for me the reason why the advancement of religion should be retained as a charitable purpose.

**Patrick Harvie:** I am not proposing to withdraw it as a charitable purpose; I am asking why it, rather than other charitable purposes, of which we could find advocates, qualifies for special status.

**Janette Wilson:** The advancement of science is also going to be one of the charitable purposes.

**Patrick Harvie:** But there are no designated scientific charities.

**Janette Wilson:** I am sorry. You are asking about designated religious charities.

**Patrick Harvie:** And their exemption from rules on governance that apply to the rest of the charity field.

**Janette Wilson:** I understand why you approach the issue from that point of view. However, as I say, the 1990 act was probably a
compromise on how to square the circle regarding the position of the Church of Scotland’s constitution, but still produce something that was fair to other religious bodies. The Church of Scotland would not want to have special privileges that other religious bodies did not have. Such privileges could be justified because they would be given only to those religious organisations that could show that they had adequate supervisory and disciplinary systems and structures in place.

Patrick Harvie: I understand the case that you make but it seems to me that many large and well-established charities would be able to show that they had procedures to ensure that disciplinary matters were dealt with properly and to ensure accountability and transparency. Indeed, I would think it inappropriate for charities over a certain size not to have such procedures. However, we do not then say that they should be exempt from regulations. They receive the benefits of charitable status; surely they should come under the same regulations as others.

Janette Wilson: Perhaps you will receive submissions from other bodies to suggest that they would like to have a provision such as this one. I note that a provision has been included for registered social landlords which, in effect, takes them out of the bill. I presume that that has been done because they are considered to be able to self-regulate.

There is concern about the burden of over-regulation. Adding another layer of regulation to some charitable bodies—depending on the area in which they operate—may be unduly burdensome. Those issues may have to be addressed depending on how OSCR performs and on how its regulatory role is perceived by the charitable sector.

Patrick Harvie: Do other panel members have views on this issue?

Vanessa Taylor: My understanding is that this is less about a special privileged status and more about avoiding a duplication of effort. Just because the status has been in place for a long time is not an argument in itself, but the status has indeed been in place for a long time and there have not been any problems with it. The issue is less about lower thresholds for designated religious charities and more about the format. Certain accounting standards will still be required, and people are obviously satisfied that the designated religious charities will meet those standards. It is simply a case of accounts being in a different format.

My understanding of the bill is that it is hoped to avoid over-regulation with OSCR and also to avoid placing a huge burden on OSCR. I have heard it said that OSCR should not offer general advice to the charity sector because that is already done by umbrella bodies in the sector. For OSCR to offer such advice would be a duplication of effort. If OSCR had to regulate each individual place of worship, it would be a huge burden, and even more of a duplication of effort, when it has already been proven that those places are meeting accepted standards of accounting.

Patrick Harvie: Proven to their own satisfaction.

Ivan Middleton: Your question is really to do with charitable purposes and the advancement of religion. As I have suggested, if “or belief” is added, you bring in 28 per cent of the population that are otherwise excluded. I would see that as being the advancement of morality and ethical behaviour. There would be more credibility if “or belief” were added.

Janette Wilson: It is my understanding that the Humanist Society already has charitable status.

Ivan Middleton: Yes, it does.

Janette Wilson: What is being suggested is perhaps simply a recasting of the list, rather than anything more radical.

12:45

Ivan Middleton: When one reads the list from a humanist perspective and sees “advancement of religion”, one has to pause and think about that. On balance, that probably should be there. If we include belief in that context of morality and ethical behaviour, then I think that it should stay.

The Convener: I understand that Linda Fabiani has some outstanding issues relating to spiritual and moral benefit. As we have discussed that at some length, I ask you to restrict your question—

Linda Fabiani: Yes, I will be quick: this is for my own benefit—not my spiritual or moral benefit, I hasten to add, but for clarification. We spoke about the subject earlier and I understand Vanessa Taylor’s comments about lawyers making definitions, but that is hard to do in this area. In a sense, there is an issue around changing from “spiritual or moral” to “ethical or moral”, but how do we define or measure those things? Who should define or measure them? Is it feasible to define or measure subjective things in legislation?

Janette Wilson: The worry of the Scottish Churches Committee was that, if there was no reference to such criteria in the bill, there would be no signal to OSCR to take them into account. Speaking as a lawyer, I find this matter very difficult. How much do we put into the bill and how much do we leave out? That brings me back to our committee’s view that it is too radical to start completely from a clean sheet. We need some help with this.
It is fair enough to say that the definition of charity cannot be put in a straitjacket—it will have to change as time goes on. Many people would now regard some of the bodies that originally had charitable status with horror, saying, "That can’t possibly be a charitable organisation." Things must change with time, but it is a matter of getting the right balance: how can we leave OSCR to judge those things without any signposts? It would be helpful to OSCR if it could refer to precedents.

**Vanessa Taylor:** I do not know to what extent I can answer the question. I do not know how feasible it would be to make such definitions and in what sort of language they could be spelled out. As it stands, the bill gives us some concerns, because we would not be confident that spiritual or moral benefit would be taken into account. There would need to be some statement of clarification along those lines. There could also be recourse to case law, which might help to clarify things.

**Ivan Middleton:** Linda Fabiani asks a very good question. I am reminded of the Social Work (Scotland) Act 1968, which I think contained a section to "promote social welfare", which was seen as a very laudable intention. That is one of the reasons that I am sitting here, in fact—I came from Northern Ireland to Scotland largely because of that provision in the 1968 act, and I am very glad that I did. If something could be included in the bill to encompass the promotion of social welfare, what would be wrong with that? That is not included in the list.

I would have thought that the draftsmen could come up with something to encompass that. That would lead to a clearer definition, to my mind, leaving aside all the spiritual and supernatural considerations, which I do not think anybody would particularly want to go into, and which could be taken as understood—or not understood, as the case may be.

**Linda Fabiani:** What I am getting from you all is that the wording “spiritual, moral or ethical” is not in itself precious, and that it signifies more of an intent. Would that be fair?

**Vanessa Taylor:** Yes.

**Janette Wilson:** Yes, although I am not terribly keen on the word “supernatural”.

If I may, convener, I will also mention a technical matter that relates to the charity test. I made a supplementary submission to the committee, having had a late thought on the subject of third parties directing or otherwise controlling the activities of a charity. The bill provides that a body will not

“meet the charity test if … its constitution expressly permits a third party to direct or otherwise control its activities”.

That cuts across the designation of charitable status. A charity may have component elements, not all of which will have charitable status, and will have to have a system in place to control them. Does that mean that it cannot be a charity? I think that that was not the intention of those who drafted the bill, but it could arise as an unintentional consequence.

I hope that I have made it clear in my supplementary submission that we think it should be okay if the third party is itself a charity. By way of an instant action, I also included the wording of an amendment to section 7(3)(b).

**Christine Grahame:** No doubt we will come to that.

**Janette Wilson:** It is on the second page of my supplementary submission. I appreciate that the committee is at stage 1 of its consideration and I am happy to return with the suggestion at stage 2.

**The Convener:** We are at stage 1, so we are considering only the general principles of the bill. I am sure that your suggestion will prove useful and we may consider it at stage 2.

**Cathie Craigie:** Chapter 9 deals with charity trustees. I think that we have some sympathy for the points and concerns that the SCC raises in its submission on the subject of the duties of trustees under section 65. Section 68 details the circumstances under which a person would be barred from being a charity trustee. Given that mismanagement is now subsumed under the definition of misconduct in section 103, is it inappropriately harsh to say that someone could be removed from being a trustee if they were guilty of mismanagement?

**Janette Wilson:** It could be. A lot would depend on the circumstances. The bill introduces a number of duties that charity trustees will have to remember; there are a number of things that they will have to submit if they are to go on to the register. I take the view that an inadvertent breach should not normally, of itself, lead to either suspension or disqualification. That should not happen unless the breach has been persistent or continued despite efforts from OSCR by way of training, coaxing and help, or if it has been of such a nature that severe danger could result to the property or assets of the charity.

**Vanessa Taylor:** The conflation of mismanagement and misconduct is a serious issue. For lay people like me, the two words have completely different meanings. Whereas mismanagement can be seen as a muddle, misconduct is seen more as a fiddle—it is more sinister and deliberate.

Criminal sanctions are entirely appropriate in cases of misconduct—indeed, they would deter people from misusing a charity for their own ends—but the idea that someone could come...
away with a criminal record for simply getting things wrong or making a mistake has serious implications for the sector. If people are not willing to take on the responsibility of becoming a trustee, there could be serious implications for charities in Scotland in general. I agree absolutely that the issue is of concern to us.

Ivan Middleton: The concept that is required is one of competence. Before the establishment of the care commission, an area of work with which I was involved, the people who ran old people’s homes or children’s homes had to demonstrate against a set of criteria that they were fit persons to do so. People knew what was expected of them and the criteria against which they would fail.

I understand colleagues’ concern if the only concept is one of mismanagement and there is no clear definition of what that might mean—for example, incompetence. It would be worth while to explore the avenue of competence testing, possibly by giving OSCR the means of bringing competence tests up to date.

Cathie Craige: You are opening up a new concept. Although there is training for volunteers in the voluntary sector and charitable organisations, it is not part of the bill.

I want to ask Janette Wilson about the articles of the church, which we started off discussing. The bill will give OSCR the power to come in and remove someone in the kirk session who has repeatedly run off with the collection. If OSCR said that such a person was not fit and proper to be a trustee, would not that fall in with the general rules of the church? Would not the church take action against someone in that context?

Janette Wilson: Absolutely. I am pleased to say that we have very few cases of office-bearers running off with money, but we can never be complacent about such things. However, there is a theoretical aspect to the question. There was, for example, a high-profile case, which I think goes back to the last time the general assembly went into private session a number of years ago, in which there were applications from two individuals who wished to train as ministers in the Church of Scotland. One had a conviction for embezzlement, having been a bank manager. Obviously it was necessary to try to test and judge their call and whether they had put their past behind them and were fit and proper persons to train to be ministers. The minister has a key role as he is a charity trustee. If we had to turn round and say to people in such a situation, “You cannot become a minister of word and sacrament because you would not qualify as a charity trustee” we would see that as the state interfering in office holding in the Church of Scotland.

Cathie Craigie: We will probably have further discussions about that. I would welcome further information on this part of the bill. I do not see conflict. The general public want us to ensure that charitable organisations are regulated and that they can trust the people who are involved with using their money for good causes. I do not know that there is such a big gulf between your position and what is proposed in the bill.

Janette Wilson: It was always said that, traditionally, churches raise money from their members; they do not fund-raise from the public. However, society changes and many congregations are going into partnership with other bodies and attracting other charitable funding. Our committee therefore accepts the increased requirements in relation to monitoring that will be put on congregations. Congregations will have the same obligations as other charities to produce their accounts and send them to OSCR along with an annual return and to answer any reasonable questions that OSCR might have about them. That exercise will produce a situation whereby any financial irregularity would immediately come to light. OSCR would intervene and the church body concerned would put its house in order. If it failed to do so, it would lose its designated charity status and would be reduced to the same status as everybody else.

The Scottish Churches Committee has already met the head of regulation control in OSCR. OSCR does not regard churches as a high-risk sector; in a way, it will be pleased that the central bodies of churches will be helping it and doing part of its work. Ploughing through in great detail 1,500 sets of Church of Scotland congregation accounts must be a pretty joyless activity. Knowing that someone else has looked over the accounts and okayed them at a presbytery level will be helpful to OSCR, as will the ability to go to a one-stop shop of people at the centre who can explain what various things mean.

Churches love arcane, useful information. I sometimes look at church accounts, which have to be prepared in accordance with the rules laid down by the General Assembly, which were approved by the Scottish Executive in order that the Church of Scotland and, indeed, the other bodies should get designated religious body status. I think that it will be helpful to OSCR to have a central controlling mechanism to assist it in its task, so that there will be proportionate regulation of church congregations.

13:00

Patrick Harvie: I want to follow up on the issue of disqualification. My question relates to the dual role of an individual being both a trustee of a charity and an employee of it; I have some general
concerns about that. You mentioned the possibility of someone being disqualified because of the designation, although that would be fairly unlikely. Are you saying that it would not be possible for the Church of Scotland to organise its affairs in such a way that someone could be employed as a minister without being a trustee of the charity?

Janette Wilson: That would not be possible. I think that the same would be said for other religious organisations. Ministers of religion and priests play a crucial role in the administration and the running of the charity.

Patrick Harvie: It would not be possible for them to do the ministry but not the administration.

Janette Wilson: There might be those who would like to remove, for example, all ministers from the General Assembly of the Church of Scotland, but it might become a quiet affair. It is simply the way in which church bodies are constituted. I am afraid that they are not the same as other charities in that respect: their structures are very different. That is the way that it has aye been. The Church of Scotland would not be very happy if it was suggested that it should totally reorganise its structures to take the bill into account.

Patrick Harvie: Everybody else in society has to.

Mr Home Robertson: We have, understandably, concentrated on the Church of Scotland, on Christian churches and on the humanists. Can we confirm that other faith communities have had an opportunity to make representations to us directly or through the Scottish Inter Faith Council? Have any specific points been raised by the Muslim community, Jewish people or other faith communities?

Vanessa Taylor: In relation to a specific aspect of the bill?

Mr Home Robertson: Are there any general points to do with the bill that we need to be aware of?

Vanessa Taylor: On most points, we would have concerns similar to those that have been expressed by the Scottish Churches Committee. One area in which we would have a specific interest would be the definition of religion. That definition should be as inclusive as possible and should not exclude multideity or non-deity religions. I do not think that anything specific has come up that has not been covered in some way.

Mr Home Robertson: But it is open to anybody else to make representations.

Vanessa Taylor: Yes, absolutely.

The Convener: I thank the witnesses for their attendance, which is much appreciated. We are also grateful for the written submissions from the Scottish Inter Faith Council and the Scottish Churches Committee in advance of the meeting. I am sure that they gave us all some food for thought last night.

13:04

Meeting continued in private until 13:18.
SUPPLEMENTARY WRITTEN EVIDENCE FROM THE HUMANIST SOCIETY OF SCOTLAND

On behalf of the Humanist Society of Scotland I wish to make this written submission. I was of course pleased to have had an opportunity of answering questions from the Communities Committee on 12th January 2005.

The Society welcomes the introduction of legislation to ensure greater control of Charities.

Our main points are:-

- We wish to see the criterion which refers to the ‘advancement of religion’ have ‘or belief’ added to it.
  
  This would encompass Humanism and at the same time achieve greater inclusivity and be in keeping with European Human Rights legislation which refers to ‘Religion or belief.’
  
  The British Humanist Association, our sister organisation in England and Wales have put forward similar arguments already to the Westminster Parliament.

- In the 2001 Scottish Census 27.9% of people living in Scotland identified themselves as having no religion. It is to the Humanist Society of Scotland that they look when they require rites of passage. This is one of the ways we would argue that we would meet ‘public benefit’ criteria.

- We wish to see some definition of ‘public benefit criteria presented at this stage.

- Another point our members are concerned about is that no Organisation which enjoys Charitable status should be able to advise its members on how to vote in General and other elections. We would draw attention to the Roman Catholic church and its record of advising its flock how to vote.

- We would not support the present proposal to have a two tier form of regulation in which larger (rich) organisations would be allowed to self regulate whilst other (poorer) organisations would be rigorously monitored.

- Otherwise I would also refer to my witness statements made to the Communities Committee on 12th January 2005.

Ivan Middleton
Secretary
Humanist Society of Scotland
24 January 2005

WRITTEN EVIDENCE FROM CO-OPERATION AND MUTUALITY SCOTLAND

Introduction: CMS is the main umbrella organisation for the co-operative and mutual sector in Scotland, having been launched in June 2003 as the result of a merger between the Scottish Co-operative & Mutual Forum and the Scottish Sectional Board of Co-operatives UK.

CMS covers the full range of co-operative and mutual enterprises - namely, worker co-ops, employee owned businesses, housing co-ops, credit unions, other financial services, agriculture, fishing, community businesses and consumer co-ops. CMS is supported financially by Co-operatives UK the apex body for co-operative enterprise.

Co-operatives have to produce surpluses to be sustainable and fulfil their social goal(s). However there is always a voluntary element in membership and structures for representation. Co-operatives do not see themselves as part of the voluntary sector – they have a trading focus – but their aims are linked.

CMS has 3 main aims: to be a strategic voice for co-operation and mutuality; to be a partner with government and others in developing and supporting new and existing co-operative and mutual enterprise and; to be an effective forum for co-operative and mutual enterprise.

CMS welcomes the opportunity to offer our comments to the Communities Committee.

General Comments

"CMS welcomes the fact that the proposed legislation will not exclude co-operatives per se but will rely on a public benefit test to ascertain eligibility. We agree with SCVO and others that purpose is more important than structure.

"We also welcome the implicit recognition that many co-operatives, although trading businesses, operate for public benefit. One of the co-operative principles is concern for the community. Co-operatives are required to work for the sustainable development of the communities they operate in. While co-ops do exist to serve their members, the co-operative principle of open membership (i.e. that membership is open to all those able to use the co-operative's services) means that they are inclusive rather than exclusive.

"Also, unlike the majority of charitable organisations, who have no requirement to be democratic, co-operatives must operate according to democratic principles which are at the heart of citizenship and co-operative principles (and thus public benefit) in our country.

"While in the long term we believe that co-operatives as such should benefit from a distinctive fiscal regime that recognises their unique contribution to society (as is the case in some other European countries), we believe that it is a step forward that co-operatives which satisfy a public benefit test should be able to opt for charitable status if they so choose, and would welcome the opportunity to explore this further with the Committee.

"We also, incidentally, believe that redistribution of part of any surplus back to the members (as a rebate in proportion to their payment for goods and services to the co-operative) should not be a disqualifying factor - although we recognise that this may well not be acceptable in the way that the proposed legislation is currently framed.

"In principle we believe that it should be open to any type of co-operative (whether the primary stakeholder group is employees, consumers, tenants, savers - or indeed a combination of these) to seek to demonstrate that it satisfies a public benefit test. However, we recognise in practice that this is likely to be much more clearcut in some cases than in others."
In order to be able to provide the members of the Communities Committee with the most up to date facts, CMS has recently spoken with a range of organisations and relevant representative bodies for those parts of the co-operative and mutual sector in Scotland that could be affected by this legislation.

**Credit Unions:**

In their submission to the Charity Commission for England and Wales ABCUL recommended that the Charity Commission formally recognise credit unions contribution to the alleviation of poverty. This would include published guidance which includes credit unions as a distinct legal entity able to receive support and benefits currently restricted to registered charities only. They go on to argue that this recognition of credit unions would provide clarity of approach to many organisations that recognise the good work carried out by credit unions but are unable to provide them with support as they are not registered charities. ABCUL argue that credit unions should be recognised as a distinct legal structure – non charity but not for profit, contributing to the alleviation of poverty.

In our recent discussions with ABCUL and the Scottish League of Credit Unions, it became clear that the concerns of credit unions regarding access to funding that is restricted to registered charitable bodies and discretionary rates relief have been resolved.

CMS has been reliably informed that from April 2005 local authorities will have the discretionary powers to grant rates relief to credit unions. It has been the experience of ABCUL that most credit unions have already been successful with applications, and they believe that the changes due in April 2005 will ensure that this is no longer an issue for the sector.

Regarding accessing support normally restricted to charitable bodies, the credit union movement have developed a solution. Through the formation of networks of credit unions, it has been possible to access funding for training costs and other such support. Individual credit unions can then access training and other support for the volunteers involved in running the credit unions.

**Housing Co-operatives:**

A particular example where we wish to underline the importance of the possibility of charitable status being extended to co-ops is the case of housing co-ops (in particular those which do not have fully mutual status).

In our submission to the consultation on the draft bill, CMS referred to the difficulties facing the co-operative housing movement in Scotland with respect to charitable status. We have recently met with representatives from the housing co-operative movement in order to gain an up to date picture, and have detailed below the salient points of the issues facing the sector.

Firstly it is important to note that housing co-ops should be recognised for their contribution to the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage. Housing co-ops abide by the same allocations policy as other Registered Social Landlords. It is therefore argued that housing co-ops provide Public Benefit. However as things currently stand housing co-operatives cannot be deemed as charities.

The main concern raised by the non-fully mutual housing co-operatives sector is their exposure to punitive taxation in the form of corporation tax.

The issue facing the non-fully mutual housing co-operatives can be traced to the withdrawal of Section 54 grant to housing co-operatives (and housing associations) which was contained in the Housing Act (2001). The consequence was that non-charitable Registered Social Landlords (both housing co-operatives and housing associations) are now required to pay corporation tax, which amounts to significant amounts for small organisations.

Housing Associations (which essentially perform the same function as housing co-operatives) can apply for charitable status which exempts them from Corporation Tax as well as providing significant other financial benefits (rates exemption).

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161 ABCUL: Association of British Credit Unions
Within current legislation housing co-operatives cannot be deemed as charities, however, the absence of charitable status does not adversely affect fully mutual housing co-operatives which operate under slightly different rules and who are taxed differently thereby avoiding exposure to corporation tax.

Non-fully mutual housing organisations would not be comfortable with changing to fully mutual status as they argue this would diminish tenants’ rights, and they wish to retain the non-fully mutual status which means that whilst tenants are encouraged to become full members it is not mandatory.

As already noted the non-fully mutual housing co-ops (along with other providers of social housing) should be recognised for their contribution to the provision of accommodation to those in need of it by reason of age, ill-health, disability, financial hardship or other disadvantage. These forms of housing co-ops abide by the same allocations policy as other Registered Social Landlords. It is therefore argued that non-fully mutual housing co-ops provide Public Benefit. However as things currently stand housing co-operatives cannot be deemed as charities.

The result of all this is that non-fully mutual housing co-operatives are therefore left in a completely anomalous position.

- They cannot apply to become charities despite the fact that most other forms of housing organisation can.
- Due to this anomaly they are exposed to Corporation Tax payments.
- They do not wish to become Fully Mutual (thereby exempting themselves from Corporation Tax exposure) as they believe this would diminish tenants’ rights.
- They do not wish to change organisational identity and become a Housing Association as they believe this would have dilute tenant involvement, and therefore community empowerment. It would also lead to a diminishing of the co-operative sector in Scotland, which seems in stark contrast to the support for the co-operative movement evident from the proposals to set up a Co-operative Development Agency.

CMS is very concerned about the lack of a level playing field for Registered Social Landlords whereby non-fully mutual housing co-ops are the only form that has no route to avoid exposure to Corporation Tax. Representatives from the sector have received advice to the effect that there is no way of raising revenue to offset the cost implication of Corporation Tax.

CMS believes it was not the intention of the changes made with the Housing Act (2001) to create an unfair playing field for non-fully mutual housing co-ops. CMS believes it is imperative that the Communities Committee fully appreciate that if the current situation continues the resultant effect will be the demise of the non-fully mutual housing co-operative sector in Scotland. CMS also believes that the non-fully mutual housing co-operative model that enables both the Right to Buy and encourages greater participation from tenants’ in the running of the organisation leading to greater community empowerment has a valid role to play in Scottish society.

The disadvantaged position of non-fully mutual housing co-operatives has been recognised by SFHA (Scottish Federation of Housing Associations) and by Scottish Community Owned Housing Forum (SCOHF).

Co-operation and Mutuality Scotland
January 2005
The National Museums of Scotland is pleased to have the opportunity to submit evidence on the Bill to the Communities Committee.

The Charity Test: Charitable Purposes and Public Benefit

NMS fully supports the broad principles of the Bill. It is entirely right that charities law in Scotland should be modernised so that charities operate effectively and are properly regulated. NMS’s concerns are about the impact of the Bill, as drafted, on Scotland’s national collections institutions.

Charitable Purposes and Public Benefit

NMS cares for museum collections which are of national and international importance. They represent a public benefit, held by NMS in trust for the people of Scotland. NMS receives public funding from the Scottish Executive to maintain and provide public access to these collections, but it also receives generous private support from both personal and corporate donors, maintaining a long tradition in Britain, of private philanthropic support for the nation’s great cultural treasures. Such private support enables acquisition of nationally important objects, funds education programmes and exhibitions and plays an important role in the major development projects essential to ensure that Scotland’s national collections are displayed and interpreted to standards which bear comparison with the world’s best. All of these are core charitable purposes which provide a clear public benefit.

NDPBs and Charitable Status

NMS is a non-departmental public body (NDPB) with charitable status. Under NMS’s founding legislation it is governed by a Board of Trustees who are appointed by Ministers. The legislation also provides that NMS may be subject to Ministerial direction. As constituted NMS would not be able to pass the Charities test of independence as set out in Clause 7 (3) of the Bill because Ministerial direction would be deemed, under the Bill as drafted, to “permit a third party to direct or control its activities”. NMS would therefore lose its charitable status. This would have an enormous financial impact on NMS in terms of its ability to raise funds through charitable giving and to receive charitable rate and tax reliefs. The details are set out below under Fundraising. NMS estimates that it would lose £1.5 million each year on revenue income. There is the potential for the loss of many million of pounds of public sector support for capital projects, many of which are private/public partnerships. Without private sector support to partner public funding, these projects would simply not be viable.

NMS believes that the public interest can best be served by the national collections institutions remaining as publically accountable NDPBs, while retaining charitable status. We believe that consideration should be given to a solution whereby the national collections institutions could be designated as a special charities under the legislation.

The Relative Position of NMS in Comparison with Institutions in England and Wales

The Bill raises serious issues for the position of Scotland’s cultural institutions in relation to those of England and Wales. Under proposed charities legislation for England and Wales, the national collections institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national collections institutions will be deprived of such support through charitable giving. If NMS loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic support currently enjoyed will be directed elsewhere. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions - of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.
OSCR and the Regulation of the Charity Sector

The independence of charities is a fundamental principle of the Bill. However the reasons for this need to be understood. Under the Bill, it is argued, independence will allow for regulation through OSCR and through that process will ensure full transparency and accountability by the charity. There is a view that NDPBs cannot, because they are subject to direction by Ministers, be independent and therefore cannot be fully regulated as charities by OSCR. There is also a view that NDPBs would be somehow less transparently accountable to the public than other charities. NMS does not believe that this is the case, for 2 reasons:

- NDPBs are accountable to Ministers, and as public bodies are subject to regular scrutiny through government accounting, requirements of public sector corporate governance, the Parliamentary process, Performance and Financial Management Reviews (Quinquennial Reviews), Best Value, Freedom of Information and other mechanisms. This demanding framework establishes a level of public accountability and open-ness which is not in place for the private sector or for independent charities.

- NDPBs could continue to be answerable to Ministers and to Parliament as public bodies, through the mechanisms above, while also being regulated as charities by OSCR. There would be a need for clear directions on the powers and responsibilities of OSCR in respect of charitable NDPBs. NMS does not believe that there is inevitably or irreconcilably a conflict of interest.

A workable solution has been found for national museums and galleries in England and Wales, which appeared to face similar difficulties when the English Charities Bill was introduced. It has been agreed that these institutions will be designated as Exempt Charities and will be regulated by the Department of Culture, Media and Sport.

Governance

NMS is governed by a Board of up to 15 Trustees, all appointed by Ministers. It has been argued elsewhere that Ministers could, if minded to consider alternatives to NDPB status for bodies such as NMS, establish new organisations without the same elements of Ministerial direction, which would therefore qualify for charitable status. It would be inappropriate for NMS to take any view of what course of action Ministers might determine. NMS would however wish to comment on some of the governance implications of alternatives to NDPB status.

Specific Implications of Loss of NDPB Status

All of the following would need to be considered:

- The national collections for which NMS cares are currently inalienable. The NMS Board has limited and clearly defined powers of disposal. Many donors have given material to NMS precisely because they wished their objects to become part of a great public collection, held in trust for posterity. Under alternative arrangements a mechanism would have to be found to ensure that the governing body of an independent organisation had powers of acquisition and disposal which were consistent with safeguarding the collections as a public asset. Even with these powers in place a proportion of potential donors would decline to give material under these circumstances. Some would elect to sell elsewhere.

- Many objects in the NMS collections are priceless and are uninsurable under commercial cover. When they are loaned they are covered by Government indemnity provided by the UK Government, or by similar arrangements with the host government overseas. Similarly major loans from abroad to museums in the UK are covered by Government indemnity. If NMS were to become independent, it would not be eligible for Government indemnity. It would therefore be almost impossible for NMS or any national cultural institution to mount major exhibitions of international material, such as NMS’s 2003 exhibition of objects from the Imperial Palace in Beijing Forbidden City: Treasures of an Emperor.
If NMS ceased to be an NDPB, its staff would lose eligibility for the Principal Civil Service Pension Scheme. This would be a major issue for the staff of NMS for whom PCSPS is an important benefit of employment with NMS. It would be an equally serious issue for the Board of NMS as the employer of staff.

NMS staff transferring to a new organisation would do so under TUPE regulations which would provide for transfer on similar terms and conditions.

**Implications for Board Membership**

Given the issues outlined above, NMS takes the view that, if it ceased to be an NDPB, it would be very difficult to find people willing to take on the responsibilities of trusteeship of an independent organisation responsible for the national collections. The liabilities would be huge. All of NMS’s Trustees are volunteers who serve part time. Again there would be implications for public accountability. At present, vacancies on the NMS Board are advertised, and the appointments process is subject to open procedures determined by the Scottish Commissioner for Public Appointments. An independent body would be essentially self governing and at least some of those serving on its governing body could be self-selected.

**Fundraising**

Loss of charitable status has huge implications for NMS’s ability to raise funds from the private sector and to optimise its income through receipt of charitable reliefs. These are detailed below (all figures relate to 2003/04 unless otherwise specified):

**Loss of Significant Tax Benefits**

*Charitable Rate Relief*

NMS will lose charity exemption on property rates, being currently £1.2m across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate NMS for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However a mechanism would need to be in place to effect this.

*Charitable Tax Relief – Revenue Fundraising/Gift Aid*

Charitable tax reliefs are essential to encourage giving for revenue fundraising outwith capital campaigns. Last year NMS received grants of over £300,000 from UK funders, which was applied to special exhibitions, research programmes and educational activities. Most of this sum may not have been given without charitable status. NMS and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to NMS no longer being a charity. This is likely also to affect support such as sponsorship in kind. Specific losses are noted below:

- NMS would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor. NMS loss estimated at £50,000 in relation to this.
- Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.
- A donor making a gift to NMS in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.
- NMS would lose donations from supporters abroad. The NMS Foundation in the USA for instance, can only apply its funding to a charitable organisation in the UK, if its donors are to be eligible for tax relief in the US.
Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However some donors would not wish to see their money routed through even a charitable trust to an organisation which was itself not charitable.

**Charitable Tax Relief – Capital/Campaign Fundraising**

Charitable tax relief is absolutely essential to capital fundraising within the private sector for visionary capital development projects such as the Museum of Scotland and the Royal Museum Masterplan, most of which are successful public/private partnerships:

- The Museum of Scotland Campaign in the 1990s raised approximately £10m from non-government sources (charitable trusts and foundations, business organisations and private individuals) both in the UK and overseas. This figure does not include the award of £6.75m made by the Heritage Lottery Fund. The three major categories of donation (Founders, Guardians and Stewards) totalled just over 300 gifts but contributed more than 90% of the total money raised. The majority of these gifts also involved charitable tax relief and many of the donations may not have been made at all had an attractive tax break not been available to higher rate taxpayers.

- The Royal Museum Masterplan is a visionary £70 million project which will transform the Royal Museum with much improved public access, new learning centres, public facilities and new displays. It is envisaged that a proportion will be raised from the private sector, with the balance of funding sought from the Heritage Lottery Fund and the Scottish Executive. Without charitable status it will be more difficult to raise private sector support, and the project will be at risk. NMS estimates that at a substantial element of the private sector funding sought would not be forthcoming:
  - Charitable Trusts. Many of the larger grant-making trusts have an absolute rule that they will only make donations to bodies with charitable status and that they will not make gifts to other grant-making charities. The latter would rule out routing their donations through the NMS Charitable Trust. Estimated reduction in giving of several million.
  - Personal gifts. Most individual givers will not be comfortable with giving to NMS without charitable status. Individual donors wish to make a gift direct to the body involved and not through an artificially interposed grant-making vehicle. Estimated reduction in giving of up to £1 million.

Some of these losses would be mitigated by directing donations through the NMS Charitable Trust. However this itself raises significant strategic issues, notably whether the public interest is best served by the private sector funding for the capital development programme of a major cultural institution being in the control of an independent and essentially unaccountable charitable trust which has the power to direct how that funding is applied.

**The Principle of Philanthropic Support for Major Cultural Projects**

In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status by organisations such as NMS and others like it, raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions. Many of the largest contributions to the Museum of Scotland campaign funds came from bodies which would not have given to a non-charitable organisation. To put this in context, the top 61 contributions accounted for more than £7m of the £10m raised.

**Consequences of the Bill’s Enactment**

NMS believes that removing charitable status from the national collections institutions will not serve the public benefit. It will mean that either these institutions lose millions of pounds in charitable giving and
tax reliefs, resulting in a poorer service to the public, or that they are replaced by independent but far less accountable organisations. Nor will it improve the cost effectiveness of government.

We believe that the Scottish public will be at a loss to understand why charitable status is being taken away from its national collections institutions, particularly when so many people have given so generously to support them and at a time when the Scottish Executive has made a commitment to a new cultural vision for Scotland.

Conclusion

NMS strongly believes that the public interest can best be served by enabling the national collections institutions to continue as fully accountable NDPBs, while retaining the charitable status that enables them to enhance the public benefit that they were established to provide. We hope that a solution can be found to enable this to happen. We believe that there is a strong case for recognising the special status of the national collections institutions by specifically designating them as charities under the legislation.

Sheila McClure
National Museums of Scotland
11 January 2005

WRITTEN EVIDENCE FROM NATIONAL LIBRARY OF SCOTLAND

The National Library of Scotland welcomes the opportunity to submit evidence to the Communities Committee on the above mentioned Bill.

Summary

NLS strongly believes that the public interest can be best served by enabling the National Collections Institutions to continue as NDPBs while retaining their charitable status, which is essential for their role as collecting institutions.

The loss of charitable status would have substantial financial implications for NLS through:

- The loss of tax and rate reliefs
- Lost fundraising ability. Many charitable trusts, foundations, and private donors will only give to institutions with charitable status
- Competitive disadvantage in relation to collecting institutions in the rest of the UK

With the loss of charitable status NLS’ services would either have to be cut or additional funding would be required from the Scottish Executive.

The loss of NDPB status would also have substantial implications for NLS:

- Many items are donated to NLS because it is a national collection with protected powers of disposal, and not an independent charity
- NDPB status is necessary for UK Government insurance of priceless and uninsurable collections
- NLS staff would lose Principal Civil Service Pension Scheme

There is no strong reason for NLS not to maintain both its status as an NDPB and a charity. **There is no irreconcilable conflict between NLS being funded and answerable to the Scottish Executive and also regulated by OSCR.**

We believe that provision should be made on the face of the Bill for the national collections institutions to maintain both their charitable and NDPB status.

The Charity Test: Charitable Purposes and Public Benefit

NLS fully supports the broad principles of the Bill. It is entirely right that charities law in Scotland should be modernised so that charities operate effectively and are properly regulated. However, NLS
has deep concerns about the impact of the Bill, as drafted, on Scotland’s national cultural institutions and their collections.

**Charitable Purposes and Public Benefit**

NLS cares for collections of national and international importance. They represent a public benefit, held by NLS in trust for the people of Scotland. NLS receives public funding from the Scottish Executive to maintain and provide public access to these collections. These roles are recognised as charitable purposes in the Bill.

NLS also receives support from charitable trusts and foundations. Such bodies would not provide funds to NLS if we were to lose our charitable status. NLS is also about to embark upon an ambitious programme of fundraising, seeking support from private and corporate sources as well as increasing the funds it gets from charitable trusts and foundations. The purpose of such fundraising is to enable nationally important acquisitions, to fund digitisation of the collections, to widen access, to develop education and visitor programmes and exhibitions.

NLS may not be able to pass the charity test of independence as set out in Clause 7 (3) of the Bill because Ministerial direction would be deemed, under the Bill as drafted, to “permit a third party to direct or otherwise control its activities.”

**NDPBs and Charitable Status**

NLS is a non-departmental public body (NDPB) with charitable status. Under NLS’ founding legislation it is governed by a Board of 32 Trustees, of whom five are appointed by the Scottish Executive. As constituted NLS may fail the Charities test of independence, because government influence could be deemed, under the Bill as drafted, to provide control by a third party. NLS would therefore lose its charitable status. This would have an enormous financial impact on NLS in terms of its ability to raise funds through charitable giving and to receive charitable rate and tax reliefs. The details are set out below under Fundraising. NLS estimates that it would lose £0.5 million each year on revenue income.

NLS believes that the public interest can best be served by the National Collections Institutions remaining as publicly accountable NDPBs, while retaining charitable status. We believe that consideration should be given to a solution whereby the National Collections Institutions could be designated as special charities under the legislation.

**The Relative Position of NLS in Comparison with Institutions in England and Wales**

The Bill raises serious issues for the position of Scotland’s cultural institutions in relation to those of England and Wales. Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport. The current draft of the Scottish Bill will, if un-amended, place institutions in Scotland at a distinct competitive disadvantage to their English counterparts. Whilst the British Museum, the National Gallery, the British Library and the Science Museum will move forward with visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of such support through charitable giving. If NLS loses charitable status, and no alternative arrangement is put in place, there can be little doubt that the philanthropic support currently enjoyed and sought will be directed elsewhere and that our fledgling plans for major fundraising will be still born. In the longer term, this will not only undermine our ability to perform our core duties as custodians – and champions - of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.

As NLS is on the cusp of a major fundraising campaign we sought advice from independent cultural fundraising experts, Brakeley Ltd. Their professional assessment is that “...loss of charitable status would so dramatically limit your ability to fundraise that we could not recommend you proceeding with your proposed campaign...or indeed any future fundraising initiative.” They conclude: “...if the Bill’s provisions do indeed cause the Library and other collections NDPBs in Scotland to lose their charitable status...the effect will be to render private fundraising for these important Scottish institutions impossible, leading to a greater dependence on the public purse and ultimately a severe curtailment of their activities.”
OSCR and the Regulation of the Charity Sector

The independence of charities is a fundamental principle of the Bill. However the reasons for this need to be understood. Under the Bill, it is argued, independence will allow for regulation through OSCR and through that process will ensure full transparency and accountability by the charity. There is a view that NDPBs cannot, because they are subject to direction by Ministers, be independent and therefore cannot be fully regulated as charities by OSCR. There is also a view that NDPBs are somehow less transparently accountable to the public than other charities. NLS does not believe that this is the case, for two reasons:

- NDPBs are accountable to Ministers, and as public bodies are subject to regular scrutiny through government accounting, requirements of public sector corporate governance, the Parliamentary process, Performance and Financial Management Reviews (Quinquennial Reviews), Best Value, Freedom of Information and other mechanisms. This demanding framework establishes a level of public accountability and openness which is not in place for the private sector or for independent charities.

- NDPBs could continue to be answerable to Ministers and to Parliament as public bodies, through the mechanisms above, while also being regulated as charities by OSCR. There would be a need for clear directions on the powers and responsibilities of OSCR in respect of charitable NDPBs. NLS does not believe that there is inevitably or irreconcilably a conflict of interest. Regulation of NLS by OSCR need not be incompatible with government funding.

A workable solution has been found for national institutions, such as the British Library, in England and Wales, which appeared to face similar difficulties when the English Charities Bill was introduced. It has been agreed that these institutions will retain charitable status as Exempt Charities, whilst continuing to be funded by the Department of Culture, Media and Sport.

There should be no conflict between the Scottish national collections institutions being funded and being given strategic direction by the Scottish Executive and being regulated by the Office of Scottish Charities Regulator.

Governance

NLS is governed by statute, principally the National Library of Scotland Act 1925. This legislation defines the role of the Library, and the powers and responsibilities of its Trustees.

NLS is governed by a Board of up to 32 Trustees, appointed as follows: 5 are appointed by the Scottish Executive, 5 by the Faculty of Advocates, 4 by Scottish Universities, 2 by COSLA, 5 are co-opted and 11 are ex-officio. These arrangements will be reviewed by the government as part of a “PFMR” five-yearly review due this year. It has been argued elsewhere that Ministers could, if minded to consider alternatives to NDPB status for bodies such as NLS, establish new organisations without the same elements of Ministerial direction, which would therefore qualify for charitable status. It would be inappropriate for NLS to take any view of what course of action Ministers might determine. NLS would however wish to comment on some of the governance implications of alternatives to NDPB status.

Specific Implications of Loss of NDPB Status

All of the following would need to be considered:

- The national collections for which NLS cares are currently inalienable. The NLS Board has limited and clearly defined powers of disposal. Many donors have given material to NLS precisely because they wished their materials to become part of a great public collection, held in trust for posterity. Under alternative arrangements a mechanism would have to be found to ensure that the governing body of an independent organisation had powers of acquisition and disposal which were consistent with safeguarding the collections as a public asset. Even with these powers in place a proportion of potential donors would decline to give material under these circumstances. Some would elect to sell elsewhere.
• Many objects in the NLS collections are priceless and are uninsurable under commercial cover. When they are loaned they are covered by Government indemnity provided by the UK Government, or by similar arrangements with the host government overseas. Similarly major loans from abroad to libraries and museums in the UK are covered by Government indemnity. If NLS were to become independent, it would not be eligible for Government indemnity. It would therefore be almost impossible for NLS or any national cultural institution to mount major exhibitions of international material.

• If NLS ceased to be an NDPB, its staff would lose eligibility for the Principal Civil Service Pension Scheme. This would be a major issue for the staff of NLS for whom PCSPS is an important benefit of employment with NLS. It would be an equally serious issue for the Board of NLS as the employer of staff.

*Implications for Board Membership*

Given the issues outlined above, NLS takes the view that, if it ceased to be an NDPB, it would be very difficult to find people willing to take on the responsibilities of trusteeship of an independent organisation responsible for the national collections. All of NLS’s Trustees are volunteers who serve part time.

At the present time, vacancies on the Board are advertised and appointments are subject to the Nolan procedures. An independent body would be essentially self governing and at least some of those who make up such an independent body could be self selected.

*Fundraising*

Loss of charitable status has huge implications for NLS’ strategy to raise funds from the private sector and to optimise its income through receipt of charitable reliefs.

*Loss of Significant Tax Benefits*

*Charitable Rate Relief*

NLS will lose charity exemption on property rates, being currently £471,000 across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate NLS for this loss through an equivalent adjustment to Grant-in-Aid. In principle this would be budget neutral to the Scottish Executive, as the Executive would be able to recover from the block grant to Local Authorities. However there is currently no mechanism in place to effect this.

*Charitable Tax Relief – Revenue Fundraising/Gift Aid*

Charitable tax reliefs are essential to encourage giving for revenue fundraising outwith capital campaigns. NLS plans to begin fundraising and a major part of its efforts would be directed towards grants from charitable trusts and foundations. Most of these funders do not give grants to institutions without charitable status. NLS and its supporters would lose a range of charitable tax relief. In addition there would be a wider impact from the public reaction to NLS no longer being a charity. This is likely also to affect support such as sponsorship in kind.

• NLS would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor.

• Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

• A donor making a gift to NLS in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.

• NLS would lose potential donations from supporters abroad. Foundations in the USA, for instance, can only apply funding to a charitable organisation in the UK if its donors are to be eligible for tax relief in the US.
The establishment of a charitable Trust has been mooted as a solution but some donors would not wish to see their money routed in this way to an organisation which was itself not charitable.

**Charitable Tax Relief – Capital/Campaign Fundraising**
Charitable tax relief is absolutely essential to capital fundraising within the private sector for any visionary capital development projects such as visitor centres, education and interpretation centres through public/private partnerships.

Most of the larger charitable trusts would not give direct to NLS without charitable status, and would have reservations about routing their donations through any form of NLS Charitable Trust, because it would be independent of NLS.

Personal gifts. Some givers will not be comfortable with giving to NLS without charitable status. Some givers will not be comfortable either with their donations being routed through any form of NLS Charitable Trust.

Some of these losses would be mitigated by directing donations through the NLS Charitable Trust. However this itself raises significant strategic issues, notably whether the public interest is best served by the private sector funding for the capital development programme of a major cultural institution being in the control of an independent and essentially unaccountable charitable trust which has the power to direct how that funding is applied.

**The Principle of Philanthropic Support for Major Cultural Projects**
In addition to the specifics of loss of eligibility for tax reliefs, loss of charitable status by organisations such as NLS raises much wider issues of the principles on which much philanthropic support is based. A number of major cultural projects in Scotland have come about as a result of successful public/private partnership for capital funding. The realistic prospect of private sector support is an essential requirement in order to lever public and lottery funding. However, without charitable status the vast majority of private contributions would not have been forthcoming. Trusts and Foundations largely restrict their donations to charitable bodies. Individual donors are exceedingly reluctant to give to non-charitable public institutions.

**Consequences of the Bill’s Enactment**
NLS believes that removing charitable status from national cultural institutions will not serve the public benefit. It will mean that either these institutions lose millions of pounds in charitable giving and tax reliefs, resulting in a poorer service to the public, or that they are replaced by independent but far less accountable organisations. Nor will it improve the cost effectiveness of government.

We believe that the Scottish public will be at a loss to understand why charitable status is being taken away from its national cultural institutions, particularly when so many people have given so generously to support them and at a time when the Scottish Executive has made a commitment to a new cultural vision for Scotland.

The national collections institutions have a unique role in Scotland. This role demands protection through unique status under law. They collect and preserve the national heritage, for the benefit of both current and future generations. They are not delivery agencies for government policy, like many other quangos, for whom charitable status is not appropriate.
Conclusion

NLS strongly believes that the public interest can best be served by enabling the national collections institutions to continue as fully accountable NDPBs, while retaining the charitable status that enables them to enhance the public benefit that they provide. We hope that a solution can be found to enable this to happen. We believe that there is a strong case for recognising the special status of the national collections institutions by specifically designating them charities under the legislation. We believe that provision should be made on the face of the Bill for the national collections institutions to maintain both their charitable and NDBP status.

Alexandra Miller
Director of Development & Marketing
National Library of Scotland
11 January 2005

WRITTEN EVIDENCE FROM NATIONAL GALLERIES OF SCOTLAND

The National Galleries of Scotland is pleased to have the opportunity to submit evidence to the Bill before the Communities Committee. NGS fully supports the broad principles of the Bill and welcomes the modernizing of charity law to ensure charities operate in the public interest and are properly regulated. NGS concerns are with regard to the impact the Bill will have on Scotland’s National Collections Institutions, primarily The National Galleries of Scotland, The National Library of Scotland, The National Museums of Scotland, The Royal Botanic Gardens – Edinburgh and the Royal Commission of Ancient and Historic Buildings

The Charity Test: Charitable Purposes and Public Benefit

With the independence principle being a key part of the charity test, the charitable status of NGS would be affected. As currently constituted NGS would not be able to pass the charity test of independence as set out in Clause 7(3) of the Bill because Ministerial direction would be deemed, under the Bill as drafted, ‘to permit a third party to direct or otherwise control its activities’

We would like present the case that the public benefit is best served if these national institutions remain as NDPBs with charitable status and that a solution is found whereby the National Collections Institutions could be designated as special charities under the legislation.

Benefits of NDPB Status

- NDPB status creates a higher standard of accountability and transparency for the public. NGS as a public body is subject to regular scrutiny through government accounting, requirements of public sector corporate governance, the Parliamentary process, Performance and Financial Management Reviews, Best Value, Freedom of Information and other mechanism. This creates a level of accountability and transparency which is simply not in place for the private sector or independent charities.
- The inalienability of the collections and buildings are protected by NDPB status. They remain in the ownership of the Scottish people. Many donors have give works of art to NGS because they wish for them to be part of the nation’s collection to be held in trust for posterity.
- Government indemnity for the collections makes them accessible to everyone, despite being extremely valuable. If commercial insurance rates applied the costs would be prohibitive and the access of the public to fine art would either be severely restricted or works of art would be put at risk. International loans are also covered by government indemnity. For example this allowed NGS to borrow from 12 countries for the Monet exhibition. This exhibition attracted record numbers of visitors, over 170,000, and would not have been possible without government indemnity.
- Free access to the collections for all members of the community is protected by NDPB status. The funding received from the Scottish Executive as an NDPB creates the financial security which enables free access to be sustained.
**Benefits of Charitable Status**

- Very successful public/private partnerships can be built up. The recently completed Playfair Project raised £30 million, with £10m from the Scottish Executive, £7m from the Heritage Lottery Fund and £13 million from private sources. This has resulted in a refurbished RSA building and a new Link Building to create one of the most comprehensive visual arts complexes in Europe. It was the most successful fundraising campaign for a cultural project in Scotland. NGS believes that the public/private partnership approach will be critical in generating additional resources for the cultural sector in the next 30 years in Scotland. To remove charitable status would create a major barrier to expanding private support.

- Individual citizens have an opportunity to philanthropically support institutions of national importance and can ‘give something back’. This not only includes major philanthropists but also more modest donors. We had 2,000 donors supporting the Playfair project and 2,500 Friends of the Gallery. This kind of support strengthens the civic community in Scotland.

- We attract funds from outwith Scotland. We raised significant funds from far away as USA and Hong Kong. Over £3 million was raised overseas for the Playfair Campaign. This is largely from individuals wishing to retain links from Scotland and to support Scottish culture. These supporters play an important role in being ambassadors for Scotland.

- Being part of the charity sector brings non-financial benefits – varying from volunteer activity, access to charity networks, training opportunities for staff. We have an active volunteer programme supporting activities at the Galleries. The very act of fundraising encourages a culture of reaching out, building partnerships to further the vision of the institution. For example we recently won a charitable grant to work with the Pensioners Forum on an advocacy project involving the visual arts.

**OSCR and the Regulation of the Charity Sector**

It is possible for OSCR to regulate charities that also have NDPB status. In principle, there need be no conflict between the regulatory bodies by maintaining the status quo. The National Collections Institutions are *answerable* to the Scottish Executive (i.e. through the boards of trustees they are held to account for their operational practices, expenditure, strategic policy etc) and are *regulated* by the charities regulator (i.e. OSCR will regulate fundraising, accounts, and other standards etc). NGS believes that is perfectly feasible to operate under the two regulatory frameworks of the Scottish Executive and OSCR.

**Comparison with England and Wales**

A workable solution has been found for national museums and galleries in England and Wales which faced similar difficulties when the English Charities Bill was introduced. The proposed legislation for England and Wales allows the national cultural institutions to retain charitable status as exempt charities regulated by the Department of Culture Media and Sport.

It is important that the Scottish national institutions remain on a level playing field with the rest of the UK. We are all competing with to deliver capital developments, acquisitions and philanthropic support with a view creating institutions of international excellence. By putting Scotland at a disadvantage with England and Wales we will see funds and support going elsewhere. In the longer term, this will not only undermine our ability provide the very best of culture in Scotland, it will impact on our ability as a tourist destination and as a major business centre in Europe.

**Governance**

NGS as a NDPB body has a Board of Trustees, appointed by the Scottish Executive, responsible for the strategy and management of the organisation. All NGS Board members are voluntary and do not receive any remuneration. Without NDPB status, (with associated public indemnity for art and buildings, inalienability of the collections) NGS believes it would be difficult to find high quality volunteers prepared to take on the potential liabilities of the organisation, which would be enormous and complex.

At the present time vacancies on the Board are advertised and appointments are subject to the Nolan procedures. An independent body would be essentially self-governing and at least some of those who make up such an independent body could be self-selected.
To become an independent charity would require a fundamental change to the mission of the institution. For example, it may be necessary to become a membership organisation similar to the National Trust.

Fundraising

Fundraising provides the means for the national institutions to move forward with visionary plans to compete on the international stage. In the National Galleries fundraising has been important to the recent Playfair Project and acquiring new works of arts. The £13 million raised by the Playfair project would not have been raised without charitable status because:

- Many charitable trusts only give to charitable organisations; £8 million came from charitable trusts, including significant sums over £4.5m from outwith Scotland.
- Many individual and corporate donors will only give to a charity. This is partly because of the gift aid tax relief, but also of a strongly held view that charitable giving should go to registered bodies.

Our fundraising has played an important part in leveraging funds for acquisitions of international stature and making them available to the people of Scotland.

For example:

- The Three Graces by Canova was bought between the V&A and NGS. It cost £7.7 million. The two institutions put £2.2 million of their own funds with the rest being raised from heritage funds and charitable gifts.
- The Botticelli Purchase by NGS cost £15 million. We put up £500,000 with the rest being paid for by tax concessions, heritage funds and charitable gifts.

The gifts play a crucial role in helping to lever the funds to make such acquisitions.

The loss of charitable status may reduce our ability to lever such funds and may make the crucial difference between success and failure in such bidding scenarios.

Fundraising is playing a vital role in developing the strategy of not having just one funding provider i.e. the Scottish Executive. At NGS we are in the early stages of developing a sustainable philanthropic programme which supports revenue as well as capital projects. NGS has invested in its fundraising activities, setting up a professional Development Office to follow on from the success of Playfair. It is an area of huge potential. We aim to build a network of donors all over the world supporting Scottish culture. Taking away charitable status at this point will largely mean this potential will never be tapped.

A further consideration will be the loss of tax relief which arises due to NGS status as a charitable body. For example in the Playfair fundraising campaign resulted in £400,000 of gift aid. We receive a further £400,000 in property tax relief.

Consequences of the Bills Enactment.

The implications for the NGS and the other national institutions of having to chose between being an NDPB or a charity will have a profound affect on the institutions and change them forever.

We have briefly explored a compromise solution of having NGS be an NDPB with an independent charity supporting our activities. This raises profound issues about control and strategic direction when talking about raising millions of pounds to support long term projects. A separate charity may work at the margins to bring in some philanthropic support, but our overall development programme would be severely hampered.

Conclusion

It is the strongly held view of NGS that the best way forward is to allow the National Collection Institutions to retain their NDPB status and charitable status. We believe it is in the public interest for NGS to be regulated by the OSCR in all charitable matters, while remaining accountable to the Scottish Executive and Scottish Parliament. We believe there is a strong case for recognizing the special status of the National Collections Institutions by specifically designating them charities under the legislation.

Catrin Tilley
Director of Development
WRITTEN EVIDENCE FROM ROYAL BOTANIC GARDEN EDINBURGH

The Royal Botanic Garden Edinburgh is pleased to have the opportunity to submit evidence on the Bill to the Communities Committee.

The Charity Test: Charitable Purposes and Public Benefit

RBGE fully supports the broad principles of the Bill and welcomes the modernisation of charity law in Scotland, ensuring charities operate effectively and are properly accountable and regulated.

Charitable Purposes and Public Benefit

RBGE is not only one of the oldest and most beautiful Botanic Gardens in the world but also contains one of the largest and most scientifically important plant collections. Through a world-renowned programme of science, education, art and conservation we aim to encourage the enjoyment, understanding, protection and exploration of plants. RBGE cares for botanical research and collections of national and international importance, which are held in trust for the people of Scotland. While the organisation receives public funding from the Scottish Executive to maintain public access to these collections, it also receives generous private support from both personal and corporate donors. Such private support funds education programmes and exhibitions and plays an important role in the major development projects essential to ensure that Scotland’s national collections are displayed and interpreted to standards which are comparable with the world’s best. All of these are core charitable purposes, providing clear public benefit.

NDPBs and Charitable Status

RBGE is a non-departmental public body (NDPB) with charitable status. Under its founding legislation it is governed by a Board of Trustees who are appointed by Ministers. Under current interpretation RBGE would not pass the Charities Bill’s test of independence set out in Clause 7 (3) and would, therefore, lose charitable status.

This would have an enormous financial impact in terms of its ability to raise funds through charitable giving and to receive charitable rate and tax reliefs. As can be seen below, under Fundraising, RBGE estimates it would lose from 10 to 20% of turnover. There is also the potential for the loss of many millions of pounds of public sector support for capital projects. Without private sector support to partner public funding, these projects would simply not be viable.

RBGE believes the public interest can best be served by the national collection institutions remaining as publicly accountable NDPBs, while retaining charitable status. We believe consideration should be given to a solution whereby the national collections institutions could be afforded retention of their charitable status under the legislation, in a similar way to comparative organisations in England & Wales.

The Relative Position of RBGE in Comparison with Institutions in England and Wales

The Bill raises serious concerns over the position of Scotland’s cultural institutions in relation to those of England and Wales where, under proposed charities legislation, the national cultural institutions will retain charitable status and will be regulated by their relevant Government Department. As tax is not a delegated issue, this is not an option here and the current draft of the Scottish Bill will, if un-amended, place institutions at a distinct competitive disadvantage to their English and Welsh counterparts. While the British Museum; the National Gallery; The Royal Botanic Gardens, Kew; the British Library and the Science Museum will drive forward visionary plans, raising millions of pounds of philanthropic support, Scotland’s national cultural bodies will be deprived of support through charitable giving.

If RBGE loses charitable status and no alternative arrangement is put in place there can be little doubt the philanthropic support currently enjoyed will be directed elsewhere. This will not only undermine its ability to perform core duties as custodian – and champion - of our cultural heritage, it will impact on the attractiveness of Scotland as a major European tourist destination and business centre.
OSCR and the Regulation of the Charity Sector

The Bill argues that independence of charities is crucial as it allows for regulation through OSCR and ensures full transparency and accountability. However, there is the view that NDPBs cannot be independent because they are subject to direction by Ministers. Therefore, it should be made clear:

- NDPBs are accountable to Ministers and, as public bodies are subject to regular scrutiny through Government accounting mechanisms, this demanding framework establishes a level of public accountability and openness exceeding any structure in place for the private sector or independent charities.

- NDPBs could continue to be answerable to Ministers and Parliament, as public bodies, while also being regulated as charities by OSCR. While clear direction would be required on the powers and responsibilities of OSCR in respect of charitable NDPBs, some agreement on dual reporting could be found to provide suitable accountability and avoid conflict of interest. A workable solution has been found in England and Wales, where the national collections faced similar difficulties at the introduction of the English Charities Bill.

Fundraising

Loss of charitable status has huge implications for RBGE’s ability to raise funds from the private sector and to optimise income through receipt of charitable reliefs. These are detailed below (all figures relate to 2003/04 unless otherwise specified):

RBGE will lose charity exemption on property rates, being currently £0.2M across all its sites. This figure is expected to increase after revaluation.

It would be essential for the Scottish Executive to compensate RBGE for this loss through an equivalent adjustment to Grant-in-Aid. In principle, this would be budget neutral to the Scottish Executive, which would be able to recover from the block grant to Local Authorities. However, a mechanism would need to be in place to effect this.

Charitable Tax Relief – Revenue Fundraising/Gift Aid

Charitable tax reliefs are essential to encourage giving outwith capital campaigns. Last year RBGE received grants of over £500,000, which would not have been given without charitable status. RBGE and its supporters would lose a range of charitable tax relief. In addition, there would be a wider impact from the public reaction to RBGE no longer being a charity. This is likely also to affect support such as sponsorship in kind.

Specific losses are noted below:

- RBGE would not be able to enhance the value of donations made under Gift Aid, which increases the benefit by 28% at no cost to the donor. RBGE loss estimated at £80,000 in relation to this.

- Donors who pay higher rate tax (ie. those most capable of making significant donations) would not be able to claim higher rate relief through their self-assessment tax return.

- Gifts to RBGE (both lifetime gifts and legacies) would not be exempt from Inheritance Tax. Could cost on average around £200,000/ year+.

- A donor making a gift to RBGE in the form of shares would no longer benefit from Capital Gains Tax exemption and would not receive Income Tax relief of 100% of the market value of the donated shares.

Charitable Tax Relief – Capital/Campaign Fundraising

Charitable tax relief is essential to capital fundraising within the private sector for visionary capital development projects.
• The RBGE Gateway Project is a £13 million undertaking which will transform the West Gate into the hub of biodiversity communication in Scotland, while providing optimum public access; state-of-the-art learning centres and related amenities. The largest proportion of funds will be raised from the private sector, with the balance being sought from the Scottish Executive. Without charitable status it will be virtually impossible to raise private sector support and the project will be at risk, despite having already raised £1 million through private donations. For example:

  o At least £3 million will be applied for from Charitable Trusts. Most larger trusts will not give directly to organisations without charitable status.
  
  o At least £2 million would be sought through personal gifts. However, many givers are uncomfortable about giving to organisations which do not hold charitable status. Others prefer to give via their Charitable Trusts – a route which would be closed to them without charity status.

**Purchasing discounts**

Charitable tax reliefs on purchases make the difference between certain projects going ahead or not. A loss of charitable status would reduce our ability to acquire number of capital items with tax relief. Last year RBGE discounts on equipment of around £190,000.

**Consequences of the Bill’s Enactment**

RBGE believes removing charitable status from national cultural institutions will not serve the public benefit. These institutions will either lose millions of pounds in charitable giving and tax reliefs, resulting in a poorer service to the public, or they will be replaced by independent and less accountable organisations.

We believe that the Scottish public will be at a loss to understand why charitable status is being taken away from its national cultural institutions, particularly when so many people have given so generously to support them and at a time when the Scottish Executive has made a commitment to a new cultural vision for Scotland.

**Conclusion**

RBGE strongly believes that the public interest can best be served by enabling the national collections institutions to continue as fully accountable NDPBs, while retaining the charitable status that enables them to enhance the public benefit that they provide. We hope that a solution can be found to enable this to happen. We believe that there is a case for designating these institutions as a separate category of charity under the legislation.

Mike Robinson
Head of Development
Royal Botanic Garden Edinburgh
11 January 2005

**WRITTEN EVIDENCE FROM ROYAL COMMISSION ON THE ANCIENT AND HISTORICAL MONUMENTS OF SCOTLAND (RCAHMS)**

**The Charity Test**

Under the bill as drafted, it appears that the charitable status of the Scottish National Collections Institutions, including the Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) (along with The National Galleries of Scotland, The National Library of Scotland, The National Museums of Scotland, and The Royal Botanic Gardens – Edinburgh) is likely to be affected. RCAHMS would not pass the ‘independence’ aspect of the charity test set out in Clause 7(3) of the Bill. Clause 7(3) states that a body will not meet the charity test if its constitution would “permit a third party to direct or otherwise control its activities”.

The RCAHMS Commissioners are appointed by The Queen with the approval of Scottish Ministers. This third party control would mean that RCAHMS would not meet the charity test.”
Loss of charitable status would have a serious impact on our work and serious financial implications.

Current status

The Royal Commission on the Ancient and Historical Monuments of Scotland (RCAHMS) was set up by Royal Warrant in 1908 to create an inventory of all monuments and buildings of historical interest in Scotland. Many other responsibilities have been added since that date, the most significant of which was the establishment of the National Monuments Record of Scotland (NMRS) in 1966. The NMRS is now one of Scotland’s National Collections, curating over 6 million items and answering each year more than 15,000 enquiries directly and 100,000 enquiries remotely through its online database and catalogue.

A revised Royal Warrant was issued in 1992 to reflect the many additional functions for which RCAHMS is now responsible all of which are undertaken in the public interest and for the public benefit.

Through its arm’s length position from government and the clear public benefit of its functions, RCAHMS was also granted charitable status in 1992. The financial impact of loss of charitable status would be a loss of revenue of approaching £0.5 million a year (over 15% of RCAHMS turnover)

Reviews of RCAHMS status and functions

The functions of RCAHMS were subjected to a most thorough Policy and Financial Management Review (PFMR) in May 1999. The Review concluded that the performance of RCAHMS over the last decade was difficult to fault and that there was a continued need for its work.

In 2001, RCAHMS was further investigated as part of the Review of Public Bodies. The Review recommended that the functions of the RCAHMS should remain the same but that they should be transferred to a new body ( provisionally named the National Survey of Archaeology and Buildings), which would be a ‘national statutory body’. This new body has not been established and RCAHMS is still operating under the 1992 Royal Warrant.

Benefits of NDPB Status

NDPB status creates a high standard of accountability and transparency for the public.
Commissioners have adopted the Code of Conduct for public appointments issued by the Scottish Executive.
As a public body we are subject to The Freedom of Information Act.
The inalienability of the collections are protected – they remain in the ownership of the Scottish nation Government indemnity for the collections makes them accessible to everyone, despite being extremely valuable. Commercial insurance rates would be prohibitive for an organization of our size.
Free access to the collections for all members of the community is protected by NDPB status.

Benefits of Charitable Status

The RCAHMS with its research profile and charitable status is an attractive and eligible recipient for grants, partnerships and subsidy by a wide range of non-government organisations in addition to government bodies and educational institutions.

RCAHMS believes that charitable status significantly assists our ability to maintain our status as one of the world’s leading centres of excellence for the heritage, particularly in the field of the online delivery of information through Canmore, Pastmap and our joint venture (SWISH) with our sister body in Wales, RCAHMW. These initiatives are dependent on our charitable status not only for discounts on capital equipment and software licensing but because our charitable status allows us to share best practice and provide shared services for others in the delivery of similar information (eg. Historic Scotland, Local Government Sites and Monuments Records) where their own status would seriously inhibit their own cost-effective services.

RCAHMS benefits from manufacturers discounts, eg. on camera and scanning equipment, and, in particular, on ICT hardware and software, in some cases attracting up to 100% discount on software
licences. There is no question that highlighting charitable status at the negotiating stage for software and other ICT services is effective in reducing costs, either with an official 'charitable reduction scheme', or in assisting the case for other reductions or simply for gaining small advantages such as assistance in kind. The amount saved varies from year to year depending on our ICT refresh strategy, but is in the region of £100,000 in the current year.

Individual citizens have an opportunity to philanthropically support charitable institutions of national importance. Gifts of archive to our National Collection can be individual photographs or large collections. A recent example is the outright gift of the Basil Spence Archive to RCAHMS by an individual donor. This archive, comprising 38,000 items is of considerable value to Scotland and has attracted a grant of £975,000 from the HLF to catalogue and conserve it and make it available to the public through exhibitions, and over the internet. The loss of gift aid reliefs and the fact that individuals may be reluctant to make gifts to a non-charitable arm of government could have a significant impact

Being part of the charity sector brings other benefits. A volunteering programme supports activities at RCAHMS, while our education and outreach initiatives support both formal and lifelong learning, an area in which public benefit is visible and paramount. The perception of the organisation as part of the charity sector sends a positive message to those partners and the public with whom we wish to engage more fully.

Governance

RCAHMS currently has 9 (unpaid) Commissioners and a Chairman who are appointed by the Queen with the approval of ministers, through the Commissioner for Public Appointments in Scotland. While RCAHMS carries out its duties responsively to the needs of the Scottish Ministers it remain at arm’s length from government.

During the Review of Public Bodies in 2001, RCAHMS undertook a study of the implications of losing NDPB status and becoming an independent trust of some kind. The consequences of the transfer of pension and employment rights were evaluated as was the loss of public indemnity for the collections. It was considered that the cost of such an undertaking would be unrealistic, would undermine the public benefit currently provided to the Scottish nation and it would be difficult, if not impossible, to find high quality volunteers prepared to take on the potential liabilities of the organization as Trustees. Additionally, such an independent body would be self-governing and self-selecting and would not be subject to the same degree of accountability as exists at present.

Fundraising

Fundraising provides the means for the National Collections Institutions to move forward with visionary plans. Very successful public/private partnerships can be built up. Many charitable trusts only give to charitable organisations. RCAHMS potential development of its future vision, includes, amongst other things, a major building project. The £12m funding allocated by the Scottish Executive will provide a much needed store for RCAHMS, but the intention is to use these funds to lever considerable additional funding – only possible if RCAHMS retains charitable status. This will allow the construction of a better facility for the national collection held by RCAHMS and the expansion of our educational and outreach capability.

Consequences of the Bills Enactment

The loss of charitable status in a climate where Charities are regulated, will send a strongly negative message to those partners and the public with whom we wish to engage more fully. It will have a profound affect on the institutions and change them forever.

It is our strongly held view that the best way forward which maximizes public benefit is to find a solution which allows the National Collections Institutions to retain their NDPB status and charitable status. We suggest that a solution be considered whereby the National Collections Institutions are given special charitable status under the proposed legislation. We would urge the Community Committee to find a way to achieve this.

Diana Murray
Secretary
WRITTEN EVIDENCE FROM UNIVERSITIES SCOTLAND

Introduction

Universities Scotland is the representative body of all 21 higher education institutions (HEIs) in Scotland. All of our member institutions (with the exception of the Open University in Scotland which comes under the charitable status registration in England of the Open University) are registered as charities in Scotland and therefore fall under the remit of the Office of the Scottish Charities Regulator (OSCR). Universities Scotland has therefore closely followed the development of the Charities Bill and has made submissions to Ministers and through the Scottish Executive's consultation process. We have also had informal discussions with the Bill team and with OSCR, and have submitted evidence to OSCR's consultations, launched in August and July 2004, respectively, on the proposed Monitoring Programme and on the draft Charities Statement of Recommended Practice (SORP). There were a number of areas in which we had concerns or sought clarification, and those are outlined below. In general, we now feel reassured on those areas of concern and are therefore generally content with the Bill as it stands. The main issue on which we would still like clear reassurance is on the issue of accountability/regulatory burden, and this is discussed below along with three other areas of interest to us.

Charity test and definition of public benefit

The higher education sector is content that Section 8, public benefit, seems clear enough but flexible enough to cover the non-commercial activities of higher education institutions. It has been noted that 'academic research' is not specified as a 'charitable purpose' in subsection 7(2). However, given that the Bill does define "the advancement of education, health, arts, heritage, culture, science, environmental protection and improvement, animal welfare" as 'charitable purposes', we are confident that academic research activities are covered.

There is some issue about aspects of higher education activity which are commercial in nature. However, these are generally carried out by separate companies and not under the parent body's charitable status and we therefore do not consider this to be a problem.

Governance

Universities Scotland and the Committee of Chairs of Court of Scottish High Education Institutions (which represents the governing bodies of institutions) initially had some concerns on how the draft legislation would affect liability of lay members of governing bodies. However we feel that the Bill as revised subsequent to the consultation process has addressed those issues and we are now content with the legislation as it stands. The Chairs of Court in particular welcomed the measures to allow redundant trusts to be reorganised or to have their financial resources applied otherwise.

Charitable bodies which fund research

One of the major concerns which higher education institutions had about the draft legislation was the potential effect it might have on charitable bodies which fund research in Scottish HEIs. For example, many medical research charities fund research in Scotland and this income is important in maintaining Scotland as a centre of excellence in medical research. The concern was that if funding activity in Scotland was considered to be 'operating' in Scotland then these charities (many of which are large international charities) might be obliged to be regulated separately in Scotland with the attendant bureaucracy. It was feared that this might have a deterrent effect on such charities funding research in Scottish HEIs. However, we have received assurances from the Minister that this will not be the case, and the Wellcome Trust and Association of Medical Research Charities (between them representing the biggest funders) appear content with the proposals in the Bill for OSCR’s duty to cooperate with other relevant regulators. Universities Scotland is therefore also content.
Accountability/regulatory burden

This leaves one area in which we have slightly greater concerns. The higher education sector in Scotland receives large amounts of public funding and Universities Scotland of course recognises that member institutions should be held to account for the effective and efficient use of public money. However, HEIs are already subject to a rigorous accountability regime and undergo 17 separate monitoring processes, including internal and external audit, audit overview and quality and standards checking (details of these are available in a Universities Scotland briefing note which can be provided to the Committee). The Scottish Higher Education Funding Council (SHEFC) is the statutory regulator of the higher education sector. HEIs make a detailed annual accounts return to SHEFC using the Accounting for Further and Higher Education (F&HE) SORP which was published in 2003. The F&HE SORP is more specific to the activities of HEIs than the Charities SORP and therefore it is our view that the F&HE SORP is the appropriate standard under which HEIs should continue to report. The consultation document on the proposed Charities SORP, issued in July 2004, states, at paragraph 11:

‘This SORP is intended to apply to all charities in the United Kingdom regardless of their size, constitution or complexity. It provides the basis for the preparation of accruals accounts to give a true and fair view. However, where a separate SORP exists for a particular class of charities, the trustees of charities in that class should adhere to that SORP.’

Were HEIs to be required to submit a duplicate accounts return by way of a proposed Charities SORP to OSCR, we do not believe that they would be any more accountable than they already are. However, it would lead to a significant increase in the administrative burden to institutions.

The Bill appears to recognise this point. Section 20 (i) of the Bill states that “OSCR must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators”. Section 45 (5) states that “Regulations under subsection (4) may make different provision in relation to different types of charity, including provision exempting charities of a particular type from some or all of the requirements of this section”. The combination of these powers enables OSCR to cooperate with an existing regulator and exempt categories of charities from producing accounts by way of duplicate SORPs where OSCR is confident that an existing SORP holds those charities to account to an acceptable level. The consultation paper on the monitoring programme issued by OSCR in August 2004 states that:

‘We plan to bring all Scottish charities into the return system, but it may be possible to agree a joint process with other regulators, for example Communities Scotland. We will work with Communities Scotland and other regulators on protocols that may permit them to forward database information to us in order to complete our sector statistics, and we will work jointly on issues of common concern.’

Universities Scotland is not seeking changes in the Bill as we believe that it contains the powers required to avoid unnecessary duplication of administration relating to accountability. We do not wish SHEFC to become the charities regulator for the sector, a role which we do not believe is appropriate for the funding body. However, we do not wish OSCR to require a duplicate SORP from HEIs. We would suggest OSCR derogate its monitoring function to SHEFC where that monitoring already takes place. Universities Scotland has had informal discussions with OSCR and OSCR has indicated that it is sympathetic to any proposal which will ensure adequate regulation and monitoring without increasing administrative burden. So while the sector has some remaining concerns in this area, they relate primarily to how the powers in the Bill are used and not with the powers themselves. We would welcome a clear Ministerial statement indicating that the OSCR should avoid placing an unnecessary burden on categories of charity which are already closely publicly regulated.

Robin McAlpine
Universities Scotland
19 January 2005
WRITTEN EVIDENCE FROM ASSOCIATION OF SCOTTISH COLLEGES

Introduction

ASC welcomes the opportunity to contribute to the Committee’s Stage 1 scrutiny of the Charities and Trustee Investment (Scotland) Bill. We are also pleased that the Committee has invited us to give oral evidence on Wednesday 19 January.

The Association of Scottish Colleges (ASC) is the policy and representative voice of Scotland’s Colleges of Further and Higher Education. For further information on the work of ASC and Scotland’s Colleges please see Annex A.

We have also attached for your information a copy of the letter that we sent jointly with Universities Scotland to Malcolm Chisholm MSP, Minister for Communities on 9 November 2004. This letter outlined our concerns at that stage regarding the draft Charities and Trustee Investment (Scotland) Bill. A copy of this is attached as Annex B.

Current charitable status arrangements for colleges

All of Scotland’s Colleges of Further and Higher Education are registered as charities in Scotland.

ASC formally responded to the Scottish Executive’s consultation on the draft Bill in 2004. ASC raised some concerns about how the draft legislation would affect the financial accountability of colleges and liability of members of boards of management. The Bill as revised has addressed those particular issues relating to governance of colleges.

Governance of Further Education Colleges

The legal framework of Boards of Management of incorporated college of further education is set out in the Further and Higher Education (Scotland) Act 1992. The composition and responsibilities of college Boards of Management is detailed in this legislation as amended.

Colleges are designated for funding by the Scottish Further Education funding council (SFEFC) which also lays down the accounting regime and monitors the financial security of colleges

Public funding is from the Scottish Executive is received as grant-in-aid through the Scottish Further Education Funding Council (SFEFC) and is subject to stringent financial regulation. SFEFC issues an Accounts Direction to all SFEFC-funded further education colleges. This requires compliance with SFEFC’s Financial Memorandum and conditions of grant-in-aid.

SFEFC directs that institutions comply with the Statement of Recommended Practice: Accounting for Further and Higher Education (SORP) in preparing their financial statements which have then to be returned and monitored by SFEFC.

Under the terms of the Public Finance and Accountability (Scotland) Act 2000 the Auditor General for Scotland is responsible for securing the audit of each incorporated college. This includes the total income and expenditure of each college (both public funds and commercially generated income).

Differences between the Scottish Bill and the draft UK Bill

The Scottish Parliament Information Centre (SPICe) Briefing Paper on the Bill includes a section on some of the major differences between the Scottish Bill and the draft UK Bill. ASC would like the Committee to consider how colleges in Scotland will be treated differently vis à vis their English counterparts under the two sets of proposed legislation.

Position in England

Schedule 2 of the Charities Act 1993, provides that further and higher education institutions are exempt charities “so far as they are charities” (i.e. where their purposes are charitable). ASC understands the UK Parliament at that time decided that further and higher education institutions were
already sufficiently safeguarding their property and did not require additional regulation. Accordingly the relevant funding council is the "principal regulator" for colleges in England.

There is no proposal under the new Charities Bill for England that this situation will change. Under the English legislation an exempt charity does not register with the Charity Commission for England and Wales.

**Effect of Bill in Scotland**

**Governance**
Governance structures in the further education sector and provisions in the proposed Bill effectively mean that members of Boards of Management will be the ‘charity trustees’.

**Accounting requirements**
Under the terms of Section 45 of the Charities and Trustee Investment (Scotland) Bill, a charity will have to keep proper accounting records and have such independently examined or audited and after such examination or audit send a copy of the statement of account to the Office of the Scottish Charity Regulator ("OSCR").

Under Section 45 (4) the Scottish Ministers may, by regulation, make provision regarding the methods and principles according to which and the time by which the statement of account is to be prepared. The Scottish Ministers may make different provision in relation to different types of charity, including provision exempting charities of a particular type from some or all of the requirements of this section.

As currently drafted, there is no provision in the Scottish Bill for colleges to be exempt from Section 45. The Policy Memorandum relating to the Bill notes that "it is intended that the accounting regulations will be more compatible with the Statement of Recommended Accounting Practice for charities" (page 9).

As currently drafted, there would appear to be a legislative anomaly in that colleges in Scotland will be required to submit accounts to both OSCR and also to their relevant funding body. This is different to the situation in England where the relevant Funding Council is the principal regulator.

Under the terms of the Public Finance and Accountability (Scotland) Act 2000 the external audit of colleges is secured by the Auditor General for Scotland who then lays the published annual accounts of each college before the Scottish Parliament. This process ensures independent audit and high-level parliamentary and public scrutiny of the accounts of colleges.

It is clear that robust audited financial statements for their entire financial operations are therefore already returned by the college sector and open to public scrutiny.

**OSCR and the Regulation of Bodies with Charitable Status**

ASC supports the principal aims of the draft Charities and Trustee Investment (Scotland) Bill, namely the regulation of fundraising, and safeguarding of funds, raised from the public for charitable purposes. ASC also supports the provision of a basic framework to safeguard the public interest and ensure proportionate regulation of bodies benefiting from charitable status.

**The Charity Test**

ASC understands that OSCR intends to review the Scottish Charities Register and seek information from charities to ensure they fit the proposed new definition of charitable purposes.

ASC welcomes the inclusion of ‘advancement of education’ as one of the thirteen criteria of the new ‘charity test’ and the requirement that OSCR must issue guidance on the charity test. ASC expects that Scottish colleges will readily satisfy the proposed new definition.
Financial Oversight

ASC has concerns with some aspects of the proposed legislation, in particular the possibility of dual and/or multiple regulation by the Office of the Scottish Charities Regulator (OSCR) and the Scottish Further Education Funding Council (SFEFC). There is a potential for overlap with the existing governance and accountability regimes that exist for colleges as set out in the Further and Higher Education (Scotland) Act 1992 and the Public Finance and Accountability (Scotland) Act 2000.

ASC recognises that the college sector is not unique among bodies subject to the proposed Bill, in being subject to existing sector-specific legislation and accounting regulation. ASC is concerned however, that the Bill does not take into account the existing checks and regulation procedures on the further education sector.

ASC welcomes the inclusion of Section 20 (Co-operation) in the draft Bill. This imposes a duty on OSCR to ‘seek to secure co-operation between it and other relevant regulators’. There appears to be no corresponding provision for ‘other relevant regulators’ to co-operate with OSCR.

ASC considers that the Bill should include a provision to recognise existing financial accountability processes applicable to Scottish colleges. It is not clear whether SFEFC falls within the definition of ‘other relevant regulators’. ASC considers that SFEFC should fall within this definition.

ASC considers that since there are existing robust accountability checks and audit processes by SFEFC and the Auditor General for Scotland, these should be acceptable to OSCR. Colleges wish to avoid unnecessary and uneconomic duplication of accounting in different formats to different regulators.

As far as possible the existing SFEFC Financial Memorandum, FE SORP and audit arrangements under the Public Finance and Accountability (Scotland) Act 2000 should be the starting point of any regulatory process of OSCR in relation to the further education sector.

ASC favours OSCR accepting the same level of accounting as is required to be returned to SFEFC. No divergence in standard and format of accounting information should be required of the sector for OSCR’s purposes.

Current consideration

ASC’s main unresolved concern is that the new regime may create unnecessary and costly additional financial cost and staff time burdens both for colleges and for OSCR. This would be manifest principally in the form of extra and unduly onerous accounting procedures.

This could have the effect of diverting resources (both financial and staff time) away from the delivery of education and training to the 500,000 students that Scotland’s colleges serve each year. It would also conflict with the Scottish Executive’s desire to reduce unnecessary bureaucracy in the public services (as outlined in the Efficient Government Initiative).

ASC’s view is that problems of overlapping jurisdiction should be resolved by co-regulation (collaboration between regulatory agencies) and that repeat or re-regulation is avoided.

ASC is engaged in discussions with the Scottish Executive on ways of avoiding re-regulation of college accounts. Possible courses of action would be:

(A) Adopting an approach as in England where colleges would be exempt from the Bill and covered wholly by their principal regulator (i.e SFEFC) instead;

OR

(B) Maintaining OSCR’s role in determining the charitable status of each college but devolve the regulation and monitoring of compliance to SFEFC (as principal regulator).

OR
Communities Committee, 1st Report, 2005 (Session 2) - ANNEX D

(C) Maintaining OSCR’s role as set out in the Bill however but ensuring that the accounts information OSCR requires from Colleges concords with that already provided to SFEFC and the Auditor General for Scotland.

Further Information

Chief Executive: Tom Kelly
Public Affairs Adviser: Mark Cummings
Policy Adviser: Neil Cuthbert

Association of Scottish Colleges
12 January 2005

Annex A

About the Association of Scottish Colleges (ASC)

ASC is the policy and representative body for Scotland’s colleges of further and higher education. We work with colleagues in the Scottish, UK and European Parliaments, Scottish Executive, Scottish Funding Councils for Further and Higher Education, Scottish Enterprise and all other relevant public and private organisations, such as Universities Scotland, NUS Scotland, COSLA, CBI, FSB Scotland and the Scottish Chambers of Commerce

ASC policy is approved by the Board of Director’s after consultation with our member colleges. ASC Policy is developed by the Executive Team in dialogue with our Principal’s Forum (who represent college Principals) and Chair’s Forum (who represent the Chair’s of college Boards of Management).

About Scotland’s Colleges

Scotland’s 46 colleges are the lynchpin of lifelong learning. Colleges deliver both further and higher education, vocational training and skills locally to enable individuals, communities and businesses to maximise their potential, development and growth.

Colleges are the largest providers of post-compulsory education and training in Scotland, with almost 500,000 student enrolments each year. Scotland’s colleges employ over 22,000 staff and in 2002-03 had a sectoral turnover of over £516 million per annum.

Scotland’s system of further and higher education is a major and justly prized asset. Colleges make a much-valued and ever increasing contribution to providing sustainable and flexible learning opportunities for students. Colleges deliver a vast range of high quality teaching ranging from access, vocational and specialist academic courses through to Higher National (HNC/HND) and degree courses. These qualifications are at the heart of developing an effective and highly skilled workforce and driving entrepreneurial activity in Scotland.

For further information please refer to the following websites that will provide information on the work of ASC, the Scottish Further Education Unit (SFEU) and links to each of the 46 colleges in Scotland.

www.ascol.org.uk
www.sfeu.ac.uk

Annex B

Mr Malcolm Chisholm MSP
Minister for Communities
Scottish Executive
9 November 2004

Dear Minister

**Draft Charities and Trustees Investment (Scotland) Bill**

Universities Scotland and the Association of Scottish Colleges (ASC) are writing to you as the Minister responsible for the Charities and Trustee Investment (Scotland) Bill. Universities Scotland has already written to you, on 12 October 2004, highlighting particular concern relating to the funding of research by charitable bodies.

Universities Scotland and ASC fully support the principal aims of the draft Bill, namely the regulation of fundraising directly from the public by charities. Universities Scotland and ASC also support the provision of a basic framework to safeguard the public interest and ensure proportionate regulation of charities.

Universities Scotland and ASC each submitted a separate response to the Scottish Executive’s recent consultation on the draft Bill, indicating issues which caused both sectors concern. Our purpose in writing now is to draw your attention to important matters of mutual concern, in particular the possibility of dual/multiple accountability to the Office of the Scottish Charities Regulator (OSCR) and the Scottish Funding Councils, and the overlap with existing governance regimes.

**Regulation and Bureaucracy**

The sectors are concerned that the draft Bill may cause unnecessary additional cost, in the form of extra and unduly onerous bureaucracy. This conflicts with the Efficient Government Initiative and the need for ‘light touch regulation’ of well managed sectors.

Universities and colleges already comply with Accounts Directions and Statements of Recommended Practice (SORPs) appropriate to their operations and public accountability. Both universities and colleges are subject to rigorous external audit processes, and their financial accounts are open to inspection by Audit Scotland.

Accounts published and audited under these arrangements can – and do – provide OSCR with all the necessary assurances as to the financial health, and to the safeguarding of public and charitable funds, of the institutions. Imposition of separate accounting requirements for OSCR will be costly and otiose. Any necessary requirements for OSCR should be incorporated in the Accounts Directions and SORPs with which the institutions must comply.

The principle of ‘Proportionality’ whereby ‘charities with lower incomes are subject to less stringent information requirements than multi-million pound charities’ is likely to impact on large institutions, and the higher and further education sectors in general, despite the fact that the sectors are already well regulated.

The duty, imposed in the draft Bill on OSCR to ‘seek to secure co-operation between it and ‘other relevant regulators’, is welcomed. There needs to be a reciprocal duty on ‘other relevant regulators’. The Scottish Funding Councils have indicated a strong interest in the matter as the proposed legislation will impact on their regulatory duties.

**Governance**

The draft Bill proposes that members of governing bodies will be termed ‘charity stewards’. Eligibility criteria and the powers to remove ‘charity stewards’ in the draft Bill appear to conflict with existing specific legislation pertaining to governance in the higher and further education sectors. There is inconsistency with respect to individual and collective liability and culpability for ‘charity stewards’ which may deter competent people from serving on governing bodies.

**Conclusion**

We reiterate the full support of Universities Scotland and ASC for public accountability and secure financial records of bodies making use of charitable status. We believe there are unintended and unnecessary consequences of re-regulation by OSCR which can be avoided by simply using the
existing frameworks of accountability. Well managed co-regulation will be of benefit to OSCR, to the institutions, and to the wider public interest.

We understand that the Scottish Funding Councils share our concerns and that they plan to communicate their views to the Scottish Executive via their sponsor department.

We are sending a copy of this letter to Deputy First Minister Jim Wallace MSP as the Minister with responsibility for higher and further education in Scotland, and to the Chairs of the Higher and Further Education Funding Councils.

David Caldwell
Director
Universities Scotland

Tom Kelly
Chief Executive
ASC

WRITTEN EVIDENCE FROM INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND

The Charities Working Party of the Institute of Chartered Accountants of Scotland ('ICAS') welcomes the opportunity to respond to the call for evidence by the Communities Committee of the Scottish Parliament on the Charities and Trustee Investment (Scotland) Bill as introduced.

We welcome moves to develop an effective regulatory regime for charities in Scotland including the establishment of the Office of the Scottish Charity Regulator ('OSCR') and support the open way in which the consultation process has been conducted.

Under the Bill as introduced, OSCR's powers are considerable and wide ranging and we are concerned that the level of funding available to OSCR may not be sufficient to meet the demands placed on it by the forthcoming legislation. Therefore, we urge that OSCR is adequately resourced to monitor and supervise charities effectively.

Our detailed comments are included under the following main headings:

- establishing a statutory charities’ regulator in Scotland
- the charity test: charitable purposes and public benefit
- inquiries and appeals pertaining to the charity test
- charity accounts and accounting regulations
- the right and duty of auditors etc to report to the regulator
- the remuneration of charity trustees

Establishing a statutory charities’ regulator in Scotland. (Chapter 1 and schedule 1)

We are generally happy with the functions of OSCR. In our response of September 2001 to the recommendations of the Scottish Charity Law Review Commission, we recommended that a charity regulator should not have the dual role of providing an effective support system for charities and protecting the public interest by providing an effective regulatory system. However, we accept that OSCR’s dual role provides a practical solution to regulation in Scotland.

We support the establishment of OSCR as a body corporate in the form of a non ministerial department, and we believe that OSCR should be, and be seen to be, independent from government. We are concerned that the role of the Scottish Ministers in determining the maximum number of members OSCR should have and in determining who should be appointed as members, apart from initial appointments, could give the impression that OSCR is not sufficiently independent from government. The appointment by OSCR of its own members will reinforce OSCR’s role as an independent regulator of the charity sector acting in accordance with legislation enacted by the Scottish Parliament.
The charity test: charitable purposes and public benefit. (Chapter 2, sections 7, 8 and 9)

The charitable purposes and the charity test set out in the Bill as introduced are not entirely consistent with the proposed approach in the Charities Bill for England and Wales as introduced to the Westminster Parliament. Whilst we recognise the potential for different interpretations to emerge after the Bills become law, we strongly believe that the starting position should be the same so that the risk of charitable recognition and the related tax benefits being more favourable in one jurisdiction than the other is eliminated within primary legislation. The creation of a level playing field throughout the UK is necessary to prevent legislation influencing a charity’s choice of location to the detriment of individuals and communities which benefit and may benefit in the future from services provided in a jurisdiction where the charity test is more onerous.

OSCR guidance
We support the provisions at section 9 which require OSCR to issue guidance on how it will determine whether an organisation meets the charity test. However, we recommend that the guidance also covers how OSCR will determine whether an organisation provides or intends to provide ‘public benefit’ and that the Bill is clear on this point.

Bi-lateral arrangements
As certain tax matters are reserved, the Inland Revenue will retain the power to award certain tax related benefits to UK charities. This power could conflict with OSCR’s role in determining charitable status. Therefore disagreement with OSCR on the issue of charitable status is possible, and it is also undesirable on the grounds some charities could be disadvantaged through not being entitled to same tax related benefits as other charities. We recommend that, in awarding tax related benefits to Scottish charities, the Inland Revenue defers to decisions made by OSCR on charitable status. With this in mind, we would urge the Inland Revenue and OSCR to reach a memorandum of understanding on this matter and issue a formal statement making public the detail of such an understanding prior to the date the Act becomes effective.

Inquiries and appeals pertaining to the charity test. (Chapter 4, section 30)

We are satisfied that section 30 of the Bill provides charities with the opportunity to seek to rectify concerns OSCR has pertaining to the charity test, should their charitable status be in doubt. However, we have concerns about the potential harm to a charity’s reputation and ability to fund raise should its charitable status be in doubt. Therefore we recommend that consideration is given to if and when such investigations are made public, should the organisation itself is opposed to this. We recognise that a balance needs to be struck between the rights of grant providers and other donors to be aware of such investigations; and the needs of individuals and communities benefitting from the work of an organisation who would suffer if charitable status is or is likely to be withdrawn.

Consequences of the Bill’s enactment
Further clarification is required on when tax related benefits made available to charities by the Inland Revenue, by Local Authorities and by Scottish Water may cease in the event of an inquiry and subsequent appeals. This issue impacts on charities (a) where there is doubt over their ability to meet the charity test and (b) where there is a suspicion or accusation of wrong-doing. We are concerned that charities may lose their tax related benefits during an inquiry or appeals process or that decisions which are not favourable to organisation will be deemed to be retrospective. We also urge OSCR, the Inland Revenue, Local Authorities and Scottish Water to develop protocols to address this issue, prior to the effective date of the Act.

In order to minimise the impact of an inquiry on those benefiting from the work of a charity, we recommend that a presumption is established which does not allow tax related benefits to be withdrawn until an inquiry is concluded and/or the appeals process is exhausted; and that tax related benefits cannot be withdrawn retrospectively, unless a departure from the presumption can be justified in terms of the public interest.

Charity accounts and accounting regulations. (Chapter 6)

We understand that draft accounting regulations for Scottish charities will be published for consultation shortly. We support the inclusion in regulations of audit and examination thresholds for unincorporated
charities and Scottish charitable incorporated organisations (‘SCIOs’) as this mechanism allows greater flexibility to amend the thresholds when deemed appropriate. We recommend that over the longer-term Scotland aims for audit and independent examination thresholds for unincorporated charities and SCIOs which are consistent with England and Wales. However, we believe that the thresholds for charities which are not companies set out in the Charities Bill for England and Wales are currently too high for the Scottish situation, given that the regulatory regime in Scotland is new. Therefore, we would like to see lower thresholds initially for Scottish charities and transitional arrangements to achieve harmonisation as OSCR becomes more established, and in light of experience, for example over a period of five to ten years.

The right and duty of auditors etc to report to the regulator. (Chapter 3, section 25)

In our response to the consultation draft of the Bill, we recommended that a right and duty to report to OSCR was introduced for auditors, reporting accountants and independent examiners and that this right and duty should be couched in terms of any matters the auditor etc believes are within the scope of those matters which are regulated by OSCR. We welcome the inclusion at section 25 of provisions permitting auditors etc to disclose information to OSCR for the purposes of assisting or enabling OSCR to undertake its duties. However, we have a number of detailed comments on the drafting of these provisions and wish to highlight the need to give auditors etc who disclose information to OSCR, under the Act, legal protection for doing so thus enabling auditors to act in the public interest. We believe that affording auditors etc legal protection in this regard is essential, as disclosing information to OSCR represents a departure from the duty of confidentiality auditors etc normally have towards their clients.

- Section 25 (2)(d) refers to auditors and independent examiners but not reporting accountants. A reporting accountant is distinct from an independent examiner and provides an independent accountant’s report on the accounts of certain charitable companies which do not require an audit. The Companies Act 1985, section 249D sets out the criteria for being eligible to act as a reporting accountant. We recommend that this provision is updated to refer to reporting accountants.
- Clarification is required as to whether a person appointed to carry out an audit etc has a right or both a right and a duty to disclose information to OSCR. Section 25 (2)(d) does not make the position clear. We recommend that both a right and duty are introduced. We would like to see a duty to report being linked only to matters of material significance in the context of OSCR’s role and a right to report being linked to other matters which an auditor etc has reasonable cause to believe are likely to be relevant in the context of OSCR’s role.
- Protection from litigation for breach of trust or duty for persons carrying out the role of auditor etc is not explicit in the Bill. We believe that in order to make provisions on disclosing matters to OSCR effective, it is necessary to protect persons carrying out these roles from litigation for breach of trust or duty as a result of discharging a right or duty to report. There is also no provision stating that a person’s role is not compromised by exercising a right or duty under the Act, which we also recommend is included.
- We recommend that a right to report and corresponding protections under the law for breach of trust or duty are extended to cover auditors etc who have ceased to act in that capacity.
- We recommended that the provisions on the right and duty to report are extended to cover the affairs of any ‘connected’ institution or ‘connected’ body to the charity.

The remuneration of charity trustees. (Chapter 9, section 66)

We recognise that there are arguments both for and against remunerating persons who are ‘charity trustees’. On balance we favour the inclusion of provisions in the Bill which are consistent with the requirements of the Charities Bill for England and Wales, adapted as appropriate for Scotland. In particular, we welcome the inclusion of provisions in the Bill which:

- Prevent the payment of any remuneration to charity trustees if the founding documents of a charity prohibit this.
- Define what is meant by a person connected with a charity trustee.

However, it is unclear from the provisions whether or not a charity trustee can be remunerated for services provided in their capacity as a charity trustee. We do not support the remuneration of charity trustees for services provided in their capacity as charity trustees and recommend that this matter is
clarified in the Bill. We also recommend that OSCR issues guidance for charities and ‘charity trustees’ on the application of any legal provisions on the subject of remuneration prior to the date the act becomes effective.

We were delighted to accept the Communities Committee’s invitation to give oral evidence on this Bill and we look forward to the meeting on 19 January 2005.

Christine Scott
Assistant Director
Accounting & Auditing
Institute of Chartered Accountants of Scotland
11 January 2005

WRITTEN EVIDENCE FROM SCOTTISH GRANT MAKING TRUST GROUP

There is a very strong welcome from the Scottish Grant Making Trust Group (SGMTG) to the content of the Bill. They would like to bring the Committee’s attention to the different nature and contribution that Trusts and Foundations (T&Fs) play within the development of the voluntary sector in Scotland.

- It is important to underline that T&Fs are charities in their own right whilst they also give grants to charities and voluntary organisations.

- The current members of the SGMTG award grants to the value of £40m to charitable and voluntary organisations in Scotland.

- It is the hope of the SGMTG that the subsequent Act will help encourage philanthropy and grant making to charitable organisations in Scotland.

We would like to illustrate to the Committee the distinctive nature of being a grant making trust and/or foundations. T&Fs add something different to the funding and in some cases the innovative and long-term support of voluntary and charitable activities in Scotland. T&Fs may often be able to fund work that public bodies might not be able to support. Risky or marginally projects which have become mainstream have often been firstly funded by T&Fs e.g. in the fields of drug rehabilitation and for those with special needs or disabilities.

T&Fs often have distinctiveness in their ease of application, assessment and reporting procedures. Operationally this can make them appear from comments received (surveys, feedback forms and attendance at funding seminars) to be positively different to deal with compared to statutory funders. Beyond essential audit and compliance and taking care to see that they money was spent for the purpose for which is awarded, there is usually not too complex reports required of those organisations who receive grants from T&Fs.

Members of the SGMTG are aware that there is a case to be made for turning more of their information into shared knowledge e.g. improving evaluation methods for charitable organisations. Additionally, individual T&Fs have been developing mutual working relationships and with others e.g. Universities and the Scottish Executive.

We would like to bring to the Committee’s attention to the fact that there is a bigger prize to be achieved in both encouraging philanthropy and giving but also in encouraging UK Trusts to spend more of their finds in Scotland. A 1% increase in UK Trust’s (usually based in England) grant making into Scotland would represent £60m per annum to Scottish charitable and voluntary organisations.

In response to the main headline areas listed, we hope that the following comments are helpful in addition to our previous submission.

- The Charity Test and Public benefit. With regard to respecting the independence of Trustees for action, there maybe issues of encouraging philanthropy around interpretation of Section 7.3.b. re the independence of Trustees and third parties. This need to be worded in a manner that does not detract from the foundation and development of new grant making T&Fs.
• **OSCR and the Regulation of the Charity sector.** It would be helpful if Trusts and Foundations had comparable methods of registration in both jurisdictions e.g. OSCR and the Charity Commission. This should have the effect of encouraging UK Trusts to be more active in Scotland.

• **Governance.** While T&Fs accept that grant making is a risky business, the risk management of grant givers is different from those who operate public services. The consequences of the procedures as outlined being too strictly applied to Trusts and Foundations may inhibit the development of new services and programmes for often much marginalised groups and unfashionable causes.

• **Fundraising.** We welcome more rigorous management of fund raising by charitable organisations in Scotland.

Finally, we look forward to discussing these and other issues with the Communities Committee of the Scottish Parliament on the 19th January 2005.

Fraser Falconer
Chair of Committee
Scottish Grant Making Trust Group
12 January 2005
Scottish Parliament
Communities Committee
Wednesday 19 January 2005

[THE CONVENER opened the meeting at 09:37]

Charities and Trustee Investment (Scotland) Bill
(Witness Expenses)

The Convener (Karen Whitefield): This is the second meeting in 2005 of the Communities Committee. I remind all of those present that mobile phones should be turned off. Item 1 on the agenda concerns the Charities and Trustee Investment (Scotland) Bill and expenses for witnesses who attend the committee. The item relates to the payment of witness expenses under rule 12.4.3 of standing orders. The committee may arrange for the payment of expenses that are incurred by any witness who is invited to give evidence at a committee meeting.

The committee is invited to delegate to me, as the convener, the responsibility for arranging for the Scottish Parliamentary Corporate Body to pay any witness expenses that arise during the committee’s consideration of the bill. Members have received a paper that explains those points. Is the committee content with the proposal?

Members indicated agreement.

The Convener: It is agreed that the responsibility for deciding witness expenses is delegated to me, as the convener of the committee.

Christine Grahame (South of Scotland) (SNP): I pass on Linda Fabiani’s apologies for not being in attendance today. She is unwell this morning.

The Convener: Thank you for that, Christine.

Charities and Trustee Investment (Scotland) Bill: Stage 1

09:39

The Convener: Item 2 on the agenda concerns the Charities and Trustee Investment (Scotland) Bill. I welcome the first panel of witnesses. We are joined by Martin Meteyard, the chair of Co-operation and Mutuality Scotland, and Mark Ewing, a voluntary board member of Link Group Ltd, which is one of Scotland’s major providers of housing services and is a registered charity. Thank you for coming along today and for providing written evidence to the committee prior to your attendance.

I will start by asking about the Executive’s consultation on the legislative proposals. Did the Executive consult well? Were you included in the process? Has the Executive considered sufficiently the points that you made?

Mark Ewing (Link Group Ltd): I very much support the way in which the Executive has consulted on the bill. Having the opportunity to see a draft bill and the further information that was provided in the consultation document has been helpful to the sector. Certainly, the consultation generated considerable debate in the housing association, or registered social landlord, sector, both in individual organisations such as the Link Group Ltd and sector-wide organisations. I have gone through the bill that has been introduced to Parliament and a number of important issues that came through in the consultation process appear to have been addressed. The process was welcome.

Martin Meteyard (Co-operation and Mutuality Scotland): I echo that, particularly as I represent an organisation that is not traditionally part of the charitable sector, but which obviously has issues that overlap with what happens in the charitable sector. We were happy to be included at an early stage and to be invited to a meeting with the Executive before the bill went out to public consultation. Since then, the dialogue that we have had has certainly enabled us to start to identify issues relating to the bill and to re-examine our own purposes and their relevance in the 21st century.

Christine Grahame: Obviously, you are aware of the role of the Office of the Scottish Charity Regulator. We are all interested in whether OSCR should give advice and guidance to the charitable community, rather than being concerned only with regulation, auditing and so on.

Mark Ewing: I will kick off on that question. Creating a true regulator of the sector is an
important development and is welcome. Obviously, OSCR will have a key role in facilitating and enabling the sector in the future. As we have an RSL or housing association background, we are used to regulation from Scottish Homes and now from Communities Scotland. An important part of that regulation is the provision of guidance and support from the regulator, which has considerably benefited the housing association sector. It would be helpful to the charity sector in progressing its business if OSCR had a similar role.

I suspect that we will deal with public benefit later.

**Christine Grahame:** Yes. I ask you to—

**Mark Ewing:** I will hold back.

**Martin Meteyard:** I echo what has been said. It is always helpful if a regulator is seen not only as wielding a big stick, but as being there to help, support, advise and guide people through the process. Therefore, I would certainly welcome an extension of OSCR’s role beyond simply regulating.

**Christine Grahame:** Are you concerned that there might be a conflict of interest if the adviser is also the disciplinarian—if I can put things in such a way—and gives advice or guidance and then must be in a position of judgment?

**Martin Meteyard:** I can see that there might be conflict in certain circumstances, but that should not occur if the organisation is well run and well regulated.

**Mark Ewing:** Communities Scotland has fulfilled exactly those roles until now. It provides guidance and it can discipline—it has a regulatory and a monitoring function. It seems to be able to undertake both functions without undue conflict.

**Donald Gorrie (Central Scotland) (LD):** The Co-operation and Mutuality Scotland submission states that the organisation would like to explore further with the committee the complexities for co-operatives, mutuals and credit unions in respect of charitable status. For me and for other members, that might be quite a jungle. Will you steer me through it?

**Donald Gorrie:** I am sure that everyone around the table thinks that credit unions, co-operatives and so on are useful parts of society, and would be unhappy if a well-intentioned bill put obstacles in the way of them developing as well as they might. What is the best way forward? If it is very technical, would you like to meet the bill team or draft amendments to address the specific points? We will not sort it out in five minutes of conversation.

**Martin Meteyard:** No, absolutely. There are issues. For instance, some credit unions choose to pay a dividend to members, which the bill potentially rules out, given the provision on the distribution of property other than for public benefit. It might not be ruled out—we need to clarify that with the bill team.

A number of co-operatives would say that their primary purpose is to trade for a particular purpose, which might overlap with but not be entirely consistent with public benefit. They might choose not to go down that road. There is an issue with credit unions, housing co-operatives—which we might come to later—and food co-operatives, and it might be helpful to go through the process that you outlined.
The existing regime has

The problem is that housing co-operatives and other co-operative organisations might face were highlighted:

Will you indicate the number of co-operatives, mutuals and housing co-operatives in Scotland that currently benefit from charitable status, and the number that might wish to apply in future?

Martin Meteyard: The problem is that housing co-operatives are not eligible for charitable status at present. I understand that some of them have had meetings with the bill team. One of the bill's advantages is that it will introduce an overlap and will allow housing co-operatives to be eligible for charitable status, which will make a big difference to them in terms of corporation tax, rates relief and so on.

We are happy for the housing co-operative sector. One problem of its being ineligible for charitable status is that housing co-operatives have drifted towards becoming housing associations, which has involved a reduction in tenant empowerment, tenants' rights and tenants' benefits.

From the public benefit point of view, the co-operative model is important, because it allows people to exercise real control and to act as fully as citizens in their community. We are happy that the bill recognises that and will allow housing co-operatives to benefit from charitable status. Given the way in which things were going, under the existing regime, only one or two housing co-operatives might have been left in a couple more years.

Cathie Craigie: Do any barriers exist? What changes are needed?

Martin Meteyard: The existing regime has barriers but, given the clarification that some of our member co-operatives have received from the bill team, we see no barriers to housing co-operatives enjoying charitable status under the bill.

Donald Gorrie: A bit of guidance would help. Why are some housing co-operatives not fully mutual? What obstacles are so important to them that they do not become fully mutual, which would allow them to benefit more under the tax system?

Martin Meteyard: One traditional principle of the co-operative movement is open membership. That means not only that membership is open to anybody who wants to become a member and use the services, but that membership is voluntary, not compulsory. We in the co-operative movement have different views about the relative advantages of being fully or non-fully mutual, but the argument for being non-fully mutual is that it leaves the tenant with the choice of whether to become a member, rather than imposing that on the tenant, which advocates of that and other organisations see as giving tenants an additional element of choice and control over what power they exercise in their accommodation environment. The justification is that tenants are given more choice.

Donald Gorrie: Can we retain that system and change the tax system? It seems to be more punitive for such co-operatives.

Martin Meteyard: If the bill is passed, that should no longer be the case. That is why the housing co-operative sector welcomes the bill and regards the provisions on its status as overdue. Under the bill, the sector will enjoy the same rights and obligations as does the rest of the social housing movement.

An Inland Revenue regulation makes fully mutual co-operatives exempt from corporation tax because they trade only with their members. As I said, under the bill, the sector will enjoy the same rights as does the rest of the social housing movement. They will also be able to propagate the values of tenant participation and control and playing a full citizenship role.

Donald Gorrie: What you have said does not to my mind—which is obviously at fault—correspond fully with the four points on the last page of your submission.

Martin Meteyard: Those points refer to the current charity regime, rather than the proposals in the bill.

Donald Gorrie: That explains it.

Christine Grahame: Before I ask my question, I declare an interest: I am a credit union member.

Do you agree that we should—as your paper says—separate mutual and non-mutual co-operatives, which might well be granted charitable status, from credit unions, which make dividend payments to investors such as me? Would that be appropriate?

Martin Meteyard: Some credit unions pay dividends, but some smaller credit unions will probably never be in a position to do so. If that is the dividing line, credit unions could choose whether to be eligible for charitable status.

The other obvious point—which is one that I think the credit union movement itself would make—is that credit unions are reluctant to see themselves as being part of the charity brand; they are about self-help in the community. We are talking about changing the public perception of what charities are about. I think that using the concept of public benefit is an excellent way of doing that.
Christine Grahame: Regardless of whether credit unions actually issue any dividend, the fact that their constitutions allow them to do so would prohibit them from having charitable status, would it not?

Martin Meteyard: I think that that is the case. I am not a lawyer, so I have a limited understanding of the wording in the bill, which I think refers to the allocation of property not for public benefit.

Christine Grahame: So there is a clear distinction between housing co-operatives—whether mutual or non-mutual—and credit unions.

Martin Meteyard: As I am not a credit union expert, I do not know whether all credit unions’ constitutions state explicitly that they retain the power to issue a dividend. In the new circumstances once the bill becomes law, they might choose to change their rules.

Scott Barrie (Dunfermline West) (Lab): From the CMS submission, it appears that the Association of British Credit Unions Ltd has indicated that, as of April this year, discretionary powers will be available to local authorities to grant rates relief. That will go a long way towards resolving some of the difficulties that the credit unions spoke about during the consultation on the bill. I do not know whether you want to amplify that point.

Martin Meteyard: That is our understanding of the position according to ACBUL. As you say, that will go a long way towards allaying some of the concerns that have been expressed in the past.

The Convener: I have a question for Mr Ewing that relates to housing associations. The bill proposes that the charitable status of housing associations would be regulated by Communities Scotland rather than by OSCR. The committee has received varying evidence on that. Some witnesses have said that the bill has got it right; others have suggested that the same criteria and rules should apply to every charitable organisation and that they should all be regulated by OSCR. As a representative of the housing association movement, what is your view on that?

Mark Ewing: I firmly support the position that is adopted in the bill. The housing association sector is highly regulated—periodically, Communities Scotland undertakes onerous and intrusive inspections of housing associations and their activities are closely scrutinised. There is a considerable body of guidance for housing associations on governance arrangements and other relevant matters. If housing associations were subject to a further tier of regulation from OSCR, the movement’s concern would be that that would inevitably result in duplication and that the views of the two regulators could diverge. In my opinion, that would be an unnecessary additional level of bureaucracy.

There is a recognition that, with the passing of the bill and the arrival of OSCR in its new form, charities will be regulated in a much more meaningful way than at present. The housing sector welcomes that. There is an expectation that Communities Scotland will take a greater degree of interest in matters relating to charitable housing associations’ compliance with charity law and so on. However, it is unnecessary for such matters to be addressed through the introduction of yet another regulator, as they could easily be covered as part of the work that Communities Scotland undertakes.

The Convener: How will it be possible for the same interpretation of the legislation to be applied by both Communities Scotland and OSCR to ensure that everyone is treated in exactly the same way? That is where some of the concerns come from. Although we do not want to add to the bureaucracy that housing associations have to deal with and work through, there is a slight possibility that housing associations might not be regulated in the same way as other charities because they will not be regulated by OSCR.

10:00

Mark Ewing: The bill will apply to charitable housing associations, so the legal framework within which RSL charities operate will have to be the same as the legal framework with which non-housing association charities have to deal. There is an overriding obligation on housing associations to comply with the law, so to that extent the playing field will be the same for housing association charities and non-housing charities. What we are examining is the way in which compliance with the legislation is monitored and scrutinised by the regulator. The answer is in the Executive’s response to the consultation process. That response suggests that OSCR and Communities Scotland will work closely together on how the regulation of charitable housing associations is projected through Communities Scotland. I suspect that that is the answer rather than involving a second regulator.

Donald Gorrie: As I understand it, because access to borrowing and resources is important for housing associations, there is a tendency for them to merge and develop into bigger organisations, some of which might not be charitable. Non-charitable bodies might have a degree of influence over housing associations, which in the bill might rule them out from being charities. Should we be concerned about that issue?

Mark Ewing: I do not see that as being an issue, particularly given the uncertainty that has existed for a while over the withdrawal of what is known as a section 54 grant, which was the Communities Scotland grant that, in effect, repaid
non-charitable housing associations for their corporation tax payments. Over the past couple of years, there has been a tendency for housing associations to convert to charitable status. More than 50 per cent of housing associations in Scotland are now charities.

The current legal position is that a charitable housing association could not be taken over by a non-charitable housing association. The point that you make is about independence. I support the position in the bill. The bill highlights the importance of independence for charities and states that they should not be subject to the control of a third party. There are a number of provisos when the third party is not a member of the charity. There is sufficient flexibility in the proposals in the bill and the principles are supportable.

The Convener: Those are all the questions that we have from committee members. I am grateful to the witnesses for appearing before the committee today and for CMS’s written submission to the committee.

I suspend the meeting for a five-minute break.

10:03
Meeting suspended.

10:09
On resuming—

The Convener: Our second panel represents the national collections institutions, which are the National Galleries of Scotland, the National Library of Scotland, the National Museums of Scotland, the Royal Botanic Garden Edinburgh and the Royal Commission on the Ancient and Historical Monuments of Scotland. We have with us Dr Gordon Rintoul, who is the director of the National Museums of Scotland; Martyn Wade, who is the national librarian at the National Library of Scotland; and Michael Clarke, who is the director of the National Gallery of Scotland, which is one of the National Galleries of Scotland. Dr Rintoul will make a short opening statement on behalf of all the national collections institutions.

Dr Gordon Rintoul (National Museums of Scotland): We are pleased to be able to give evidence on behalf of the five national collections institutions. I will make a few key opening points. First, the prime purpose of our institutions is to hold collections in trust for the people of Scotland, both for their benefit and for that of visitors from abroad. The collections are held in trust not just for this generation but for future generations.

In our view, the Charities and Trustee Investment (Scotland) Bill marks an important step forward for the charity sector in Scotland. We fully support the general principles and aims of the bill, but we must point out to the committee that the national collections institutions would not be granted charitable status under the bill’s proposed charity test because of the criterion forbidding third-party control. In our collective view, the public interest can best be served by enabling the national collections institutions to remain accountable non-departmental public bodies that are charities.

The loss of charitable status would have a severe impact on our institutions’ ability to continue maintaining, developing and enhancing our services and facilities for people in Scotland and across the world. Among those impacts would be a loss of charitable rates relief; a loss of charitable discounts in purchasing; a significant loss in individual and corporate donations; a significant loss of grants from charitable foundations; and the creation of a competitive disadvantage with respect to our counterpart institutions in London. Under the bill that is going through the UK Parliament in Westminster, our related institutions in London look likely to continue as charities that are regulated by the Department for Culture, Media and Sport. The financial impact to our institutions would be the loss of many millions of pounds per annum. Essentially, that would be a loss to the public benefit.

We see no strong reason why the national collections institutions cannot be maintained as NDPBs and retain their charitable status. We do not consider that there is any irreconcilable conflict between being funded by the Scottish Executive and being regulated by OSCR. Scotland seems to have taken a different view on that from the one taken in England, where the DCMS will continue to be the regulator. We believe that it is perfectly appropriate and feasible for us to be regulated by OSCR.

To sum up, our view is that the interests of the people of Scotland would be best served by provision being made in the bill for the national collections institutions to continue as accountable NDPBs that retain their charitable status.

The Convener: I am sure that many of the points that Dr Rintoul has touched on will be explored further by committee members.

Let me start by asking a general question. Do you believe that the Executive’s consultation process for the bill was comprehensive? Were the representations that you made listened to and have they been reflected in the bill? It appears to me that you are at variance with at least one of the principles of the bill—the one that would affect your status—so I am particularly keen to hear your views on that.
**Dr Rintoul**: I will answer first, convener, and my colleagues may want to add points. I think that the consultation process was comprehensive. However, the full ramifications of some of the emerging issues were not quite appreciated by our institutions. We discussed the matter with Scottish Executive officials and understood that the current situation of NDPBs and charities would continue. In hindsight, that assumption was wrong. It was only when the draft bill was published that the full ramifications began to be appreciated by many people, including our institutions.

10:15

**Scott Barrie**: I will ask a question that we have asked every witness who has come before us. Do you think that OSCR’s statutory duty should be to provide advice to the sector on good governance as well as on adherence to the law?

**Martyn Wade (National Library of Scotland)**: I think that we would agree with that. As Dr Rintoul said, we see no issue with our being regulated by OSCR. Anything that OSCR can do to ensure the most effective governance of all charities is to be welcomed; we would welcome that advice to help to support charities in fulfilling their functions in line with the legislation.

**The Convener**: I want to ask about accountability and transparency. In your written submission to the committee, you state that the status of an NDPB "creates a higher standard of accountability and transparency for the public."

However, one of the defining principles of the bill is that there should be independence from political control. How will you be able to get round that and address those issues?

**Dr Rintoul**: Our organisations are run by boards of trustees who give up their time freely and voluntarily: none of them is paid. It is fair to say that we are very much at arm's length from the Scottish Executive, with which we do not have day-to-day involvement. The kind of political involvement that you are talking about does not happen on a daily basis. I report to my board of trustees, who look after the day-to-day operations of the institution. What they have in mind is the development and preservation of the collections for the public benefit—that is what they focus on.

None of us executes Government policy or is primarily involved in giving out grants or a host of other activities in which other NDPBs are involved; our five institutions are markedly different from other NDPBs. The reason why we are NDPBs is that we hold the collections in trust for the public benefit. If that facility were to be compromised or reduced in any way, everyone would be a loser.

**Martyn Wade**: On transparency, the institutions have a long tradition of being open, especially since the passing of the Freedom of Information (Scotland) Act 2002. The discussions of the trustees are recorded and are in the public domain. The corporate planning process and the financial processes of all the institutions are completely open and transparent. The whole operation of the institutions is fully transparent, in line with existing practices and with our being regulated by OSCR, and that will continue.

**The Convener**: Do you believe that, if the general principles of the bill are agreed to without any recognition of the points that you have made about your position, real difficulties could be created for the future of the national collections?

**Dr Rintoul**: Absolutely. The only thing that marks us out as different from other NDPBs is the fact that we raise significant sums of money from a range of benefactors in Scotland, the United Kingdom and abroad, especially the United States. Our view is that the majority, if not all, of that would be at considerable risk. That would be to the detriment of the public because public services would suffer.

There is another point worth making that, although not a financial one, is important. Our institutions operate museums, galleries, libraries and archives for the public benefit and the public get involved in our activities. For example, there are 300 volunteers in the National Museums of Scotland. There is a bond between the public and our institutions and there would be a question of public trust and public involvement in our institutions if we did not remain charities.

**Michael Clarke (National Galleries of Scotland)**: I amplify that, convener, with a concrete example. The recently completed Playfair project cost about £30 million, of which we raised £13 million from outside sources. Trusts, foundations and sources abroad gave that money on the basis that it was going to a charitable institution. In the modern world, institutions such as ours are increasingly plurally funded for the public benefit. If that facility were to be compromised or reduced in any way, everyone would be a loser.

**The Convener**: Would you go as far as to suggest that, unless the general principles of the bill as they relate to your institutions are altered, they will be flawed?

**Dr Rintoul**: We are not legislative experts, but from reading the bill it appears to us that a relatively simple amendment could be lodged that would not affect the main thrust of the bill but would retain the five national collections institutions as charities regulated by OSCR in the normal way.
**Mr John Home Robertson (East Lothian) (Lab):** Other colleagues may want to explore that issue further. Is there anything to be made of the possible distinction between the right of ministers to appoint board members to the institutions and any residual authority for the minister to direct board members? Those are clearly two different things, but the issue is crucial. Would you like to say anything more about that? Can you cite any examples of cases, within the national collections institutions, of ministers directing boards to do things that have gone against their duties as the trustees of a charity?

**Dr Rintoul:** Absolutely not. That is something on which we have compared notes and none of us has ever come across anything remotely of that nature.

**Scott Barrie:** The written submissions that we have received from you have been useful in enabling us to crystallise the main issues. The submission from the National Museums of Scotland states:

> “Many objects in the NMS collections are priceless and are uninsurable under commercial cover.”

It then talks about eligibility for Government indemnity, which brings collections to Scotland and allows collections to be loaned abroad. To your knowledge, is your eligibility for Government indemnity solely a function of your NDPB status? If that status were removed, would the collections be uninsurable?

**Michael Clarke:** As far as the status of the national collections is concerned, the answer to your question is yes. Our specific indemnity arrangement with the Government is dependent solely on that being the case. Other institutions, which can have indemnity for loans in, are not eligible for indemnification of their permanent collections. The Government takes the view that it does not commercially insure its collections; therefore, a form of indemnity is granted to national institutions collections. That is essential for our smooth and sensible running.

**Dr Rintoul:** If any of us were to insure commercially loans in from abroad, the costs would be astronomical. The insurance value of a loaned-in exhibition at the National Museums of Scotland or the National Galleries of Scotland could run to the high tens of millions of pounds. Without such indemnity, it is likely that such international collections—whether they be from China, from Russia or from the United States, to name some recent examples—would not come to this country. The system here is the same as that in the rest of the UK and we would certainly be at a disadvantage in Scotland if the people of Scotland were unable to see those treasures from abroad.

**Mary Scanlon (Highlands and Islands) (Con):** That leads on very well to my question. In your opening statement, you mentioned the severe impact of the loss of charitable status, including in relation to collections from abroad. For the record, could you clarify any further costs—to your institution and to Scotland as a nation—of losing out in that way?

**Dr Rintoul:** We are working out the full ramifications of the costs, but the exercise is not straightforward. You want to know the order of magnitude of the costs. If we look at the situation over the next decade, we cannot see that the loss could be less than £10 million to £15 million per annum. That is partly driven by capital developments and by the large sums that we all raise. Michael Clarke mentioned that £13 million was raised from individuals and foundations for the Playfair project. The National Library of Scotland and other institutions are all engaged in major fundraising campaigns.

There are also other losses, which would either be to the detriment of service or would lead to increased costs. For example, we have 300 volunteers. If any member of the public from Scotland, the UK or abroad goes into the Museum of Scotland on any day of the week, they can arrange to have a personal guided tour with one of our volunteer guides, who give up their time freely. One of the things that drives them is the fact that they are doing that for a charity. Our view is that we would lose quite a bit of volunteer input and that we would therefore have to cease the service, reduce the service or pay some people to do it instead. There is a whole series of monetary and service ramifications.

**Mary Scanlon:** I think that you would agree that not all costs are financial.

**Dr Rintoul:** Yes.

**Mary Scanlon:** In the National Museums of Scotland submission, you mention the competitive disadvantage and you say that loss of charitable status will

> “undermine our ability to perform our core duties as custodians—and champions—of our cultural heritage, but will also impact on the attractiveness of Scotland as a tourist destination and as a major business centre in Europe.”

I would like to hear on the record a comment that measures your concerns, even beyond the significant financial concerns.

**Dr Rintoul:** Our view is that the bill as it stands would inevitably mean that we would have to reduce our service to the public. We would not be able to mount the major exhibitions that we currently mount, which are certainly a factor in helping to make Scotland an attractive tourism destination, as VisitScotland and others recognise.
The work that we do is a key part of the tourism economy. Tourists from abroad come to our institutions to see some of our treasures. We have some of those treasures only because donors have given them to us or lent them to us because they believe that they are doing that for the public benefit. Our being charities is a key part of that picture.

Mary Scanlon: You have spoken quite a bit about losing charitable status. If you lost NDPB status and became a charity regulated principally by OSCR, what would be the implications for public accountability?

Martyn Wade: The issue for us is the complexity and cost of changing the status of the organisation from being an NDPB to being an entirely new organisation. The issues would relate to the transfer of staff, their pension rights and the sheer cost and complexity of setting up a new organisational structure.

Going back to the more important element of the issue, we are custodians of national collections on behalf of the nation, which are currently owned, in effect, by the NDPB. The status of those collections, the responsibilities attached to them and the ability of the organisation to manage, care for and grow those collections could also be at risk if a completely independent body were looking after collections that are owned on behalf of the nation. For example, the National Library has well over 8 million items. Every year our collections grow by 300,000 items. We also provide significant public access services. The status of the collections and our ability to manage, control and grow them would be put at risk if we had to set up a completely new organisation.

10:30

Mary Scanlon: The financial memorandum states that

"The value of tax relief, non-domestic rates relief and donations flowing from the charitable status of"

the 13 NDPBs

"is estimated to be approximately £10 million per annum, including some £3 to 4 million of local rates relief."

I appreciate that the national collections represent only five of the 13 NDPBs, but do you think that the financial memorandum provides an accurate estimate of the cost of the loss of charitable status to NDPBs?

Dr Rintoul: Absolutely not. We think that the figures in the financial memorandum do not reflect the real picture. We cannot say where the figures came from, but they certainly did not come from the institutions that we represent. The estimate that we are developing is in the range of £10 million to £15 million per annum, just for our institutions. We do not believe that the financial memorandum presents an accurate picture of the financial impact of the loss of charitable status.

Mary Scanlon: It would be helpful if the witnesses could give us what they believe to be an accurate estimate.

The Convener: Perhaps you can supply us with that information, once you are in a position to do so. Committee members would find that helpful in their deliberations on the bill.

Mr Home Robertson: Am I right in thinking that any loss of access to Government indemnity insurance would make it much more difficult for you to exhibit items from the national collections outwith the institutions? I know that the National Galleries of Scotland has outstations in different parts of Scotland and that from time to time exhibitions are laid on in schools and other places around the country. Surely the loss of indemnity would make that much more expensive and difficult.

Michael Clarke: It would reduce enormously our operating flexibility and our ability to serve all the different parts of Scotland. Internationally, it would make the temporary grant of export licences much more complicated, so Scotland's treasures could not be seen so easily around the world.

Cathie Craigie: Thank you for your written submissions, which made interesting reading. They highlighted the issues about which you have serious concerns and the adverse effect that you believe the bill will have on Scotland's national collections and the bodies that organise them. The same concerns were raised in England and Wales. In your submissions and in the evidence that you have given orally this morning, you point out that a workable solution has been identified in England and Wales. Have you had discussions with the Scottish Executive about finding a similar solution in Scotland?

Dr Rintoul: Individually and collectively, we have had all had discussions with the Scottish Executive and impressed on it the consequences of the bill as it stands. We have communicated to the Executive our view that in the Scottish context it would be much more appropriate for us to be regulated by OSCR than by a Government department, as is the case for the equivalent national institutions in England. We actively believe that it is right and proper in the Scottish context for us to be regulated by OSCR.

Cathie Craigie: How has the Executive responded to the suggestions that the national collections institutions have made?

Dr Rintoul: It appreciates that the bill will have a significant impact. I believe that it is considering the matter.
Cathie Craigie: In your submission and this morning you have spoken about the impact of the bill on the national collections institutions and the fact that they will be at a disadvantage as compared with their counterparts in England and Wales. Can you expand and share more of your thoughts on that point?

Michael Clarke: We have looked into the issue of charitable giving. All people in the charity market are out there looking for funding and, if donors and institutions in countries such as the United States were looking to Britain, they would naturally be more likely to favour our equivalents south of the border if the bill were to go through as currently phrased.

Dr Rintoul: It is fair to say that Scotland has a long philanthropic tradition of people giving for the benefit of future generations. However, in comparison with London-based institutions, we are at a relatively early stage in raising significant sums from a wide range of sources in this country and internationally. We raise a significant amount, but a lot more could be done—as was shown by the Playfair project, or the Museum of Scotland campaign, which raised significant sums. However, some funds that currently come to Scotland and benefit people here will go to London.

Martyn Wade: I can give a specific example. The National Library of Scotland is starting to move in that fundraising direction very quickly for the first time and we have been taking advice from experts in the field. Those experts have gone so far as to tell us that

“loss of charitable status would so dramatically limit your ability to fundraise that we could not recommend you proceeding with your proposed campaign”

in respect of the John Murray archive. The target for that campaign was to raise £6.5 million towards the purchase of an internationally important archive for the library. Leverage is important, because the inability to raise £6.5 million would prevent the bringing to Scotland of an archive that is valued at £45 million. There is an impact on fundraising and an impact on the leverage that fundraising produces, which affects the scales of the projects that we can deliver.

Cathie Craigie: The submission from the National Museums of Scotland talks about philanthropic support for major cultural projects. It was interesting to note that £7 million of the £10 million raised for one project came from 61 different contributors, which is a lot. Do you feel that people who might want to contribute to a public organisation that holds archives and treasures in trust might be attracted not to where the organisation operates from, but to south of the border?

Dr Rintoul: There will be a range of impacts. For example, many charitable foundations can give money only to charities, so they would not have a choice. Other people, such as residents of the United States who may have Scottish ancestry or heritage, will generally give money to a not-for-profit organisation in the United States, under the federal tax code. That organisation can give money to an organisation in this country only if it is a charity. Again, there would not be a choice.

The National Museums of Scotland received several million pounds-worth of donations from the United States, but that would not be able to happen in future. The National Galleries of Scotland received substantial funds from donors from the United States for the Playfair project but, again, that would not be able to happen in future. The US system is built on tax benefits and flows through not-for-profit organisations. The system is integrated with the system in this country.

Michael Clarke: Not only will donations from the United States be affected, but donations from south of the border will be, too. For example, the education facilities in the Playfair project—which ran to millions of pounds and aimed to offer the widest possible access to the collections—were funded by bodies south of the border that can give only to charitable institutions. That sort of giving, which is of enormous benefit to everyone, would be under threat.

Christine Grahame: The case that you are acting as charities is proven beyond reasonable doubt, as is the case that you have made about losses. You want to be regulated by OSCR but you have rightly identified a hurdle—section 7(3)(b) of the bill, which mentions “a third party”. I agree with John Home Robertson that there is a distinction between direction and the appointments system. That is where you have some problems. I ask you about this matter because I would like to be of assistance.

There is a distinction between the National Museums of Scotland and the National Galleries of Scotland—where I believe that all your trustees are appointed one way or another by the Executive—and the National Library, where there is a more diverse appointments system, which might get through the net if the current arrangements were to continue. I do not want to divide and rule; I am just making a point.

Is there a solution that would mean that you did not have to seek some specialist status? I am thinking of the judicial appointments system where a committee has been set up and that has built something of a Chinese wall between the Executive and the judiciary. Perception is almost as important as fact and I make no comment about the integrity of the existing trustees; it is just that there are difficulties with the manner of appointment.
I have not gone into this in detail, but you might look at the constitution of the National Trust for Scotland, which also allows that organisation to get over the problem. Have you taken legal advice to investigate means by which to overcome the charity test?

Michael Clarke: I am not expert on the National Trust for Scotland arrangements, but an important point about trustee liabilities is that trustees appointed through Government have their liabilities underwritten by Government.

Christine Grahame: That makes it even more important that all trustees are seen to be the same and that some are not more equal than others because of the particular ramifications of presumptions of mismanagement elsewhere. Will you answer my question about whether you have investigated other processes? The problem is surely not insurmountable.

Dr Rintoul: We have taken advice from other sources. It is not clear to us that there is a straightforward way to get over that hurdle in the way that you suggest. It strikes us that in the real world, when one looks at the impact that the changes could have and at the public benefit, the simplest course of action is often the best. The fact that we operate very much at arm’s length from Government makes us different from other NDPBs. Government control is not really an issue in practice.

Christine Grahame: With respect, the appointments system is the problem here. I make no comments about individual trustees, I just think that you require to tease out the process through which the judiciary has had to go. I hope that you will forgive me for saying that you should take senior legal advice on the matter. There must be a device whereby you are not left at risk under the test.

Dr Rintoul: I take your point, although it is not just a question of the appointment of trustees; it is also a question of ministerial direction.

The Convener: Am I right to think that ministerial direction might be required from time to time? If the bill were passed unamended with regard to the national collections and they became independent to allow them to retain charitable status, would there be anything to stop those who managed the collections from selling part of them off? The organisations would be completely independent and able to do what they wanted, despite the fact that some parts of the collections were given so that they could be safeguarded for future generations of Scotland. There might be nothing to stop items being sold off to finance something else because the money could not be found any other way.

Dr Rintoul: That is certainly conceivable. That we hold the collections in trust for the people of Scotland is underlined by the fact that our institutions cannot dispose of things except under some very limited criteria. That is buried in an act of Parliament. My trustees cannot just decide to sell something to raise some money. You are right to say that there could well be a problem if those collections were no longer held in trust for the public in quite the same way.

Michael Clarke: One of the charities that benefits us all greatly is the National Art Collections Fund. One of its specific conditions is that it will allow works to go to institutions only on the condition that they are never sold off. There would be questions about works that have already come to the collections through the National Arts Collections Fund. That would open up a horns’ nest.

10:45

Patrick Harvie (Glasgow) (Green): I have a question about the practical implications of making the changes that you are suggesting. You have made it clear in your written and oral evidence that you are comfortable with regulation by OSCR—you seem almost enthusiastic about it, in fact. Dr Rintoul described the required change to the bill as being quite small. The written evidence of the National Library of Scotland said:

“There would be a need for clear directions on the powers and responsibilities of OSCR in respect of charitable NDPBs.”

I wonder whether there is a difference between what various people expect from the changes and whether it would be a simple change that would be required or whether an entirely different regulatory regime would be required if you were to retain your status of being a charitable non-departmental public body.

Martyn Wade: We recognise that a number of different solutions could be delivered by amending the bill. Two or three routes have been pointed out. At this stage, we want the committee to support us by recommending that an amendment be made to enable the national collections institutions to retain their charitable status as NDPBs. We recognise that there are various routes by which that can be done and that that is best explored in the form of the discussions that we have had with the Executive and others. We view the outcome as being the most important element—we do not have a preferred route.

Dr Rintoul: We do not think that there is a difference between us, other than in the language that we have used. The legal advice that we have taken is that there need not be any additional regulatory framework in any meaningful sense.
Clearly, one would need to state quite clearly how we would relate to OSCR and so on, but we see no need for any different regulatory framework.

Patrick Harvie: Are you saying that you would expect the powers and responsibilities of OSCR to be broadly the same as they are at the moment?

Dr Rintoul: Yes.

Donald Gorrie: If the committee wants to pursue the point that you have made strongly that what is proposed in the bill would be detrimental to you, there would seem to be three options. One is that, as you have proposed, your organisations would be designated special charities and the status quo would continue, except for the fact that OSCR would have some say with regard to your business. The second option would be to do what John Home Robertson and others have talked about and adjust to some degree the rules governing your appointed board. The third option, which is mentioned in all the papers that you have given us, would be to set up a charitable trust through which donations and all the other charitable stuff would be channelled. On the whole, you argue against that last option. Could you elaborate on why it would be a bad idea if we were minded to pursue that option?

Dr Rintoul: The suggestion is that we would remain a non-departmental public body, but would have a separate charitable arm. We do not believe that that would be to the public benefit; we think that it would not be advisable at all. The charitable trust would have to be wholly independent of the organisation, which would be unable to have any control over it, otherwise the charitable trust would fall foul of the third-party rule in section 7(3)(b). Basically, the charitable trust would raise money for the institution and would also decide what the money could be used for. Essentially, a body that was entirely separate from the organisation would be determining the activities and capital programmes of a public institution that owns assets on behalf of the public.

Elsewhere in the United Kingdom, there have been significant conflicts when other organisations have set up such a framework. South of the border, for example, some charitable trust museums organised themselves in such a way that the museum was run by one charity and a separate charity raised funds. However, they found that, over the years, the two charities were at loggerheads because the fundraising charity did not agree with the direction in which the museum charity was going. One can quite easily imagine that sort of thing happening.

Further, there is a question of the people who donate. Often, donors want to know the use to which their money will be put. If Michael Clarke and Sir Tim Clifford were to talk to a donor about a possible donation, that donor would want to be assured by the director of the National Galleries that their money would be used for a certain purpose. Clearly, if there were a separate charitable trust involved, the director of the National Galleries could not give that assurance because it would not be his decision but that of the trust.

Donald Gorrie: You have said in your submission that, in practice, it is a long time since ministers have interfered. Would it be possible, in your view, to have the bill state that they absolutely could not interfere in improper ways?

Dr Rintoul: That is a difficult question for us to answer. It is not something that we have considered. Perhaps it is something for ministers to consider.

Donald Gorrie: It might help in relation to the independence bugbear.

Dr Rintoul: It is not something that we have considered.

Donald Gorrie: Would you reiterate that, in practice, none of your institutions has had any ministerial interference in recorded memory?

Dr Rintoul: Absolutely.

The Convener: I thank our panel members for joining us. You have provided us with interesting information that we will reflect on in our further deliberations.

10:52

Meeting suspended.

11:01

On resuming—

The Convener: I welcome our third panel of witnesses, who are David Caldwell, the director of Universities Scotland, and Tom Kelly, the chief executive of the Association of Scottish Colleges. I thank them for appearing before the committee and for their written submissions. I will start by asking the question on consultation that I have asked the previous panels. Did the Scottish Executive consult fully on its proposals and give sufficient consideration to the responses that it received?

David Caldwell (Universities Scotland): I can give a positive answer to that because the consultation was a good example of such a process. That is generally true of the Executive's consultation on draft bills. We have experienced two consultations relatively recently. In both cases, we had significant concerns about the draft bill, but when we articulated those concerns, they were taken on board before the bill was introduced.
Clearly, a consultation will not resolve all the issues, as was evident in your discussion with the previous panel, but the universities and higher education institutions are impressed with how the consultation was conducted.

**Tom Kelly (Association of Scottish Colleges):** I endorse those general points about consultation. There is a difficulty with bills that come before the Scottish Parliament in which sectors such as ours have a minority interest. We are well aware that we are not the primary target of the proposed legislation—the bill is not constructed with further education colleges primarily in mind—which means that we had to react quickly to a complex bill that does not relate to our main business or that of the colleges. There was one slip-up in the original consultation, in that a number of colleges were not included in it, but that simply drew attention to the extent to which the previous consultation was conducted.

**Scott Barrie:** Do you have any opinion on the view that OSCR’s statutory duties should include providing advice on good governance to the sector, as well as on adherence to the law?

**Tom Kelly:** We certainly accept that greater clarity is needed on what trusteeship in terms of charitable purpose represents. Good, clear guidance on what is expected in that respect would be helpful. We do not envisage that OSCR would provide training for boards of management, because trusteeship is only one aspect of the good governance that boards of management are expected to undertake, but it is a feature that we would hope to develop in co-operation with OSCR. We hope that it will have the capacity to contribute to that work, but not necessarily to lead it.

**David Caldwell:** I have little to add to what Tom Kelly said. It will be helpful if OSCR provides guidance on how it will interpret its responsibility, but the advice and guidance role should be limited to that sort of activity.

**Scott Barrie:** I will ask about charitable purpose. It would help me and other committee members if you could tell us what benefits charitable status brings to the further education sector.

**Tom Kelly:** There are three. One relates to the tax regime to which the organisation is subject: colleges do not pay corporation tax. That is a substantial benefit, because it is an acceptance that any surplus that is generated on the college’s operations will be recycled for the purposes of the college.

There is also the local taxation benefit of rate relief. If we did not have a form of rate relief that was provided through charitable status, there would need to be an alternative to that. I have no doubt of that.

It must be acknowledged that alumni and other donations to colleges are not large in comparison to those to, for example, community colleges in the United States of America. Colleges do not have large endowments and reserves that are gifted to them by the their former students or local businessmen, for example, but they have the facility to raise funds in that way, which is particularly important for specific projects. Therefore the Association of Scottish Colleges would not want to lose the opportunity and tax advantages of the sorts of income that go with charitable status.

**David Caldwell:** The main difference for the higher education sector relates to the last of the factors that Tom Kelly mentioned, because charitable giving to universities is, in some cases, very significant. Moreover, the Government in the UK as a whole and in Scotland in particular is at present strongly encouraging universities to engage even more actively in fund raising and to raise more of their income in that manner.

That is terribly important for competitiveness internationally, as well as in the UK. If one looks across the Atlantic at practice in the United States, one finds that universities there typically enjoy public funding at least as generous as the funding that is provided in the United Kingdom—in fact, it is at a slightly higher rate. On top of that, however, they have the benefit of huge charitable giving, so that the overall level of funding for the great majority of United States universities is very much higher than that for universities in the UK, and in Scotland in particular. That sets us a big challenge, because it is extremely important that we remain internationally competitive. On the whole, we do pretty well, despite the gap in funding, but universities have an extremely strong interest in improving their fund raising from charitable sources. That is very important.

**Scott Barrie:** What would be the effect on that source of funding if your institutions did not retain charitable status?

**David Caldwell:** It would be very serious indeed, but I do not believe that there is any serious danger of universities failing the charity test. Universities are in a different position from the national collections: universities are autonomous bodies, not NDPBs, and Government ministers have no role in making appointments to the governing bodies of universities, nor do they have direct powers to instruct universities or the trustees who serve on their governing bodies. In a number of respects, universities would have no difficulty satisfying the charity test or the charitable purposes that are listed in the bill. The issue does not cause us any immediate concern.
Tom Kelly: The situation is slightly different for colleges, in the sense that ministers have powers to make, close and merge colleges that are consequential to their general duty to provide further education. Most of that duty is now delegated to the Scottish Further Education Funding Council, which the Further and Higher Education (Scotland) Bill will merge with the Scottish Higher Education Funding Council later this year. So there are powers that mean that colleges can be imposed on. Ministers can remove the board of management from a college. We do not see that as necessarily being at odds with a college having charitable status, because the legal entity would still be the board of management of the college, albeit that it would comprise different people if the previous board were removed. In the light of the earlier discussion, perhaps we need to consider the issue more carefully than we have done so far.

Cathie Craigie: My question is directed mainly to Mr Kelly, as it is on the ASC submission. You said that further and higher education institutions in England and Wales were designated as exempt charities under schedule 2 to the Charities Act 1993. You also said that you are having discussions with the Executive on the issues relating to this part of the bill that are concerning you. How are the discussions going, and what are the details of the issues involved?

Tom Kelly: The key issue for us is that we want to ensure that there is light-touch regulation in two senses. We want to ensure that we are not re-regulated on something that is already regulated by statute with full public accountability. We were particularly concerned about the accounting provisions, which are stringent for colleges. We did not see why OSCR should spend a lot of time trying to understand college mechanisms when colleges already have accounts that are audited independently by auditors appointed by the Auditor General for Scotland and submitted to the Scottish Parliament. We did not see the need for such duplicate functions. Those accounts ought to provide sufficient evidence and assurance for OSCR. It can tick the box and move on to do other things that only it has the capacity and expertise to do.

Part of our concern is that accounting, as anyone who gets deeply involved in it knows, is highly technical and serves many purposes. We are anxious to ensure that we can satisfy those who are concerned about charitable purpose that we are delivering that purpose. We do not in any way resist the notion that we need to account for our charitable purpose—we are clear about that—but we need a simple, straightforward method of incorporating that in the statutory accounts that we are already producing.

The other point was on the control issue, which we were reasonably satisfied about, but which we need to take another look at.

David Caldwell: I would like to add to that, because the issue affects the universities as well. The universities are entirely happy to come under the ambit of OSCR. That is not an issue as far as we are concerned. It is significant that that is different from how things appear to be working out in England. It appears that the universities there will be recognised as a group of charities that will be regulated not by the charities regulator but by the Higher Education Funding Council for England. We do not particularly want to go down that route in Scotland. We do not think that the English always get things right. Indeed, in relation to their incarnation as charities, it is more appropriate for universities to come under OSCR rather than to be answerable to the Scottish funding council.

The Scottish funding council has a serious responsibility to ensure that we apply appropriately the public funds that it distributes. That is the funding council’s role, and it ought not to extend beyond that role into dealing with money that is derived from other sources, such as voluntary and charitable giving. That is the first point; we are content that OSCR should have responsibility for universities.

That said, I agree with Tom Kelly on the general principle that the burden of regulation should be no greater than necessary. There is an important underlying principle that, in the same way as every other body, OSCR will have limited resources to carry out its responsibilities. It is therefore very important that in deciding how to concentrate its effort, it should engage in risk assessment and take account of relevant factors in deciding how deeply it has to get into the regulatory business.

One of those factors is the scale of activity, but it is only one factor and it is not necessarily the most important; there are others. Do the charities in question have well-established governance and management structures in which people can have confidence? What other lines of accountability exist? What is the track record of the institutions concerned? Have they existed for a long time and if so, have they given few problems during that period?

A key issue arising from that is that higher education institutions and further education colleges represent a low level of risk in comparison with many other organisations. The charities regulator should take that into account. However, the principle that the charities regulator should have responsibility is absolutely reasonable and we support it.
Cathie Craigie: Thank you. I would like to follow that up, but my colleague Mary Scanlon will be asking about the area into which you led us.

Christine Grahame: You seem to have dealt with everything. We all agree that there should be a light touch in regulation and that the accounting systems should be married or paired with the systems that OSCR wants. That will come out in the guidance.

Do you agree with the principle of proportionality that the regulations should be less stringent in certain areas for the wee charity shop than they are for the big university?

David Caldwell: I go back to my previous answer and say that the scale of the operation is a factor, but it is only one factor. The charities regulator should be responsible for making sure that the money that charities gather from a variety of sources—most importantly, from members of the public—is applied appropriately. Scale has to be one of the factors because a charity that gathers a lot of money represents a bigger risk than one that collects small amounts. However, scale is only one factor and the solidity of the governance and management structures that are in place also have to be considered. You might find that some of the large charities—and I acknowledge that universities represent pretty large charities—are a lower risk than some of the smaller ones.

Christine Grahame: But do you concede that, although you are less of a risk, you are subject—quite rightly—to many other procedures and to regulation by other sources because of your funding and other obligations to society? The woman or two-woman charitable operation might be subject to different tests by OSCR because there is much less to deal with. I am not saying that the principle should not be the same for it or that it is much less to deal with. I am not saying that the subject to different tests by OSCR because there is quite rightly—to many other procedures and to the public—is applied appropriately. Scale has to be one of the factors because a charity that gathers a lot of money represents a bigger risk than one that collects small amounts. However, scale is only one factor and the solidity of the governance and management structures that are in place also have to be considered. You might find that some of the large charities—and I acknowledge that universities represent pretty large charities—are a lower risk than some of the smaller ones.

David Caldwell: I return to my previous answer. The criterion must be a global risk assessment that takes account of size and all other relevant factors.

Tom Kelly: We do not accept that a college with a higher turnover is inherently more of a risk than one with a smaller turnover. However, as far as the law of proportionality is concerned, I accept that a distinction can be made between very large and very small organisations and that what can be asked of a very small organisation is different. We should remember that the larger the organisation, the easier it is to separate powers, which is a key matter when it comes to safeguarding funds. A small organisation finds it more difficult to separate such powers and functions.

When we prepared our submission, we had not yet met bill team officials. I think that they understand our position. We do not wish to avoid the requirements to satisfy the charitable test or to meet the safeguards that will apply to charities in general. We are simply seeking the best mechanism for doing that and will continue discussions to that end.

Christine Grahame: In a pre-evidence session, OSCR made it clear that it would try not to cause onerous duplication but to use the mechanisms that institutions had already put in place.

Mary Scanlon: On that point, both of your submissions contain substantial evidence to back up concerns about dual or multiple regulation. The ASC submission says that there are “existing robust accountability checks and audit processes”.

I believe that you have answered most of the committee’s concerns. Universities Scotland’s submission says that it “has had informal discussions with OSCR and OSCR has indicated that it is sympathetic to any proposal which will ensure adequate regulation and monitoring without increasing administrative burden.”

I also note that you are asking for “a clear Ministerial statement indicating that the OSCR should avoid placing … unnecessary” burdens on organisations. Are you quite satisfied with the discussions that you have had with OSCR or should we do more in that respect?

Tom Kelly: I have to say that we are never fully satisfied. After all, every additional regulator represents an additional burden and cost that we would prefer to avoid.

More work needs to be done on the matter, but we are pursuing the general principle. Someone referred earlier to plural funding. Colleges are not unique in this respect, but we take money from quite a range of sources, all of which bring with them burdens of accountability and sometimes even specific accounting requirements. It is the gradual accretion of those burdens that makes the business of accounting for what we do so onerous and complex. That is why we are seeking a general statement on the general principle; I believe that what we have set out is simply a specific application of that principle.

Mary Scanlon: Are you satisfied that the duty that is being imposed on OSCR “to seek to secure co-operation between it and other relevant regulators” will ensure that unnecessary duplication is unlikely to occur?

Tom Kelly: We were uneasy because the provision was not sufficiently explicit about the
relevant regulatory and statutory framework that applies to us, in particular the Public Finance and Accountability (Scotland) Act 2000 and Audit Scotland; and the Further and Higher Education (Scotland) Act 1992 and its derivatives and the Scottish Further Education Funding Council. I think that we are moving towards meeting that concern.

Mary Scanlon: But you still feel that there is a need for a ministerial statement.

Tom Kelly: We would like that, but we are pressing the Executive on the general point, not just on this specific case.

David Caldwell: We are relatively happy about the way in which things are going and believe that OSCR will interpret its duties in a reasonable and commonsense way. There will always be on-going discussions and it is important that they take place.

The regulations that are written in association with the bill once it has become law will be important. There is every indication that they will be written in a sensible way that avoids unnecessary duplication and an excessive burden. It will be important for us to engage with those who draft the regulations to ensure that they properly understand the circumstances of our sectors and ensure that the regulations are drafted appropriately.

Donald Gorrie: I want to explore that point further and a point that Tom Kelly made earlier. As I understand it, there are two issues to do with the accounting. The first is that you have to be audited to ensure that the people in a college or university do not take a lot of the money and head for the Bahamas. Secondly, there is the issue of whether you are fulfilling the charitable requirements that are set out in the bill.

I understood Tom Kelly to say that your existing auditing could cover the first point and that, in discussion with OSCR, you could slip a few questions in to satisfy OSCR. Would the best way forward be for universities and colleges to negotiate with OSCR individually to find out what is needed, and then for that to be incorporated into your existing audit, so that you only have one big audit?

Tom Kelly: Yes. The accounts direction and the audit regime for colleges embrace anything that is required for OSCR purposes. For example, if a stronger statement were required about trusteeship in relation to charitable purpose, that could easily be included in the annual statement of accounts, as long as people know in advance that it will be required. We do not want to have to produce a supplementary or duplicate set of accounts for OSCR in addition to those that are already produced for statutory purposes.

David Caldwell: It is an important part of the audit process that the auditors certify among other things that the institution complies with all the obligations that are placed on it as a charity.

Donald Gorrie: Is that the existing situation?

David Caldwell: That happens now as part of the audit process.

The Convener: As no member has indicated a desire to ask further questions, that concludes our questions to you. Thank you once again for attending and for your written submissions.

I ask members to remain in their seats. The meeting will be suspended for a couple of minutes to allow the changeover of witnesses.

11:27

Meeting suspended.

11:29

On resuming—

The Convener: I welcome our fourth and final panel. We have Mike Gilbert, who is the chairman of the charities working party of the Institute of Chartered Accountants of Scotland, and Fraser Falconer, who is the chair of the committee on charity law reform of the Scottish Grant Making Trust Group. Before the committee proceeds to questions, Donald Gorrie has something that he would like to say.

Donald Gorrie: I put it on the record that I am a colleague of Fraser Falconer as a trustee of the small Nancy Ovens Trust.

The Convener: Thank you for your written submissions to the committee. I will start by asking the same question that I have asked all previous panel members this morning, on the Executive's consultation process. Did the Executive fully consult all interested parties, and has it reflected the submissions that it received in the bill?

Mike Gilbert (Institute of Chartered Accountants of Scotland): The system has worked very well indeed. I would give it a very good mark. Recognition has been given to the points that we submitted in the consultation. In addition, we appreciate the opportunity to participate in the continuing consultation on Scottish charitable incorporated organisations. We are very pleased.

The Convener: I call Scott Barrie—

Fraser Falconer (Scottish Grant Making Trust Group): I agree with Mike Gilbert.

The Convener: You did not look too keen to say anything, which is why I moved on.
Scott Barrie: I hope that you will give this committee a very good mark for its stage 1 scrutiny. I have a question that I have asked a couple of times already this morning, on schedule 1, which seeks to establish OSCR as a corporate body. Should OSCR have a statutory duty to provide advice to the sector on good governance as well as on adherence to the law?

Mike Gilbert: No, it should not. We have to take into account proportionality, which has been mentioned. I suspect that a new organisation such as OSCR might not have sufficient resources to do everything at present. It should work towards that duty. The current duties are enough for OSCR to cut its teeth on. It should not be asked to run before it can walk. I am not suggesting that that duty should not be placed on OSCR in future, but initially we should leave it as it stands. We are not as big as England anyway, and we do not have the same requirements. I have checked OSCR’s objectives against those in the English Charities Bill, and they are not that different.

Fraser Falconer: Many charitable trusts work part-time and on a shoestring. OSCR could be helpful as a central source of supportive information for the charitable and voluntary sectors. There is a strong view among grant-making trusts that OSCR should be as strong and as visible as possible in the voluntary sector and public life in Scotland.

Scott Barrie: Those responses are interesting. The question arises because, during our pre-legislative consultation, different organisations said different things about what they wanted from OSCR. The two answers have encapsulated the two arguments that are around, on which it will be necessary for the committee to deliberate. It is useful to get everyone’s view on the issue.

On charitable purposes, the ICAS submission states:

“a level playing field throughout the UK is necessary to prevent legislation influencing a charity’s choice of location to the detriment of individuals and communities”.

What are the key deviations in respect of the charity test between the Westminster bill and the Scottish bill that will cause the most difficulties for charities?

Mike Gilbert: Our concern is that a charity might be recognised in England but not in Scotland, even though the regimes might have the same objectives. When the legislation comes into force throughout the UK, we will have the undesirable possibility that an organisation that wants to set up in Scotland might decide to migrate to England because it would not be recognised here, which would be counterproductive. The organisation would be going to what it saw as a softer jurisdiction.

That leads on to the Inland Revenue. We hope that the Inland Revenue will recognise OSCR’s decisions on charitable status and not take a separate view. In other words, we want to know whether anything can be done to ensure that, by liaison, agreement or arrangement between OSCR and the Inland Revenue, when OSCR makes a decision on charitable status, the Inland Revenue accepts it.

Scott Barrie: We probably all agree with that, but I want to return to the point in your submission about the different charity tests. There will be nothing to stop charities registering in both jurisdictions, which will be made clear when the system is in operation. You have highlighted the disadvantages of the system, but do you accept that there are also advantages if charities can claim that they are recognised under two regulatory regimes, even if there are differences?

Mike Gilbert: Given the size of the United Kingdom, there should be a level playing field in relation to what is, or is not, a charity. We should remember that each charity will at some stage have to prove its charitable objectives in both jurisdictions. However, it would be wrong if an organisation that wanted to set up in Scotland deliberately moved south because it was easier to set up there.

Mary Scanlon: Is the relationship between OSCR and the Inland Revenue sufficiently clear? In its submission, ICAS recommends that the Inland Revenue should defer to decisions by OSCR. Will you clarify that? Is it a working practicality that a charity could be recognised by the Inland Revenue but not by OSCR?

Mike Gilbert: I would have thought that that is a possibility, but it would be highly undesirable. We should have the situation that exists in England, where the Charity Commission decides whether an organisation is a charity and the Inland Revenue accepts that decision. I would like to ensure that the same happens here. It is unlikely that the Inland Revenue would recognise as a charity an organisation that OSCR did not recognise, but as OSCR will be the primary decision maker on whether an organisation is a charity, the Inland Revenue should defer to OSCR’s decision.

Mary Scanlon: So you suggest that the bill is not sufficiently clear on the relationship between OSCR and the Inland Revenue and that a memorandum of understanding is required to clarify that issue.

Mike Gilbert: That is correct.

Donald Gorrie: ICAS’s written evidence has a couple of paragraphs that deal with inquiries into charities, which are covered in section 28. You express concern about the damage that might be
done to charities during the period in which an investigation is being carried out into whether the organisation is a proper charity or into alleged misconduct. How should that issue be dealt with? Could such inquiries be kept absolutely private until a decision is made, or is that not realistic?

Mike Gilbert: I would like to think that that is realistic, unless something major legislates against it. We are concerned about the benefit to the public interest. If an inquiry is launched into a charity that has been collecting funds that it appears to have been using to provide a service that is required, the charity might suddenly find itself in limbo. Even if the charity is subsequently cleared, it might find that all its good work has gone to waste.

I think that OSCR will be able to deal with situations that might arise in which the shutters need to come down because of a major fraud, but there is an issue to do with cases that are not quite as clear-cut. During the investigation and perhaps during the appeal, neither the charity nor the public should be disadvantaged until a final decision has been reached. For example, if the organisation has received charitable rates relief and tax recovery, those benefits should continue until OSCR reaches a decision that it is not a charity. If such an organisation's funds are perceived to be used properly, any services that it provides or grants that it receives should continue during the inquiry. Otherwise, the public could be disadvantaged.

Christine Grahame: The submission from ICAS states that the thresholds for independent examination of accounts that are proposed for England and Wales will be too high, at least initially, for Scotland. What are those thresholds? Can you provide a few examples to put some flesh on that for me? What would be an appropriate banding in Scotland?

Mike Gilbert: We have been told that there are around 20,000 operating charities in Scotland. According to Martin Currie’s “Top 1000 Charities in Scotland”—the book is published by Caritas Data Limited and a charity’s entry in it is voluntary, not mandatory—only 275 of Scotland’s top 1,000 charities have an income of more than £1 million and the next 225 have an income of between £380,000 and £1 million. Therefore, only 500 of those 20,000 charities have large incomes.

Under the English bill, any charity that has an income of more than £500,000 will be audited. We feel that such a figure would be too high for Scotland. Unfortunately, we do not at present have enough information on the sector to work out what the appropriate level in Scotland should be. We must remember that OSCR will need to perform sufficient audits and independent examinations of charity accounts if we are to ensure public confidence. If we were to pick a figure of £500,000, so many charities would drop out that public confidence would not necessarily be ensured.

At the other end of the scale, we think that the level at which independent scrutiny begins, which is currently £25,000, should be increased. Again, we lack enough information on the sector to be able to reach a firm conclusion on what the level should be. I believe that we will find that out only once OSCR starts receiving returns and makes that information available.

Christine Grahame: Thank you; I was able to follow that. An accountant has made me understand something—that is one of life’s miracles. A miracle has happened today.

The question that follows on from that is how OSCR will know what to do. At what point in time after it starts registering charities will OSCR be able to make a rule about the level of income at which independent examination will be required? What do you foresee for that? The nub or root of the issue is that charities could be brought into disrepute by unscrupulous management of funds.

Mike Gilbert: To be honest, I do not know. We need information from the sector to be able to select even a broad guideline. Whether that should be done in conjunction with OSCR or how it should be approached, we just do not know because we do not have the information. However, if fewer than 500 out of the 20,000 charities end up being audited, that would not serve the public. Personally, I might argue that we should halve the figure that is used in England and Wales. However, even a threshold of £250,000 might be too high. We just do not have enough information on the sector.

Christine Grahame: Who should deal with that issue? Should the minister’s department not deal with it, given that it is fairly fundamental?

Mike Gilbert: We do not have the information. Perhaps the Executive does not have it either.

Christine Grahame: We can ask the minister.

Mr Home Robertson: He might not have it either.

Christine Grahame: We can still ask him, so that he can tell us whether he has it.

11:45

Cathie Craigie: Chapter 3 is on co-operation and information. Section 25 will remove restrictions on the disclosure of information to OSCR by charity trustees and independent examiners or auditors of charities’ accounts. The Institute of Chartered Accountants of Scotland recommends in its written submission the
introduction of a right and a duty for auditors to report to OSCR. You make a number of detailed comments on that—they take up almost a page of your submission—and you are obviously worried that auditors who disclose information to OSCR will not have the proper protection of the law. For the benefit of the committee, will you summarise the main issues and talk us through them?

Mike Gilbert: I will try. The bill refers to a right to report, but we believe that there should also be a duty to report, so that if an auditor comes across something that should be reported they are bound to report it. That compares to whistleblowing in relation to pension schemes, for example, although we should avoid falling into the same trap. With pension schemes, there was a requirement to report absolutely everything and the authorities were inundated with matters that were not significant. Discretion must be left not just to auditors but to reporting accountants and independent reporters to report to OSCR only material items—in other words, things that they cannot sort out with the charity concerned. In that process, however, we are destroying client confidentiality, and we think that there must be some protection for reporters so that they cannot be pursued by the people on whom they report, be they the charity’s staff or individual trustees. That is a summary of our position.

Cathie Craigie: Can you give us some practical examples? Perhaps some of your members have dealt with such cases in the past and have been concerned about them.

Mike Gilbert: I would have to do that on a personal basis, and unfortunately I cannot think of any examples at the moment. I use pension schemes as a parallel; if a pension scheme produced its accounts later than the specified date by a matter of a few days, we were required to report that. There can be all sorts of simple reasons for such lateness, which, to my mind, is not reported nowadays unless accounts are significantly late and no attention is being paid.

If a charity has not followed the rules but the mistake will be corrected, there is no point in reporting that. However, if a charity is taking deliberate action—for example by paying a trustee when it has no authority to do so—that should be reported.

Cathie Craigie: We had discussions with previous witnesses about mismanagement and misconduct. You are seeking protection for accountants or auditors in cases in which they think that there has been genuine misconduct in an organisation and in which a phone call to say that things are not okay has not satisfied them.

Mike Gilbert: That is correct. They should not be sued for breaking confidentiality, because it is their duty to report that something is wrong.

Donald Gorrie: The Scottish Grant Making Trust Group argues that, for the recipients of money, one of the merits of grant-making trusts is that they have a lighter touch of regulation than public bodies. Will you be able to satisfy OSCR that that light touch is adequate? Is it possible to have a regime in which you can continue to support innovative and perhaps slightly risky ventures that might fail, given that OSCR might say that they are not a proper use of charitable money?

Fraser Falconer: Grant-making trusts will ensure, under good audit and compliance procedures, that the money that they have donated to a playgroup or youth club has been spent for the purpose for which it was given and that there will be basic reporting back from a community organisation that has received a grant. I think that we can satisfy the existing regulations or any new regulations that are introduced with regard to ensuring that we are good stewards of money.

The second point is strong, and is at the heart of many grant-making foundations. We are talking about organisations such as the Carnegie Trust, the Robertson Trust and others that have built up a history of funding unfashionable causes. There is a risk in funding such causes. We think that the risk is often that the project will not work, rather than that money will not be spent properly. Many grant-making trusts are concerned that, for example, a grant could be given to a new Streetwork project that works with young homeless people, a worker could be funded and all the receipts and payment details might be available, but the project might not work for other reasons. It might not work as a result of the nature of dealing with vulnerable people. We think that we can separate audit and compliance in our heads, and spending money for the purpose for which it was given and the outcomes from doing so. We have wanted to encourage grant making and philanthropy in such high-risk areas, because society will not change unless somebody takes a flier or a calculated risk.

Donald Gorrie: So OSCR must accept a project’s right to fail.

Fraser Falconer: Yes. It should look into projects and say that money was given for a purpose and was spent on that purpose, but that the outcome was not achieved for some other reason.

Christine Grahame: The Scottish Grant Making Trust Group’s submission makes a salient point when it states:

“A 1% increase in UK Trust’s (usually based in England) grant making into Scotland would represent £60m per annum to Scottish charitable and voluntary organisations.”
A plea could be made for that now, but will the bill have any effect on existing contributions from south of the border?

Fraser Falconer: We are aware that, for every 10 miles further from Edinburgh that a person goes, the more mysteries and mystiques there will be about how we do our business in Scotland.

Christine Grahame: I say to John Home Robertson that that includes East Lothian.

Fraser Falconer: I am sure that members have come to recognise that over the past couple of years. People who manage UK trusts have a UK responsibility and can spend money throughout the UK. From our contact with those trusts, there is nervousness and a wait-and-see attitude, as parallel legislation is going through at Westminster. We are keen for people not to take their eye off the ball in Scotland, but we do not detect any reluctance to come and fund at the moment. Our submission tries to look at how OSCR and the Charity Commission for England and Wales could consider similar registration processes for grant-making trusts, so that if a grant-making trust is based in London and wants to fund in Scotland, things that do not prohibit them from doing so are considered. The phrase “prohibit them” might not be right, but the regulation regimes are quite similar. If somebody is running a grant-making trust in London and it is a legal requirement that it must register with OSCR if it is operating in Scotland, some documentation and paperwork should look similar.

Christine Grahame: As matter of interest, do UK trusts that are based in Scotland reciprocate?

Fraser Falconer: Yes. The Carnegie Trust is the most famous example.

Christine Grahame: Do you have figures for that?

Fraser Falconer: No, but I think that we are talking about a fraction. Only one or two major UK trusts are based in Scotland.

Mary Scanlon: You heard the evidence from the national collections institutions, which said that they would be unable to attract funding from grant-making trusts and foundations if they lost their charitable status. What prevents a grant-making trust or foundation from giving to organisations that are not run for profit but which do not have charitable status?

Fraser Falconer: It comes down to the trust deed of the individual trust. For instance, some grant-making organisations can give grants to organisations in Scotland that are not charitable trusts. In my day job, I run the BBC children in need appeal in Scotland. We fund playgroups, youth clubs and residents associations that are not companies limited by guarantee with charitable status, as recognised by the Inland Revenue. It is down to the individual trust deed. Other prominent members of the Scottish Grant Making Trust Group—the Robertson Trust and Lloyds TSB, for example—have it written into their trust deeds that they can give only to registered charities. It is a double whammy.

Mary Scanlon: But it is more financially beneficial for an organisation to be registered as a charity.

Fraser Falconer: Yes. If you were setting up an organisation and it was your wish eventually to trade, hold assets and employ staff, we would think that you, as a trustee, should go for charitable status because that would limit your liabilities. However, if you were setting up a playgroup in your area and your sole activity was to run the playgroup, collect payments and employ one member of staff for that single purpose, as things stand, we would say that you should go for unincorporated association as a normal self-help organisation. To be honest, Scotland thrives at community level through nurturing and encouraging those groups that often get left out of the funding from other bodies. The matter is complex, but most voluntary organisations aspire to do more and grow; therefore, they would eventually want to become registered charities.

Mary Scanlon: Is there any threat in the bill to those small groups to which you give that are not registered as charities?

Fraser Falconer: I do not think so. There is a sensitivity to the process that is going on whereby small self-help groups will become recognised.

Mary Scanlon: It will also depend on the thresholds, which you discussed with Christine Grahame.

Fraser Falconer: Yes.

Christine Grahame: I have a specific question on section 93, on the power of investment. I will give an example. I feel that I am a poacher turned gamekeeper, although I am sure that I will get it wrong. Let us imagine that a trust and a company are in close association. The trustees may be family members—they may not be, but let us say that they are—and the company is a family company. The trust invests in that company and its members are shareholders in the company. What impact would the bill have on that arrangement? Could the trust no longer have shares in the company, given the need for trustees to have regard to

“the suitability to the trust of the proposed investment”
and

“the need for diversification of investments”?

Christine Grahame: If it is operating in Scotland, some documentation and paperwork should look similar.
Under the current circumstances, does the trust have charitable status with the tax benefits that flow from that? I hear a snort from someone, so I think that I am getting it wrong.

Mr Home Robertson: You have lost me.

Christine Grahame: There are two issues. First, there is the question about the investment. Would the trust no longer be entitled to have shares in that company because of the closeness of association, which would not be diversification? Secondly, would the trust lose its current charitable status? Or am I asking the wrong questions? Could shares in that company no longer be taken out by the trust because of the circumstances that I have described?

12:00

Mike Gilbert: I would have thought that the trust could invest in a family company, but I would not have thought that the trust would have had charitable status in the first place.

Christine Grahame: That one is out of the way. That is fine.

Mike Gilbert: That is one of the matters about which we have concerns. In proposed new section 4A(4) of the Trusts (Scotland) Act 1921, the trustees are allowed, or permitted, to make an investment without reference.

Christine Grahame: Proposed new section 4A(4) states:

“If a trustee reasonably concludes that in all the circumstances it is unnecessary”.

It is up to the trustee to take that view.

Mike Gilbert: Yes. It would be a very bold trustee who would do that, and that is where our concerns lie. What is laid down is fine up to a point. I hope that that subsection will cover a situation in which, for example, a trust has surplus funds for a short time. A trust may have collected £10,000 that it does not need to spend for six months, so it could put the money in a short-term deposit. The trustees would not need to take independent advice in such an investment.

Christine Grahame: But the situation would be different when, as in my example, there is a more structured investment.

Mike Gilbert: Yes. I believe that the trust should take advice. That is one of our concerns. I like to think that we would get guidance from OSCR on that aspect. As an institute, we have a concern about giving trustees free rein to do something that might end up being reportable. They may find that the rules do not let them do that, but I think that there needs to be guidance on the matter from OSCR for charitable trusts, so that the trustees do not fall foul by doing something that they should not do.

Christine Grahame: I appreciate that and I also follow that. I wish that you had taught me accountancy; I would not have failed it the first time.

Would the situation that I described be unusual or would many small trusts find themselves in such a situation?

Fraser Falconer: I think that it would be very unusual.

Mike Gilbert: Because of the connected persons, there would have to be full disclosure in the accounts in any event so there would be no way in which the situation would not be above board.

Christine Grahame: Absolutely.

Donald Gorrie: The Institute of Chartered Accountants of Scotland expressed concern in its submission about the genuine independence of OSCR because the minister will say how many members OSCR should have and will continue to appoint the board. As I understand it, you suggest that the minister should appoint the initial board but that, after that, OSCR should be independent and appoint its own members. Is that what you are saying? Why are you saying that?

Mike Gilbert: That is absolutely correct. We seek to ensure that OSCR is not only independent but is seen to be independent. It is inevitable that the minister will have to appoint the initial members of the board, but thereafter those who are appointed should elect their own chairman and additional members. That should be subject to approval, but nevertheless the objective was not for OSCR to be seen to be linked to the minister in any way but for it to be seen to be independent. That is the purpose behind our suggestion.

Donald Gorrie: Would it help if the Parliament, rather than a minister, appointed the members? Are we more independent than ministers? We can perceive that OSCR could become a small inward-looking clique that would appoint like-minded people.

Mike Gilbert: Yes. There would have to be an approval mechanism somewhere. To be fair, we had not thought about how the board would be appointed under those circumstances.

Donald Gorrie: You have made your point.

Mary Scanlon: I asked Fraser Falconer what would prevent a grant-making trust or foundation from giving to bodies that were non-profit-making organisations but which did not have charitable status. Would the same situation apply with regard to giving to other trusts?

Fraser Falconer: A grant-making trust can give money to another grant-making trust, provided that it has recognised charitable status. For example,
an organisation such as the Scottish Community Foundation raises a lot of its money from and is sometimes an agent for spending money on behalf of other grant-making trusts in the United Kingdom.

**Mary Scanlon:** Nothing in the bill would change the existing situation.

**Fraser Falconer:** That is right. I think that it is okay.

**Mr Home Robertson:** To return to evidence that we heard earlier, if any of the national collections were to fail to qualify that would be a problem for grant-making trusts.

**Fraser Falconer:** Yes.

**The Convener:** As members have no further questions, I thank Mr Gilbert and Mr Falconer for their attendance and for sitting through all the evidence sessions.

*Meeting closed at 12:05.*
I am writing to you on behalf of the National Collections Institutions which gave evidence to the Scottish Parliament Communities Committee on the Charities and Trustee Investments (Scotland) Bill. We were asked by the Committee to provide a projection of loss of income should the National Collections Institutions lose charitable status. I enclose our joint projection over the next ten years. It shows that loss of charitable status would potentially lose our institutions between £8 and £27 million per annum.

We believe that the financial impact is very likely to be severe and will have a significant impact on the capacity of the Institutions to maintain existing services to the public and to expand these as part of Scotland’s evolving cultural sector. The impact on capital projects to renew exhibitions, visitor facilities and provision for education to a standard which bears international comparison, will be particularly severe.

We would, however, like to stress that it is not just the financial impact of the draft Bill that is significant to the future of these institutions. As organisations which clearly fulfil charitable purposes, we enjoy a broad community of support from our many thousands of donors, members, sponsors and volunteers, which would be very seriously curtailed if we ceased to be charities. All of our institutions already have and are further developing a solid basis of support which underlines the potential for a wider sustainable public engagement with Scotland’s culture in the future.

In our view there is recognition from a wide range of people that the public interest would not be best served by loss of the charitable status of our Institutions. We also believe that it is important that our institutions remain as NDPBs as the most effective way of securing our collections in trust for future generations and of ensuring public accountability. It is important to recognize that our collections have been built and sustained over many years by a combination of public support and private philanthropy. It is this synthesis which has created the unique value which our collections represent and a position which, we believe it is essential to maintain for the benefit of the people of Scotland.

We believe that the Draft Bill should be amended to enable our Institutions to remain both as charities and continue as NDPBs. We would like to suggest that this could be readily achieved by including a provision in Section 7 of the Bill which designated the National Collections Institutions as charities. Having looked into this matter carefully and taken appropriate advice we see no reason why such an amendment would in any way compromise the key elements of the Bill.

In our view the above solution would best serve the public interest. It would enable us to remain as fully accountable NDPBs while being regulated as charities by OSCR.

Dr. Gordon Rintoul
25 January 2005

On behalf of:
The Scottish National Collections Institutions
National Museums of Scotland
National Galleries of Scotland
National Library of Scotland
Royal Botanic Garden Edinburgh
Royal Commission on the Ancient and Historical Monuments of Scotland
### NATIONAL COLLECTIONS INSTITUTIONS OF SCOTLAND

Projected Additional Resources resulting from charitable activities for the next decade

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### Historical Information

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NB: Capital Projects are Projects that are programmed or under active consideration. The leverage funds are for the HLF/ National Art Collection Fund. It does not include any Scottish Executive money.

**SUPPLEMENTARY WRITTEN EVIDENCE FROM ASSOCIATION OF SCOTTISH COLLEGES**

**Charities and Trustee Investment (Scotland) Bill**

Association of Scottish Colleges (ASC) gave evidence on 19 January to the Communities Committee on the impact proposals contained in the Charities and Trustee Investment (Scotland) Bill would have for the charitable status and activities of colleges of further education. ASC’s aim is to ensure that Scotland’s Colleges retain the benefits of charitable status without excessive or overlapping regulation.
ASC recognises the importance of tighter responsibility and better accountability of public bodies which benefit from charitable status. For Colleges charitable status brings benefits in the form of:

- Exemption from UK corporation tax
- 5% VAT rate for utilities and 0% VAT rate for most marketing expenditure
- 80% relief on non-domestic rates relief

ASC estimates that these tax benefits alone could amount to £13 million per annum across the College sector. It would put a great strain on College finances to lose these benefits. In addition loss of charitable status would adversely affect opportunities for fund raising for both capital projects and recurrent services.

Following our evidence session ASC understands that the proposals in the Bill for much tighter rules on independence of charities would mean Colleges losing their charitable status unless the Bill is amended. Colleges are not alone in facing a problem of compatibility between their existing statutory requirements and the tighter requirements of the Bill as introduced in the Scottish Parliament. In this respect, Colleges are in a similar position to the National Collection NDPBs that gave evidence at the same session as ASC and Universities Scotland.

ASC has had useful discussions with Scottish Executive officials (including the Charities Bill team) and the Scottish Further Education Funding Council (SFEFC) on the ways in which these issues can be addressed.

ASC asks the Communities Committee for their support in securing amendments to the Bill that will safeguard the continuing charitable status of Scotland’s Colleges.

ASC remains of the view that the wide-ranging regulatory regime of OSCR (for accounting standards and various statutory approvals) should take into account the existing statutory requirements and the duties of other regulators such as SFEFC and Audit Scotland.

This Bill is an important opportunity to ensure that the new charities legislation delivers the most workable and most efficient solutions possible for Scotland’s Colleges. ASC believes more work is needed on the detail of the Bill. But we are optimistic that in working together with the Scottish Parliament and Scottish Executive we can achieve the best outcome for Colleges’ trusteeship.

I am copying this letter to the Deputy Convener of the Communities Committee Donald Gorrie MSP.

Tom Kelly
Chief Executive
Association of Scottish Colleges
11 February 2005

SUPPLEMENTARY WRITTEN EVIDENCE FROM INSTITUTE OF CHARTERED ACCOUNTANTS OF SCOTLAND

Charities and Trustee Investment (Scotland) Bill as Introduced to the Scottish Parliament on 15 November 2004

I listened with interest to the matters discussed at 19 January’s Communities Committee meeting and having considered further the issues explored during our panel session I’d like to provide clarification on our views in a number of areas. I’d be grateful if you could treat this as a supplementary submission which should be read in conjunction with the written evidence I submitted to the Committee on behalf of the Institute of Chartered Accountants of Scotland’s Charities Working Party on 11 January 2005.
The charity test: charitable purposes

In his question to Mr Gilbert, Mr Patrick Harvie MSP asked us to highlight the differences in the detailed wording, between the charitable purposes set out in the Charities Bill for England and Wales and those in the Scottish Bill, which have the potential to result in different approaches to the charity test emerging north and south of the border.

We have not formed a view on the detailed wording we would prefer to see included in both Bills, although we are comfortable with the wording in the Scottish Bill as introduced. In our view there is no apparent reason why the charitable purposes should be worded differently if the principles underpinning what is a charity are to be the same throughout the UK. Even differences in wording which at first sight do not appear to be significant could ultimately lead to divergent approaches.

We understand that it is likely that the two Bills will not fully converge on this issue. Therefore the Inland Revenue will have to deal with two slightly different regimes in relation to granting tax reliefs. We would like to see an understanding between the Inland Revenue and OSCR, to the effect that OSCR’s decisions on charitable status will be accepted by the Inland Revenue, so that Scottish charities will have certainty as to the UK tax reliefs for which they will be eligible.

Accountancy regulations: initial thresholds for charities which are not companies

We appreciate that thresholds for audit and examination will need to be established by regulations before OSCR’s work on collecting and analysing both financial data and information on areas such as corporate governance is complete. Therefore, we recommend a cautious approach to the setting of thresholds for charities which are not companies, hence our view that initial thresholds should probably be substantially less than half those planned for England and Wales. However, further consideration needs to be given to information currently available on Scottish charity income and assets before setting these initial thresholds to ensure that a reasonable proportion of charity sector income and assets are subject to external scrutiny such that public confidence in the charity sector is maintained. Martin Currie’s book ‘Top 1000 Charities in Scotland’ 2005 edition is now available and we understand that this provides information on the top 500 charities by income, expenditure and funds.

There is also a need to consider whether the smallest charities which are not companies could reasonably be excluded from the independent examination regime. At the moment all charities which are not companies require an independent examination. We recommend that charities with an income of say £25,000 or less are not required to have an independent examination. Charities with this level of income will be required to prepare annual returns for OSCR and we do not believe that an independent examination in addition to this requirement would necessarily benefit the charity or further contribute to the public interest.

There is some scope for immediate convergence with aspects of the proposed thresholds for England and Wales and with thresholds for charitable companies, from the effective date of the Scottish legislation. In Scotland, there is currently no asset threshold applied in determining whether an audit is required. The Charities Bill for England and Wales (which also amends the Companies Act 1985) includes an asset threshold for each form of charity. We believe that an asset threshold is useful as this would require charities with significant asset bases but with proportionately lower levels of income compared to the rest of the sector to have an audit. For example, grant-making trusts may fall within this category.

What is reasonable in terms of thresholds will need to be determined by the Scottish Ministers and ultimately Parliament based on their views on what levels of assurance would be acceptable to donors to Scottish charities and to the general public. It should be noted that all charities have the option of having an independent examination or audit either voluntarily or through the terms of their constitution if external scrutiny is not otherwise required.

Appeals and inquiries

We remain of the view that inquiries and appeals should remain confidential, unless a charity elects to make the proceedings public. In this way, we believe that the interests of donors to such charities and those benefiting from their services can both be served. For example, section 28(2) permits OSCR to
direct a charity, body or person not to undertake activities for a period of six months in the event of an inquiry. This will enable OSCR to stop charities under investigation from making public collections therefore ensuring that members of the public are not donating monies in circumstances where OSCR believes that funds might not be used for the purposes intended.

OSCR independence

Mr Donald Gorrie MSP asked for our view on whether OSCR appointing its own members could lead to ‘cronyism’, and if appointments being made by the Scottish Parliament would be a reasonable alternative. Subsequent to the meeting we have had time to consider this point. We remain of the view that OSCR should appoint its own members, other than initial appointments.

However, the process of recruiting members would need to have built in safeguards to ensure that it is fair and transparent. For example, we would expect OSCR to have documented guidelines on the appointment process and we expect to see posts being open to competition through advertising in the press. We would not recommend that appointments are made by the Scottish Parliament as this could make the process of recruitment more complex and time consuming than necessary.

We look forward to being of further assistance to the Committee.

Christine Scott
Assistant Director, Accounting & Auditing
Institute of Chartered Accountants of Scotland
25 January 2005
26 January 2005, (3rd Meeting, Session 2, (2005))

WRITTEN EVIDENCE FROM THE CITY OF EDINBURGH COUNCIL

Charities and Trustee Investment (Scotland) Bill – Proposals

It is understood that the Committee wishes us to further examine the implications for Leisure Trusts in respect of Section 7 (3)(b) of the draft Bill.

The Council welcomes the development of the proposals identified in the Bill, setting out a single legislative structure for charitable operations and improved governance arrangements for charities. Key aspects of its previous submission have been reflected in the current draft of the Bill.

The Council has different levels of relationship with a variety of organisations having charitable status in Edinburgh, including some organisations involved in sport, leisure and the arts. This can be both contractual, e.g; Landlord and Tenant, or through financial support (neither types being mutually exclusive).

In a few instances the relationship is more complex where the Memorandum and Articles of Association of a Charity provides that the Council may nominate a certain number of Directors to serve on its Board. Edinburgh Leisure and The Festival City Theatre Trust are subject to such a dual relationship and the Council has the right to nominate directors to serve on the boards of these charities.

Although both charities are actually Companies Limited by Guarantee, incorporated under the Companies Act 1985 and having “charitable status”, they are not a “Trust” set up under a Trust Deed. The description of these charities as Trusts is therefore misleading with confusion arising from the fact that at one time nearly all charities were set up in Scotland under a Trust Deed, with only a few being set up by Royal Charter or Act of Parliament.

Edinburgh Leisure was established in 1997/98, and from 1 April 1998 it took over responsibility for the management and for the operation of the Council’s sporting and leisure facilities. The Council makes an annual financial contribution of around £7.4M in grant aid. Edinburgh Leisure generates additional income of £10M from operations and other activity which is reinvested to develop public services.

Festival City Theatres Trust (originally known as the Empire Theatre Trust) was established in 1992. The group receives an annual subsidy of around £470,000, representing 16% of total income. The core service is the operation of two key city theatres.

Background

Establishment of these independent charitable companies was undertaken with a view to:

- ensuring that there was easy access to affordable sporting and leisure activities open to users at all levels of sporting ability;
- providing a single structure for managing the city’s sports and leisure infrastructure, and;
- providing a more holistic service in line with community engagement priorities and improved public benefit.

Governance and Control Issues

The Council annually appoints Elected Members to a range of independent groups / charities across the city.

In appointing to charitable and other third parties, the Council is clear that the appointees are charged with the pursuance of business and charitable objectives. In terms of both trust and company law, once appointed the Council appointee has always to act in the best interests of the body to which they are appointed, even if that provides a conflict of interest position with the Council.
The Memorandum and Articles for Edinburgh Leisure make provision for five Councillors to be appointed to the Board, from an overall membership, currently at thirteen. The total Board strength is likely to be increased to fifteen in the near future.

Appointments from the Council to the Board of Festival City Theatres is subject to similar requirements.

**Public Benefit**

Edinburgh Leisure’s charitable objectives are identified as the following:-

- the advancement of health;
- civic responsibility and community development;
- advancement of amateur sport, and;
- advancement of education.

The charity provides services that support health attainment and improvement, tackle health inequality, social inclusion and the city’s objectives of an inclusive society and a safer & healthier place. Edinburgh Leisure is also able to make provision for under-represented community interests. As Edinburgh Leisure is not profit driven, the charity reinvests in service development. For example:-

- partnership agreement with the Edinburgh Young Scot initiative – allowing more access to young people at discounted rates;
- the community access programme that supports community engagement with socially excluded youth groups for £1 at off-peak times;
- a programme of free swimming available to pupils within Edinburgh primary schools. This achieved around 225,000 free swim visits over a 9 month period in 2004.

Other areas include access to leisure facilities as a reward for active citizenship, an annual youth games event for over 1000 young people, a free outreach swimming coaching service, promotion in schools of health and fitness and supporting leadership development with young people.

Edinburgh Leisure also contributes to the SPORT 21 initiative to support sporting excellence, achieved through specialist coaching, partnership with the HE/FE sector and priority access to facilities.

Festival City Theatres provides for the advancement of arts, heritage, culture or science. Public benefit here is the provision of the accessible public service and education programmes and participation in the city’s theatre strategy and other associated local arts strategies.

**Public funding requirements**

In providing grant aid, the Council requires to secure Best Value and compliance with funding objectives consistent with the proper stewardship of public funds. Both organisations are responsible for developing and progressing a Business Plan, achieving financial targets and identifying operational priorities. As part of the grant management arrangements, the Council receives the plan for agreement. This is in order to safeguard public access and engagement without detriment to programme, opportunity or community need(s).

Officers from the Council undertake monitoring of the spending of grant aid by recipients, to ensure both sound governance and achievement of funding / business targets. Responsibility for achieving all objectives however remains the preserve of the respective Boards, and both charities have operational freedom to develop their services within the Business Plan. Legal responsibility for the operation and management of facilities and of all events remains firmly with the Boards.
Future charitable criteria

In respect of the re-consideration of charitable status by OSCR, it is clear that the charities deliver a service which will meet both the charitable purposes test and that of governance arrangements. In respect to section 7 (3)(b), it is suggested that the Committee consider an amendment which would delete 7 (3)(b).

Graeme McKechnie
Policy Officer, Voluntary Sector Liaison
The City of Edinburgh Council
24 January 2005

WRITTEN EVIDENCE FROM OXFAM IN SCOTLAND

Evidence presented to the Scottish Parliament’s Communities Committee on 26th January 2005 regarding the Charities & Trustee Investments (Scotland) Bill 2004.

Oxfam welcomes the introduction of the Charities and Trustee Investments (Scotland) Bill, seeing reform of charity law in Scotland as a means of creating a modern and appropriate framework for supporting and regulating charitable activity in Scotland. In our response to the Scottish Executive’s Consultation on the Draft Charities & Trustee Investments Bill, and through participation in the draft Bill Reference Group, we have broadly welcomed the proposals brought forward, and believe that improving the regulatory environment for the charity sector has the potential to enhance public confidence in, and support of, the work of charities in Scotland.

Oxfam works to overcome poverty and its causes in over 70 countries around the world. Our experience and expertise in development and humanitarian assistance is recognised internationally. Oxfam has been working in Scotland for almost sixty years, where we currently have over sixty shops and campaign groups, and around sixty thousand donors and supporters. Oxfam in Scotland campaigns and advocates on issues related to trade, aid, education and conflict; we fundraise for our international development programmes, in response to humanitarian emergencies, and for our UK Poverty Programme. Development Education to promote global citizenship is another critical part of our work. Oxfam plays a prominent role in civil society, working through staff and volunteers, through networks, through partnership with other NGOs, and with political and civic institutions.

As a charity that operates throughout the UK, Oxfam’s principal concern about the Charities & Trustee Investments (Scotland) Bill 2004 remains the proposals for the registration and regulation of charities that operate UK-wide and are already regulated by the Charity Commission. We strongly believe that the Bill should be amended to specify on the face of the Bill the registration requirements for charities with headquarters in England, Wales or Northern Ireland that operate in Scotland.

As we suggested to the Scottish Executive, in re-examining the status and registration requirements of charities that operate in Scotland but have their headquarters in other parts of the UK, it would be relevant to consider the current registration requirements of foreign companies registered in the UK (and indeed in Scotland) as set out in the Companies Act 1985. This would bring the registration requirements for charities in Scotland into line with international law on the control and regulation of foreign companies.

We would also like to see the Bill amended to specify and restrict the regulatory powers of the Office of the Scottish Charity Regulator in relation to those charities registered elsewhere.

Dual Registration and Regulation

We wish to distinguish between the requirements of registration and of regulation in the Bill. Oxfam has a long history of the registration and regulation of NGOs in over 70 countries, including its own experience of being licensed to operate in those countries. This experience leads us to believe that a balance needs to be struck between the appropriate provision of information by charities operating in a different jurisdiction and the difficulties of over regulation. We believe the Bill should distinguish between different kinds of non-Scottish charities in the registration requirements in Part 1 of the Bill.
Our concern is with the scope and extent of the registration and regulation requirements of charities with their headquarters in other parts of the UK. Neither the requirements of registration nor limits to the powers of regulation by OSCR in relation to ‘non Scottish’ charities are established in primary legislation. This creates the potential for such charities to be subject to extensive dual regulation under different jurisdictions, which may or may not be compatible.

There can be no objection to requiring non Scottish charities operating in Scotland to register their presence in Scotland if the Scottish Parliament regards this as an appropriate accountability mechanism. As noted above, there is a similar obligation on overseas companies to register their company and directors’ details under the Companies Act 1985. However, under schedules 21A/B/C of the Companies Act 1985 (which implements the 11th Company Law Directive) the registration details required are specified in primary legislation and limited in scope. The basic requirements are to:

- Register the name, legal status of the company and its country of incorporation.
- Register the names and details of its directors and secretary.
- Supply certified copies of certain documents, principally constitutional documents.
- Submit copies of annual accounts of the parent company.

Oxfam has registration requirements in over 70 countries and in most cases the requirements are limited to 1,3 and 4. In Kenya item 2 is also required. In some countries there are additional audit requirements, but this applies in a minority of cases. In some countries we are also obliged to file a statement of activities in that country.

We note however that under Companies Act rules, registration as a foreign company operating in the UK does not confer powers on the UK authorities to regulate the internal workings of the company (save for limited powers relating to winding up which derive from case law). However, the UK activities of the company are subject to UK law. Likewise, none of our registrations in any country in the world empower a government outside the UK to regulate Oxfam’s internal workings but we are obliged to comply with all local laws which affect our activities in those countries.

**Regulation of charities or regulation of the activities of charities?**

We welcome the provision in the Bill (Chapter 3, Co-operation) placing a duty upon OSCR to co-operate with other regulators, and welcome the statements of intent in the Policy Memorandum to “reduce the additional burden of regulation on charities” already regulated elsewhere. The Scottish Executive’s Consultation Paper on the Draft Bill stated that “OSCR will only take action [against non Scottish charities] regarding their Scottish activities.” (p13). However, this is not reflected in the construction of the Bill as introduced.

Under s103 a charity is defined as “a body entered in the Register”. Large parts of the Bill then apply to “charities” generally with no distinction between charities that are registered exclusively with OSCR and those that have their principal regulator elsewhere. This could lead to considerable problems of interpretation.

We strongly believe the Bill should distinguish between organisations whose principal regulator is in the UK and those whose principal regulator is elsewhere. This applies particularly forcefully to charitable companies that are already subject to a common regime under the Companies Acts, but also to any charity registered in England and Wales where the common approach of OSCR and the Charity Commission would mean that each regulator respects the principle of home state control. This argument applies with less force to charities from outside the UK, which have a very different method and principles of regulation. For example, charities in the UK have a common tax status and very similar rules as to charitable purposes. Charities from countries with other legal traditions, such as Sharia law or Chinese law will have very different regulatory regimes.

The fundamental legal principle is that it is the “home” state’s responsibility to regulate the conduct of charities established in that state and that the courts of one state will defer cases involving foreign charities to the courts of the foreign charity’s state. However, the general activities of foreign charities or companies carried out in a particular state will be subject to the regulations which apply to those activities in the state concerned, regardless of their status or registration.
Given that the Bill proposes a registration regime for charities which differs in practice from regulations affecting England and Wales and Northern Ireland, we believe it would be appropriate for the Charities and Trustee Investment (Scotland) Bill to specify in the primary legislation the requirements of registration for charities not headquartered in Scotland and to establish limits for the powers of the regulator in relation to those charities.

**Definitions of ‘charity’ and ‘public benefit’**

We support the definition of charitable purposes and particularly welcome the creation of the advancement of human rights, conflict resolution or reconciliation as a charitable purpose in its own right. The scope of the framework for the regulation of Scottish charities is in our view necessary and proportionate.

**Additional financial and administrative burdens placed on charities**

Dual registration and regulation will undoubtedly result in additional administrative costs for UK-wide charities operating in Scotland. For charities, keeping administrative costs low is important to the maintenance of public confidence, and so we would stress the need for OSCR to be diligent in keeping compliance costs for charities minimal and proportionate. We welcome the commitment to take a ‘proportionate’ approach to information requirements. This issue highlights one reason why the duty placed on OSCR to cooperate with other regulators is essential.

**Fundraising**

We warmly welcome the regulations to control fundraising set out in Part 2 of the Bill. We fully support (and contributed to) the detailed comments made by the Institute of Fundraising in their submission to the Scottish Executive Consultation on the Draft Bill and their recent evidence presented to this Committee. We share the Institute’s concern that the Bill as introduced will fail to achieve a unified and proportionate scheme for licensing public benevolent collections, which is able to be applied consistently by local authorities. It would be unfortunate if the opportunity to do so were to be missed in the introduction of new legislation.

**Conclusion**

We welcome the Bill and in particular support the proposals for charitable purposes and the control of fundraising.

However, in its application to charitable and benevolent organisations whose principal regulator is outside Scotland, the Bill raises significant issues, especially where there are conflicts of laws and/or jurisdictions.

These are issues that require clarification on the face of the Bill and not be left to secondary regulations. We strongly believe that the Bill should have a separate Section on the registration and regulation of charities registered elsewhere and clearly state which parts of the Bill apply only to charities headquartered in Scotland.

Judith Robertson  
Head of Oxfam in Scotland  
18 January 2005

**WRITTEN EVIDENCE FROM CAPABILITY SCOTLAND**

Capability Scotland is the country’s leading disability organisation working for a just Scotland. We work with children, adults and families living with a disability to support them in their everyday lives. We are a leading provider of flexible, person-centred services for children and adults with a range of needs and disabilities. Social justice is at the core of our ethos and we campaign on this by working with disabled people, their families and carers to influence policy legislation, practice and attitudes.

We are also one of the country’s largest charitable organisations with a turnover in excess of £25million. We employ 1200 people and support 700 volunteers in the provision of quality, person...
centred services for disabled people of all ages, living all over Scotland. Every year we reach over 4000 disabled people, family members and carers.

As an organisation, we have played a full role in the development of the new legislative framework for charities. We are proud to have done so and to have made a significant contribution to the proposals contained in the bill. This contribution has been made in a variety of ways: through our organisation and through our membership of the Institute of Fundraising Scotland, whose convenership we currently hold. Where our evidence is silent on particular matters, it can be assumed that we support the views expressed in evidence by the Institute of Fundraising.

We welcome the Charities and Trustee Investment (Scotland) Bill. We also welcome the measures taken to date by the Scottish Executive, specifically in establishing the Office of Scottish Charity Regulator (OSCR).

Part 1, Chapter 2, The Charity Test

Capability Scotland broadly welcomes the charitable test and criteria set for determining public benefit. We believe this will be beneficial in terms of providing public confidence in the work of the sector. It is hoped that OSCR will also perform a monitoring role in relation to the relevance and appropriateness of the criteria in line with any developments in the sector or society. We would welcome the committee seeking clarification on this point and indeed that there are powers in the legislation to enable amendment of the tests in the future without recourse to further primary legislation.

Charitable Status

Capability Scotland is concerned that the breath of the exception would enable organisations that for example, have members for campaigning purposes who are Scottish to accept and use funds raised from Scotland through a UK wide fundraising campaign in its work elsewhere in the UK. Yet, it is not clear whether OSCR would have any regulatory role in relation to such situations. There is a risk that public confidence could be undermined in terms of its understanding of the extending of such organisations’ operation. It also potentially widens the fundraising net for example, English registered and operating charities while continuing to restrict the net for Scottish registered and operating charities to Scotland. Capability Scotland would welcome the committee exploring these concerns and seeking clarification from the Scottish Executive on how such situations might be prevented and/or dealt with.

Chapter 7, Scottish Charitable Incorporated Organisations (SCIOs)

Our organisation is concerned at the proposed option of non liability for SCIO board members. There is a risk that board members may make more rash decisions than they would if liable for the cost of their decisions. Capability Scotland would prefer that limited liability be retained as an option.

Chapter 9, Charity Trustees

Capability Scotland is pleased that the Scottish Executive has responded positively to concerns expressed by us, and others, about changing the name of trustees.

Part 2, Fundraising for Benevolent Bodies

Capability Scotland is a member of the Institute of Fundraising and concur with evidence submitted by it on funding and fundraising matters. We would specifically emphasise the points and recommendations made by the Institute about public benevolent collections.

Conclusion

Legislative overhaul of charities in Scotland has been long overdue. Capability Scotland recognises the need for a strong regulatory framework to monitor and provide guidance to the charities sector in Scotland and to protect against fraudulent charity activity and misrepresentation. Just as importantly, such a framework should promote and foster the vital and often, unique work charities do. Capability
Scotland considers that the bill substantially achieves its purpose. This has been achieved after a very lengthy period of deliberation and consultation. While that has been frustrating at times, in some respects it has been necessary. The Scottish Executive has shifted its position on many issues in response to the views and experience of the sector. Capability Scotland very much welcomes and appreciates this approach and the role the Scottish Parliament is now playing in that listening and finessing process. The result should be better law. Ultimately, the new law will help create the environment required by the charitable sector in Scotland to continue making its vital contribution to society in the future.

Kate Higgins
Policy and Parliamentary Affairs Manager
Capability Scotland
24 January 2005

WRITTEN EVIDENCE FROM THE WISE GROUP

About the Wise Group

The Wise Group is a social economy organisation with charitable status. Our primary objective is to help unemployed people to move into sustainable employment. We currently employ around 400 permanent staff operating in central and southern Scotland and the North East of England. We have an annual turnover of just under £20m.

Support for the Bill

We welcome and support the main provisions of the Bill, in particular:

- The proposal that the definition of a charity should be closely aligned with the definition that applies in England, as we operate in both Scotland and England
- The establishment of an independent regulator to ensure public confidence and accountability
- The proposed role of the regulator in promoting good practice
- The proposed powers of the regulator to deal with wrong-doing

Our main Concerns

Our main concerns centre on ensuring that the Regulator exercises its roles in regulation and the investigation of wrong-doing in a proportionate way, that reflects the characteristics of individual charities. We believe that the Wise Group and similar organisations are already subject to excessive scrutiny. There is a danger that additional scrutiny by the Regulator could reduce our operational efficiency whilst adding little or no public benefit.

We will use the example of the Wise Group to illustrate our point. The Wise Group does not receive any charitable donations directly from members of the public. The vast majority of our income comes either in the form of grants from public sector organisations (e.g. local authorities, Communities Scotland, the European Union) or from contracts to deliver public services (e.g. Job Centre Plus).

All public sector grant applications are subjected to rigorous appraisal procedures, monitoring regimes and audit to ensure public accountability and value for money. It is not unusual for individual projects to receive grants from more than one source and, consequently, we often find that we have to comply with several appraisal and monitoring regimes within one project. For example, our Renfrew Recycling Project has 10 sources of funding.

Where we enter into a contractual relationship, we will either have won the contract as part of a competitive tender process or we will have negotiated the contract. In either case, the contract will be subject to normal commercial scrutiny, evaluation and audit to ensure value for money.

The Wise Group as a whole is registered as a company limited by guarantee and must conform to all UK accounting standards. A voluntary Board of Directors oversees all of the company’s activities. They receive no payment for their work. We must submit annual accounts, which have been approved by the Board, an Audit Committee and an external auditor, to Companies House.
We receive no core funding and all our overheads must be met through contributions from individual projects. We estimate that the burden is equivalent to five full-time members of staff.

In these circumstances we believe that the interests of the public are well protected and that any scrutiny by the Regulator should be very light touch. Indeed, we would argue that a more rigorous approach by the regulator is not in the public interests for two reasons:

- There will be a financial cost involved in complying with any regulatory regime. Since nearly all of our income comes from the public sector, it is the public purse that would end up meeting the cost of the additional regulation
- It is the Scottish Executive’s policy to enable social economy organisations to increase their role in delivering public services. The additional costs of regulation would increase our overheads and diminish our ability to compete for public contracts.

Our proposed amendments to the Bill

We recognise that it is very difficult for the Bill to anticipate the particular circumstances of each charity. However, we do believe it is appropriate that the Regulator is held accountable for the regulatory burden it places on the charitable sector.

We therefore recommend that the Bill should contain provision for a regular independent review of how the Regulator puts into practice its powers to regulate and investigate wrong-doing. That review should take place every 3-5 years and be overseen by a steering group drawn from the charities sector.

Colin Armstrong  
Head of Regeneration Services  
The Wise Group  
21 January 2005

WRITTEN EVIDENCE FROM OFFICE OF THE SCOTTISH CHARITY REGULATOR (OSCR)

The charity test

Charitable purposes
In our original submission we suggested further consideration be given to categories (j) and (k) which are narrowly drawn compared to English categories, as now seen in the English Bill. Given the policy intention to align definition as far as possible, we do not think there is a policy requirement to maintain these narrow definitions and we suggest they should be expanded in line with the wording now incorporated in the English Charities Bill.

Independence
Independence is already an existing requirement, although the case law on this is underdeveloped (see 2.2 below). The revised text in the Bill is a response to the issues originally raised by the McFadden Commission and the debate throughout the consultation period. In England, the question of constitution is addressed through the technical rules relating to establishing High Court jurisdiction and also in the guidelines issued by the Charity Commission on “The independence of charities from the state”.

We note the concern that existing NDPBs may not meet the requirement of independence. From the regulator's point of view, the impact of clause 7 (3) (b) depends on the exact constitution of an organisation (as distinct from matters of custom and practice, or the conditions attached to a separate funding agreement). Whether any individual NDPB – or indeed any charity set up by a third party such as a local authority - will be caught, therefore depends on the exact terms of the constitution. The organisation must meet the charity test at the time of creation and on an ongoing basis, since in terms of clause 30, OSCR must remove any charity which does not meet the charity test. Once the charity is recognised, a change to charitable purposes would require OSCR consent.

Independence of governance and action is also a continuing requirement, reflected in trustee duties to act in the interests of the charity (clause 65 (1), subject to clause 65 (3)). The Charity Commission
guidelines cover matters such as confidentiality of Board papers and the right to send an Observer to all meetings which are likely to be matters covered in the founding constitution.

Public benefit
In our submission to the consultation we welcomed the removal of the presumption of public benefit. Our view is that it will assist the development of a regulatory system which clearly meets public expectations of consistency and transparency.

So far as the test of public benefit set out in the Bill is concerned, we have discussed this in detail with the Inland Revenue Charities Unit. Our joint position is that the test is workable, and in broad terms involves little difference in interpretation from that applied by the Inland Revenue in their current practice in assessing public benefit. The statement of principles should provide welcome clarity on all sides. In conjunction with the requirement to consult, where we will liaise closely with the Charity Commission, the test should enable OCSR to provide detailed guidance and to assess applications and conduct a rolling review programme objectively, fairly and transparently. The process will also benefit charities, who will be in a position to better articulate the benefit which they provide to the public, as part of their general public accountability, not simply through their dialogue with the regulator.

Applying the test

Consistency and transparency
We agree that it is highly desirable to align definitions of charitable purpose in England and Scotland as closely as possible, in order to preserve consistency of tax treatment and certainty for cross border organisations

However we think it is also desirable from the public perspective to achieve greater clarity of the underlying principles in the Scottish context. That is why OSCR indicated in our submission to the consultation that we were sympathetic to the idea that there should be principles of public benefit on the face of the Bill. We welcome the fact these have now been introduced.

The English approach has been that public benefit is an aspect of charitable purpose rather than a separate test. In terms of evidence this may make little difference, but it does mean that in English case law public benefit and purpose are interwoven. We suggest that the Scottish approach is more transparent and easier for the public to understand, and may be more helpful in distinguishing type of purpose from quality of benefit.

Availability of precedent
There has been argument from Scotland for the continuing relevance and authority of English case law. We are not clear that English case law will be as authoritative in either jurisdiction as some witnesses have assumed. On any view, both OSCR and the Charity Commission will have to develop a new approach to some aspects of the charity test. In particular:

a) The presumption of public benefit will be removed in both jurisdictions. Although the Home Office and Charity Commission position is that the current law on public benefit is preserved by the Charities Bill, the fact is that since existing case law proceeds on the basis of presumption, the underlying assumptions will come under scrutiny in a way which has not been the case hitherto.

b) The joint position of the Charity Commission and OSCR is that “because there has been a presumption of public benefit in favour of particular purposes, the law as it relates to public benefit is not always fully developed in the case law. The removal of the presumption will mean that regulators’ guidance will assume greater importance in articulating, clarifying and developing the relevant principles. The Charity Commission guidance will be reviewed in line with developing understanding of these principles and their application and the operation of the guidance will be subject to review by the courts.” OSCR will have a similar statutory obligation to consult and issue guidance, where we will aim to work closely with the Charity Commission. OSCR decisions will also be reviewable by the courts.

c) There is very little charity case law on independence of constitution, the definition of which, as noted above, relies to a large extent on Charity Commission guidance and on the technical rules relating to establishing High Court jurisdiction in England. The Charity Commission guidance is largely
focused on the relationship between charities and local authorities, although in Scotland the debate within McFadden and subsequently has focused on NDPBs and the impact of Ministerial directions.

Application of precedent
The law is not static, and it has been recognised by the courts, the Charity Commission and the Inland Revenue that social and economic circumstances so change that individual decisions may not create binding precedents. Examples include

a) Recognition by the courts that purposes regarded as beneficial to the public and charitable in one age may not be so regarded in a later age, and vice versa. See particularly the judgements in National Anti-Vivisection Society v IRC (1948) and Lord Wilberforce’s judgement in Scottish Burial Reform and Cremation Society v Glasgow Corporation (1968) where he summarised the principle as that court decisions “have to keep the law on charities moving according as new ideas arise or old ones become obsolete or satisfied”.

b) The Charity Commission, while following overriding principles, has departed from precedent on occasion. In the vast majority of cases, this has been used to expand rather than limit the purposes which can be recognised as charitable. Examples of recent new purposes include the promotion of community capacity building, conservation of the environment, and promotion of racial harmony.

c) The Inland Revenue in Scotland recognised a clear change in public policy towards gun clubs by withdrawing charitable status in the wake of the Dunblane tragedy and new legislation.

Summary
If the changes to the categories of charitable purpose are made, we think other fears stated by some witnesses may be overstated. If amended, we do not share the view that the charitable purposes available in Scotland would then be narrower than in England and that Scottish charities would be disadvantaged. For the reasons outlined, we think the importance of case law may be overstated, and it is appropriate that the Bill as introduced sets out clearly Parliament’s intention.

OSCR’s view, shared by the Inland Revenue Charities Unit is that the Bill as introduced provides sufficient clarity and flexibility to allow OSCR, and in due course the courts, to develop the class of charitable purposes and the test of public benefit in light of philosophical, social and economic developments in society, within a clear legislative framework.

Consistency of regulation
The Bill as introduced is attempting to strike a balance between principled consistency and a pragmatic response to legacy, expectation and the resources available both to the regulator and the regulated constituency. There are therefore variations which can be seen as anomalous or alternatively a reasonable adjustment. From the regulator’s perspective:

a) The removal of presumption of public benefit and the application of a statutory test achieves consistency in the application of principle to the grant of charitable status. There will be significant exceptions to the scope and nature of regulation, assuming the charity test is met, but we welcome the logic that all charities are subject to the charity test, although recognising the difficulty that the independence test as framed creates for some NDPBs.

b) RSLs: the Bill provides that Communities Scotland will act as lead regulator of RSLs. This is clearly a significant variation in terms of operation of regulation. Our intention is to work closely with Communities Scotland, to ensure that there is consistency in the application of proportionate regulation.

c) Designated Religious Bodies: currently enjoy a certain immunity from intervention by OSCR and the courts, provided that they meet certain criteria and certain standards as to internal regulation. The Bill preserves immunity for organisations which meet the same criteria. Understandably there has been no regulatory activity since the original grant of status in 1993. While the criteria may be unchanged, it is likely that standards and the evidence required in future will be higher, in an era of greater scrutiny of both charities and the charity regulator than was the case in 1993.
Technical issues

Misconduct or mismanagement? OSCR locus to intervene

Whereas the 1990 Act was directed to those in “management or control” the focus of the new Bill is on the concept of trusteeship (stewardship) rather than management as such. This is consistent with the modern approach to corporate governance in both the public and private sectors, and certainly by no means exclusive to the charity sector. Although we understand there are concerns about the distinction between misconduct and mismanagement, it is hard to envisage a serious failure of management which is not ultimately also an issue of governance. In these circumstances, our view is that it is appropriate that OSCR powers should be directed, as currently framed, against misconduct and (where appropriate) mismanagement — but also that those powers should be proportionate and should be proportionately, fairly and transparently exercised.

OSCR powers

a) The detailed provisions of the Bill focus on OSCR powers of intervention, essential in a small number of cases. However the policy intention is to allow OSCR to continue the current practice to provide specific advice and guidance in the vast majority of individual cases considered by the OSCR staff. It would also be OSCR intention to issue general guidance, where this was considered more appropriate and useful than individual guidance. OSCR had also suggested in our submission to the original consultation that OSCR should have a specific remit to advise Ministers, not currently included in OSCR functions.

While we understand it is technically possible for OSCR to rely on clause 1 (3) to provide both general guidance and advice in individual cases, we can understand and appreciate the argument that this is not wholly transparent. It might give reassurance to those concerned at possible undue exercise of intervention powers if OSCR were given a more specific advisory function and powers as well as clause 1 (3) powers.

b) As presently framed OSCR powers under clause 28 and again in clause 31 are largely prohibitive. While OSCR could advise under clause 1(3) OSCR could not direct trustees to take positive action e.g. to hold a trustee meeting. The powers under clause 30 do include a power to direct. It would be unfortunate if the choice at an early, preventive stage were between advice and prohibition/sanction with no intermediate powers. Consideration might be given to a power to direct the charity under clause 28 (2) to “undertake or not to undertake” and to similar positive powers of direction under clause 31.

c) In our submission to the consultation, we indicated a serious concern about the test required before either OSCR or the court could exercise interim powers, given the policy intention set out in the consultation paper that “it is important for the regulator to have effective powers to deal with occasions when advice and direction are not sufficient”. On one view the test of satisfaction simply requires OSCR or the court to be “convinced” and that there may be no real distinction between “appears” and “satisfied” despite the wording of the 1990 Act. However it would be unfortunate if the test of “satisfied” precluded an early ability for OSCR or the court to exercise interim powers. We do not think case law offers assistance: as far as we are aware the courts have not had to distinguish between “appears” and “satisfied” in relation to the (relatively few) SCO petitions presented under the 1990 Act. Under the 1990 Act OSCR powers at its own hand are very limited, so the question of whether the test of satisfaction might be different for OSCR compared to the courts has not arisen. We remain of the view, therefore, that it would be useful to permit OSCR powers to be exercised on an “appears” basis in appropriate cases.

d) Clause 20 requires OSCR to co-operate with other regulators, a requirement which is very much in line with OSCR current thinking and operations. However in our submission to the consultation, we strongly recommended that there should be reciprocal obligations in the Bill for other regulators to co-operate with OSCR. We feel that reciprocity is an appropriate principle in relation to a regulatory framework which is intended to be proportionate and as far as possible to avoid the burden of dual regulation.

As presently drafted, OSCR has an obligation to co-operate with other regulators but the statutory obligation is not mutual. We suggest this can be easily addressed by expanding clause 20 (1) and by...
amending clause 20 (3) to read “the person or OSCR to exercise their respective functions”. This would be consistent with the disclosure provision in clause 24.

e) We note that ICAS proposes that auditors should have not simply a power but a duty to disclose matters of concern to OSCR (clause, 25). This would be consistent with the provisions of the English Bill and was one of OSCR's recommendations in our submission to the consultation. Like ICAS, we would wish to see a duty, which would not only ensure relevant information is passed to OSCR but would provide immunity for auditors from what might otherwise be a breach of client confidentiality.

**OSCR Governance**

**Independence**

A number of options were considered before the choice was made of a Non Ministerial Department. This model is relatively rare in Scotland, while the creation of a body corporate as part of the Scottish Administration is wholly novel (other NMDs are headed by individual office holders who are civil servants, whereas OSCR will have a non Executive Board). There are arguments for and against all possible models but from the regulators perspective, sufficient authority and operational independence are both critical. OSCR is content that the NMD model offers the best balance between authority, derived as part of the Scottish Administration, and effective, operational independence.

**Transparency and wider accountability**

The Annual Report is a means by which OSCR will formally account to Parliament, but there are numerous other opportunities for scrutiny and challenge of OSCR. OSCR has already set up a number of User Panels and been active in discussion and consultation, with charities and the public generally. As a public authority OSCR will be required to comply with FOI legislation and this has been built into OSCR as an Executive Agency. We envisage OSCR publishing general reports similar to our forthcoming report on the monitoring pilot and OSCR will have a duty to publish reports into enquiries. As noted earlier, there will be challenges to OSCR decisions, reviewable by the Appeals Panel and ultimately the Court of Session. Taken together, we think that there will be sufficient transparency and accountability to counter any concerns about constraints on OSCR independence arising from possible Ministerial direction or intervention.

Jane Ryder  
Chief Executive  
Office of the Scottish Charity Regulator  
19 January 2005

**WRITTEN EVIDENCE FROM COSLA**

**Charities and Trustee Investment (Scotland) Bill**

We thank you for your invitation to give oral evidence to the Communities Committee regarding the Charities and Trustee Investment (Scotland) Bill. We are keen for COSLA to be represented at this session, but have not, as yet, been able to secure suitable representation. In the meantime, I would wish to draw the Committee’s attention to the points highlighted within this letter.

In terms of our position on Charities and Trustee Investment (Scotland) Bill, we clearly represented within our response to the draft Bill, that we welcome the ethos of the Bill and feel that greater regulation will enhance public confidence in the sector and give the Scottish public reassurance that their donations are reaching the destinations to which they were intended. Our response to the consultation simply highlighted areas which we sought additional clarification for Local Authorities.

These points of clarification predominantly centred around the establishment and future working of the OSCR. We acknowledged the general welcome of the OSCR, but questioned the relationship between them and the Inland Revenue, particularly how tax relief would work in practice. Additionally considering how, if there is no requirement for UK charities to submit separate accounts to the OSCR, and the if the OSCR are only empowered to respond to Scottish activity, they would be able to distinguish between Scottish and the remainder of UK activities.
However looking at the Bill as introduced, it is interesting to note that the consultation version does not have an equivalent of what is now clause 7 (3)(b). COSLA has concerns regarding the possible implications for Local Authorities of the inclusion of this clause within the Bill. This could cause real financial problems for local authorities if the charitable status of existing trusts is lost because the wording of clause 7(3)(b) is so very wide ranging. We would argue the way to resolve the problem for local authorities is for "7(3)(b)" to be deleted in its entirety or else an exemption could be made for Local Authorities for their provision of public services.

We are aware that City of Edinburgh Council will raise these concerns at the Committee meeting. Should they wish to proceed with a call to remove this clause from the Bill or indeed seek amendment to clarify intent, this is certainly something we would support.

Should you require further information please do not hesitate to contact me.

Cllr Pat Watters
President
COSLA
20 January 2005
Scottish Parliament
Communities Committee
Wednesday 26 January 2005

[THE CONVENER opened the meeting at 09:30]

Charities and Trustee Investment (Scotland) Bill: Stage 1

The Convener (Karen Whitefield): Good morning and welcome to the third meeting of the Communities Committee in 2005. I remind everyone present that mobile phones should be turned off.

Agenda item 1 is on the Charities and Trustee Investment (Scotland) Bill. We will hear evidence from three panels of witnesses. I welcome the first panel, which is comprised of David Jack, the head of strategic support at the City of Edinburgh Council; Keith Jackson, the chief executive of Edinburgh Leisure; and Robert Livingston, the director of Highlands and Islands Arts Ltd, which is known as Hi-Arts. Before we begin formal questioning, I mention that the Convention of Scottish Local Authorities was also invited to give evidence today, but it advised the committee at somewhat short notice that it was unable to do so. In addition, I understand that Christine Grahame is unable to attend the meeting because she is a little under the weather this morning.

I will ask the first question. Do you believe that the Scottish Executive consulted satisfactorily on the bill’s proposals, took on board the responses to the consultation and reflected the suggestions in the bill as introduced?

David Jack (City of Edinburgh Council): Perhaps I could make the first contribution. We were impressed with the original consultation material, which was very well presented. Proposals for legislative change are usually fairly dense, so it was helpful to have easy-to-read material. The council had to do an internal consultation and collect views together, and the base material was certainly useful for that.

On whether the views expressed in the consultation were reflected in the report analysing the responses, I thought that the report was an extremely good production and an excellent summary of all the views that were taken. There was obviously evidence of significant changes in the grain of the totality of the consultation responses.

Our own experience at the council shows that taking consultation to a Rolls-Royce standard requires bespoke responses to individual consultation replies rather than just a composite, summary reply. However, that would be quite a task when there are hundreds of responses. The step on from the standard that has been achieved in this case might just be such a high standard.

Robert Livingston (Highlands and Islands Arts Ltd): From a Highlands and Islands perspective, I am certainly conscious that bodies such as the Scottish Council for Voluntary Organisations and Voluntary Arts Scotland carried out thorough consultations with their constituencies. I think that their submissions have been listened to and taken on board. However, when working through such umbrella bodies, there is the danger that on-the-ground groups in rural areas such as the Highlands and Islands are not necessarily fully engaged in the consultation. It can be difficult for voluntary sector bodies to carry out such consultation on a Scotland-wide basis. Certainly, from the point of view of our charity, I was aware that the consultation on the bill was going on, but I was not aware that it particularly impinged on the Highlands and Islands. Having said that and having been invited to come here today, I found all the documentation extremely clear. As my colleague said, that did a great deal to advance the process.

Keith Jackson (Edinburgh Leisure): I support my two colleagues’ comments. Advance information was very thorough. The only weakness that I would highlight is the late invite to this meeting. We were invited only last week, which did not give our organisation much opportunity, if any, to debate the issue at board level. It is at the latter end that there has been weakness.

The Convener: The main role of the Office of the Scottish Charity Regulator will be one of regulation, but it is being suggested to the committee that it should also have a role in advising on good governance. Do you think that OSCR should have a role in giving advice as well as its main, primary role of regulation?

David Jack: In our original submission, the council’s view was that it was difficult to be both an advising body and a regulatory agency. We had identified the potential for SCVO at Scottish level, and perhaps also the local councils for voluntary service, to support advice giving and any other more benign support for voluntary organisations in the charitable area.

Based on our experience in the council, we feel that the only other way to approach the issue would be to have very clear protocols—Chinese walls, if you like—between those giving advice and those monitoring and overseeing the delivery of services. Inside one organisation, that raises questions of where the real divide lies. Our preference would be for appropriate resourcing,
either nationally or locally, of local agencies to provide that support. In many areas, there is a growing atmosphere of partnership between agencies and the voluntary and community sector. Complications arise in the area that we are talking about, as there are differences between advice giving and support and monitoring and evaluation. That is a growing issue and does not affect this bill alone.

**Robert Livingston:** From what I know of the plans for OSCR, there seem to be a lot of benefits to its remaining a relatively lightweight, small-scale, streamlined organisation with a clear focus. Speaking from the point of view of the cultural sector that we deal with, I know that governance issues can become specific to different sectors and are often best addressed within those sectors, through bodies such as the Scottish Arts Council, local authorities or Voluntary Arts Scotland. As the SCVO submission said, there is a great deal of that kind of help out there. Perhaps it needs more resourcing, but I agree that it should be kept distinct from the regulatory functions of OSCR.

**Donald Gorrie (Central Scotland) (LD):** Before I ask a question about arm’s-length companies, perhaps I should put on record the fact that I was on the City of Edinburgh Council when it set up its arm’s-length company. At the time, I was not enthusiastic about that, but a lot has happened since then, so I have an open view on the matter.

What are the benefits of having some activities that used to be council activities done by an arm’s-length company? What are the benefits to the council, to the arm’s-length company and to the public, who are supposed to be the main beneficiaries?

**David Jack:** Perhaps I can offer a word or two on that, but I am sure that Keith Jackson is better able to describe the operational benefits. As far as the council is concerned, the history of the creation of arm’s-length companies such as Edinburgh Leisure is that it was originally driven by financial questions and by the search for savings in service delivery. Those companies are much more mature now and, for example, the independent status of Edinburgh Leisure provides a guarantee of affordable sporting and leisure activities for the whole of the city, with all sorts of prospects for engagement with communities made easier in a linkage with a separate organisation. A single structure has been achieved for managing the city’s sports and leisure infrastructure that has operational freedom to get on with that job without suffering from the fetters of the local government machine. Because there are more interests and input at board level and management level, the quality of service is improved.

On the financial front, the trust vehicle allows for the capturing of external resources from other funds, which substantially boosts the funding available for service development. Those are the main points. Since the trust was set up, other benefits have been discovered and the service pattern has improved as a result.

**Keith Jackson:** My first point is that Edinburgh Leisure is not an arm’s-length company of the council but a principal in its own right. That is an important differentiation.

There is no doubt that the financial gains to the service have been quite significant. The main benefits that have accrued since the company was established in 1998 are predominantly cultural in nature. There is no doubt in my mind that the service lends itself to operating outwith a local authority bureaucracy. The benefits of being a not-for-profit organisation have been substantial and the way in which the organisation is viewed by many of its partners has a quite significant impact. The views of those partners are important because they determine how they work with us. How they view the status of a local authority versus that of an organisation that is independent from that local authority is also important.

On immediate benefits, there is a risk of doing too much number crunching, but the financial benefit comes in the form of tax benefits. Since the company was established, it has saved somewhere in the region of £1.6 million per year in operating costs. That is a substantial saving over an eight-year period at a time when local authority budgets are under real pressure. Services such as culture and leisure tend to suffer in such an environment.

We should not ignore the impact of bringing an independent board into that environment. Edinburgh Leisure has a board of 13 and its size is about to increase to 15. The local authority has about 30 per cent representation on the board. There have been enormous benefits to bringing in people with different skills and, if you like, a selfish interest in the services that we are trying to provide. At any one time, Edinburgh Leisure has eight to 10 people aboard who focus solely on the delivery of the service that the company was set up to deliver. They have brought new skills and challenges to people such as me and other senior members of staff who are trying to move the organisation forward.

**Robert Livingston:** We are in an interesting situation because we relate to Highlands and Islands Enterprise in a way that is similar to the way in which Edinburgh Leisure relates to the City of Edinburgh Council. Hi-Arts was established by HIE and we receive an annual contract from it.

I echo everything that has been said about the benefits of that degree of independence, and particularly the points that were made about the
ability to bring in interests and influences from outside the organisation and to secure funding. The amount of money that HIE gives Hi-Arts each year is less than a quarter of its total turnover, all of which is applied for the benefit of communities and the cultural sector in the Highlands and Islands.

As it stands, the bill enhances the concept of independence as an absolute good without necessarily reflecting on the similar benefits that can accrue from partnership. There are already strong checks in place. Through an intervention from, I believe, the National Audit Office, we had to lose a member of HIE from our board; they were required to stand down under new regulations. That meant that our organisation lost a valuable link that benefited both organisations.

**Donald Gorrie:** One of my colleagues will be pursuing the problems that your organisations would face if they lost charitable status. However, before we come on to that, can you say how many of the benefits that you have described are due to the independence of the organisation and how many are due to its charitable status?

**Keith Jackson:** Charitable status means that we get relief on the tax on the buildings, which is quite significant. I am not sure what the amount is because the money accrues to the city and not to Edinburgh Leisure. At the time of transfer, it was in the region of £1 million. I suspect that it is probably double that by now. I mentioned earlier that the savings achieved by our decision-making autonomy in operations delivered is in the region of £1.6 million per year.

**Donald Gorrie:** Those savings are due to the independence of the organisation rather than its charitable status.

**Keith Jackson:** Yes.

**Donald Gorrie:** Thank you.

**Robert Livingston:** In our case, it is difficult to divide the two, but I can give you a concrete example. We recently completed a project called ArtsPlay, which links the child care sector and the arts. ArtsPlay was a £300,000 project and the bulk of the project’s funding came from the Community Fund and the Esmée Fairburn Foundation. We had to be independent to access the money and we had to be a charity; the two were very much tied together. If we had not had charitable status, we could not have conceived of the project. ArtsPlay was delivered in partnership with local authority-based child care partnerships across the Highlands and Islands.

09:45

**Scott Barrie (Dunfermline West) (Lab):** I want to continue to develop the idea of independence—the theme that Donald Gorrie introduced—but bring the discussion back to what the bill says.

Last week, we heard evidence from representatives of non-departmental public bodies who expressed concerns that they would fail the charity test because their boards are subject to ministerial direction. The independence about which you have spoken today is not quite the same thing, as the number of council appointees does not make up a majority of your board members. Are you concerned that you may be in danger of failing to satisfy that part of the charity test? What would be the effect of the loss of your charitable status?

**Keith Jackson:** Originally, when we read the bill, we saw no danger of losing our charitable status in that way. The impact of losing our charitable status would be significant for the local authorities that are the direct beneficiaries of the savings in tax. The impact on them would, in turn, have an impact on organisations such as Edinburgh Leisure.

The way in which other bodies view us is interesting. There has been a significant change in people’s attitudes towards us as an organisation. People perceive us as being a not-for-profit organisation and a charity. It is difficult to say whether additional funds have come into our organisation because we are a charity as opposed to a not-for-profit organisation—it is possible to be the one without being the other.

Since we became a charitable body, it has been interesting to note a definite softening towards us and an increased willingness to work with us, particularly at the community level of our work. If the situation were to be reversed, it is difficult to ascertain what the position would be, as the effects would take some years to work through the system. The question is difficult to answer.

**David Jack:** Perhaps I could volunteer a slightly different perspective on the issue that I hope is helpful to the committee. Clearly, there is a tension between the independence of funded bodies and the requirements that councils and other public authorities have nowadays for the proper stewardship of public funds. A lot of the council’s grant aid—something like £20 million each year, including the Edinburgh Leisure trust funding of £7 million—goes out to funded bodies. In most cases, we require much more intense and clear service-level agreements, funding criteria and levels of monitoring and oversight. Lately, that has allowed the council to report in the public domain on the efficacy of our grant-aided programmes. For example, we are now able to say how many people benefit from them and what the character of the benefit is in terms of increased volunteering and improved services to tackle social disadvantage. Although the relationship has
intensified, particularly in relation to audit, scrutiny and the need to deliver best value, that does not mean that there has been a direct impact on the independence of funded bodies. It is really important that those bodies are perceived to have a stand-alone position. As others have said, they have to pursue funds in other ways.

There is a tension between the funder’s—in my case, the council’s—requirement for increased oversight and the independence of the bodies themselves, particularly when the funding is absolutely central to a charitable body’s activities.

**Robert Livingston:** If I may, convener, I will add a point about the NDPBs. I fear that there is a risk of things getting out of step if a decision is taken on the status of the national collection-based bodies before the Cultural Commission reports. A number of national cultural bodies are not NDPBs at present—I am thinking of the performing arts companies—and whatever the commission recommends for their status remains in limbo at present. Clearly, any decision that is taken now on the charitable or independent status of the national galleries and museums will have implications for the future of the performing companies.

**Scott Barrie:** We might be muddying the waters here, but it is important to air this point. Judging from its written submission, which I have seen only this morning, COSLA appears to be arguing that it wants section 7(3)(b) to be deleted. That paragraph says that a body would not meet the charity test if “its constitution expressly permits a third party to direct or otherwise control its activities”.

Are you saying that you do not think that the situation is quite as clear cut as that, and that you are concerned about falling foul of the regulator with respect to satisfying it that you are a charity.

**David Jack:** In the note that the City of Edinburgh Council prepared for today, we said that we think that section 7(3)(b) should be deleted for the avoidance of doubt. Our submission also says that, for a number of reasons—not least the clear public benefit, the charitable objectives and the areas of direction and governance in the case of Edinburgh Leisure—there is not a problem with the test. However, there seems to be some doubt, given the fact that there is now more scrutiny between public funders and charitable bodies. That is an issue.

**Mr John Home Robertson (East Lothian) (Lab):** I declare an interest as a trustee of the East Lothian Community Development Trust. There may be others who have the same problem.

Mr Jackson said in his initial reply to Scott Barrie’s question that he was satisfied that Edinburgh Leisure would not fall foul of the new provision. I understand from your written evidence that Edinburgh Leisure’s board has 15 members, of which just five are councillors. That is a small minority of the trust. What has changed since your first reading of the bill to give rise to your concern?

**Keith Jackson:** There are two issues there. First, we have no written submission; the submission to which you refer is from the City of Edinburgh Council.

**Mr Home Robertson:** Sorry—I beg your pardon.

**Keith Jackson:** The second issue goes back to some of Mr Barrie’s comments. On the question of control of our organisation by the city council, that is not the case through the membership of the board. Councillors are in a minority of five among 13. From tomorrow, I hope and believe that that will become five among 15. That is on a par with many other organisations that the city council funds: councillor membership of the board is around 30 to 33 per cent. The control comes through the funding environment, as with any contract. We are geared to delivering the council’s policies. Should we fall foul of that, the local authority, through the funding mechanism, has the opportunity to pull the organisation in and address not so much how it is operating, but the direction that it is choosing to take. The funding mechanism is the controlling factor in that, not the membership of the board.

**Mary Scanlon (Highlands and Islands) (Con):** In paragraph 25 of the policy memorandum, independence is listed as one of the key principles for charities. Given what you have just said, do you feel that you could pass that key test of independence?

**Keith Jackson:** When we were established in 1998, the Inland Revenue wanted us to pass several key tests, and the process was quite long-winded. The Inland Revenue posed some quite detailed questions, central to which was, “Who makes the decisions on charges?” Charging policy is quite important, given the nature of our services. There were many other tests, and I cannot remember what they all were, but from an independence perspective I have no doubt that the city council does not try, through the funding mechanism, to control or overly influence—or influence at all—how Edinburgh Leisure operates. The council defines the purposes of its grant aid. It provides very broad parameters, for example in relation to the social inclusion agenda, young people, health and sports and recreation. The council will ask the company to tell it how it will deliver services in those areas. That involves a business planning process.

**Mary Scanlon:** You mention social inclusion, which is a key Scottish Executive objective. If that
were to change in some way, then what you are delivering would change. You are, therefore, following the policies of the Scottish Executive. If you should change direction at some time, would you not find it difficult to meet the key criterion that has been set down by OSCR and prove to OSCR that you are independent? For example, if there were a change of Government, there would be a key change in policy objectives. Would you be able to prove that you were independent?

**Keith Jackson:** I am sorry, but I am not really sure what your question is. I would have to look at the criteria for independence before I could say whether we would meet them.

**Robert Livingston:** If there were concern over that particular memorandum, I trust that there would be concern over every charity that receives public funding for a specific set of activities. That is why I say that putting forward independence as an absolute good perhaps does not take account of the natural funding regime within which those who receive public money from any source must operate. The funding regime has, understandably, become increasingly regulatory. It has also become increasingly contractual, for very good reasons. The advantage of a contractual relationship is that it is a two-way relationship that allows the charity to be in negotiation with its funder about the services that it provides and to have the opportunity to refuse to undertake certain activities. That is more difficult when grant aid is simply handed down with a set of conditions attached.

**Keith Jackson:** It must be borne in mind that, when we undertake our forward planning for three to five years, a clear direction is given to our organisation through a wide range of the council’s policies—not just its sports strategies, but its broad social inclusion strategies. We also take note of strategies such as sport 21, which is run by sportsscotland, which is an agency of the Scottish Executive. There is a range of strategies and policies that influence the policy of our organisation in developing our strategy. Within the broadest sense, there would be something wrong if the council’s policies were not a key driver; however, there are other policies of which we take cognisance, which are do not always go in the direction in which the council would wish to go but which may be in the interests of the organisation as a whole.

**CathieCraigie (Cumbernauld and Kilsyth) (Lab):** It could be argued that Edinburgh Leisure and Highlands and Islands Arts are delivering services that the local authorities should deliver for the residents of their local authority areas and beyond. Some people might say that that undermines the charity brand. How would you respond to that comment?

**Robert Livingston:** There is a simple answer, in our case. By operating with Highlands and Islands Enterprise, we operate across six and a bit local authority areas and we are able to undertake activities that it would be extremely difficult for those local authorities to undertake either individually or in tandem. Also, we are—as Keith Jackson suggests—guided by many things other than the priorities of any single local authority or of Highlands and Islands Enterprise. We look at wider issues such as the development of the creative industries. That may not be a priority for any local authority in our area, but it is clearly of interest to the Executive, to HIE and to the Scottish Arts Council. It is difficult for any one statutory body to deliver that multiplicity of aims and objectives, but it is much easier with the flexibility of a degree of independence.

**David Jack:** I can add another point, which perhaps runs away in a direction in which the committee would not want to go. The question was about what it is appropriate for a local council to deliver and what might be delivered in other ways. I do not think that, nowadays, there is the same preoccupation with who delivers a service, not least because of the community planning framework in which we are all working. Joined-up service provision and a sensitive and responsive service profile in communities is what really matters. For example, increasingly, the council and the health authority will work together—perhaps alongside Edinburgh Leisure—to deliver a health improvement programme in communities. It is about ensuring that the pattern of services matches the local need within an overall policy framework, and the distinctions between what local government delivers and what other agencies deliver is more in the background. The notion is that we should have a more coherent service at the point where it is received.
committee’s questions have been about. That has been a positive process for us and has helped significantly in improving how we are viewed.

I endorse what David Jack said about the general public. All the surveys that we have done—this is perhaps sensitive for some members—demonstrate clearly that the public is not particularly concerned about who provides the service. However, the surveys show that the public is concerned that the organisation that provides their leisure services is not for profit. The surveys were done for us by System 3, as it was then, TNS as it is now, which is a reputable company; they show that the public is very keen on the not-for-profit model and would have difficulties using a commercial leisure service. Members will know that that option is now available to people in some areas. However, people consciously make a choice in our favour, partly because of the nature of our business.

An anecdotal example of the public’s attitude is mentioned in the City of Edinburgh Council’s written submission. Edinburgh Leisure, not the council, decided to give free swimming to children about 18 months ago. We funded that through increasing charges to the general public—those who could pay. We spent a lot of time marketing that principle, saying, “We are going to increase quite substantially the costs of your swimming. However, we are going to redirect your income into subsidising free swimming for young children.” The fact that we are a not-for-profit charity helped that process. We had virtually zero negative responses to the increase, although it was significant. Branding, and how we sell ourselves as a charitable organisation, are important. My opinion is that if the local authority had tried the same process it would not have had the same response.

Linda Fabiani (Central Scotland) (SNP): I want to move away from the added value that you all obviously believe was produced by the creation of the arm’s length, not-for-profit company and start considering costs. The Executive believes that it has managed to work out the potential loss to NDPBs should they not attain charitable status. I suspect that many of those bodies disagree with the amount that the Executive has come up with. This question is for Mr Jack. Can you quantify the potential loss to your local authority, in cost rather than value terms, should your hands-off charitable bodies be unable to meet the charity test?

David Jack: We have touched on some of these dimensions already, but I will give an example from Edinburgh Leisure’s figures. As far as I know, the rate relief that is available to Edinburgh Leisure in its current operating mode is something like £1.118 million. Edinburgh Leisure operates the council’s leisure facilities, although the council

owns them. The comparable figure for the theatre trust is something like £165,000. Those rate charges would be back with the council as extra costs if we operated those services. That does not take into account the scope for attracting income that the charitable bodies have. The council would not have the same scope to bring in such extra income to add to service provision. That is the best example that I can give with regard to the position of Edinburgh Leisure.

Linda Fabiani: You are going to have to broaden that out a wee bit for me. With the council as the body that collects the rates and with Edinburgh Leisure and the Edinburgh Festival Theatre not paying rates, in my head it would seem cost neutral if they were not there. Can you explain why that would be a loss?

Keith Jackson: The business rate goes into a central pot, which is redistributed.

Linda Fabiani: How does that apply to the charities? At the moment, is the council compensated by the Executive for any rates that it does not collect? I do not know the answer to that question. Are councils currently compensated by Government for the fact that charities do not pay commercial rates?

David Jack: I do not think so, but I would have to check. I am not briefed on the nuances of the ratings system to help the committee on that today. I would have to come back with that information.

Linda Fabiani: I would appreciate it if you could do that. Thank you.

Mary Scanlon: In the financial memorandum to the bill, it is estimated that local authorities process around 100 applications for public benevolent collections per annum and that the cost of processing those applications is around £500 a year. Do you think that those figures are accurate?

David Jack: I anticipated that question. With the information that I have been able to bring to the table today, I can give you a feel for the situation. In a city such as Edinburgh, the collections figure for the year lies between 250 and 300, and we would expect that to increase if more of the fundraising activities identified in the bill required licences. We would be talking about a substantial figure, probably in excess of 300 rather than the 100 figure that you have in the financial memorandum.

The licensing process involves the administration of an application, the obtaining of a report and a view from the police, the issuing of a licence and then the recording of returns obtained from collection agencies, which provide us with the figures raised after the event. Although that is all
inside the general licensing function of the council—and there are 80 or 90 different types of licences that are processed by councils—I do not think that the modest administration figure that you quoted is realistic. We do not have figures ourselves for the individual costs of licensing the collections, but it must be more than the figure for which you have an estimate.

Mary Scanlon: I would like to ask two questions. First, the financial memorandum also says that you take 20 minutes to deal with each application. Do you think that that time is accurate? Secondly, do you think that £500, on a pro rata basis, would be an accurate figure for 100 applications? Are you simply saying that trebling that figure would cover your costs for 300 applications, or do you think that the timing is wrong and that, on a pro rata scale, the finances are wrong?

David Jack: I would have to spend more time with my colleagues drawing some of that information out, and we could do that if the committee sought those figures. Patently, even receiving an application, sending it to the police, getting a report back from the police and processing a licence takes more than 20 minutes. The notion of its costing a fiver a throw really is not realistic. It costs £20 or £30 to issue a letter, does it not? We are talking about a substantially larger figure than that for licence management.

Mary Scanlon: Convener, could we ask Mr Jack to let us have that information in writing? I think that it would be helpful.

David Jack: We shall do our best to assemble those figures for the committee.

Mary Scanlon: Are you assured that the bill will help you to manage the applications system more effectively, through OSCR's advice and the proposal for a more consistent national regime?

David Jack: The point about national consistency is helpful. There is no question there. As to the licensing arrangements, I do not know that OSCR's advice in that area will add greatly to a licensing activity that we are quite familiar with.

Mary Scanlon: This question is for City of Edinburgh Council. On boxing day we had the tsunami disaster. Councils are generally closed on public holidays—like others you are entitled to them. In Inverness money was collected in buckets in pubs, clubs, supermarkets and so on, because of the public's enormous compassion and their wish to give to the appeal. Will we be able to respond in such a way to a similar appeal, or will people have to wait days or weeks to apply to collect money? Would that not be a national loss?

David Jack: I am not expert in the particulars of that situation. As far as I know, the licensing aspect relates largely to official street collections, so informal collections in pubs and workplaces would not be within the ambit of the licensing activity.

Mary Scanlon: So people would still be able to collect in pubs, clubs and supermarkets, but not stand on street corners.

David Jack: That is probably right, but I am afraid that I am not absolutely sure.

Mary Scanlon: My next question is for Hi-Arts. Unfortunately, we did not receive a written submission, but your evidence today has been helpful. You covered most of the points that I wanted to raise when you answered Scott Barrie's question, but I have one final point. You are an independent company limited by guarantee with charitable status. Will Hi-Arts meet the charity test if the representatives of local authorities and other public bodies are only invited observers? If so, could that be a model for other arm's-length charitable bodies?

Robert Livingston: At present, all our directors are independent, so our funders have only observer status, although we encourage them to be active observers and not to sit silently until they are invited to speak, so that we benefit from their input. We work in a range of sectors and geographical areas, and have always believed that we are an interesting model of service delivery, because of our flexibility and our low core cost to the main agencies that fund us—the Scottish Arts Council and Highlands and Islands Enterprise. The tenor of our discussions with the Cultural Commission has been to advance us as a model for taking a more regional approach to the delivery of cultural services throughout Scotland.

Mary Scanlon: As you did not provide a written submission, can you tell us whether any aspect of the bill will be detrimental to the delivery of your service throughout the Highlands and Islands?

Robert Livingston: I will say a couple of things on behalf of the charities that we work with in the sector. First, I warmly welcome the concept of the Scottish charitable incorporated organisation. The organisations that we work with have been waiting for that model for a long time, as it will give them greater protection than if they were unincorporated associations, without the complexity, cost and ethos of becoming a full-scale limited company. It is a beneficial step.

I am slightly worried that, in some respects, the bill is—understandably—slanted towards concerns about charities whose prime purpose is to raise money from the general public for further dispersal. Obviously, most charities in the cultural sector provide a service to the community, and most of the funding that they receive is either proper earned income from ticket sales or other
activities, or grant aid from various public and private bodies. As my colleagues have said, such grant aid is already thoroughly regulated and audited.

I therefore recommend that indirect public benefit be formally incorporated in the bill. I have seen that discussed in a number of papers. Quite a few charities would be viewed as giving indirect benefit, for example friends organisations, such as the Friends of Eden Court, which arose to aid another charity in delivering benefit to its constituency. I slightly worry that they may fall foul of the public benefit test. I feel similarly for those bodies that are fixed on a particular kind of activity, and whose members provide an indirect benefit to the wider community.

Linda Fabiani: I seek quick clarification from Mr Jackson. Following from Mary Scanlon’s question about observers, are the councillors on your board full voting members or are they there on a co-opted basis?

Keith Jackson: They are full voting members. I remind the committee that the council’s submission states that we also are a fully independent company limited by guarantee.

The Convener: That concludes the committee’s questioning. I thank you all for appearing. We are particularly grateful to Mr Jackson, who came along at short notice at the request of the City of Edinburgh Council, when we discovered that COSLA was not going to appear before the committee today. Thank you for your written submissions. All committee members found them helpful.

The committee will be suspended for five minutes to allow for a short comfort break and a changeover of witnesses.

10:15  
Meeting suspended.

10:23  
On resuming—

The Convener: I welcome everyone back to the meeting. We are joined by our second panel of the morning, which is comprised of Eilidh Whiteford, the policy and public affairs co-ordinator of Oxfam in Scotland; Kate Higgins, the policy and parliamentary affairs manager of Capability Scotland; and Colin Armstrong, the head of regeneration services in the Wise Group. I thank all of you for your helpful written submissions to the committee, which have informed committee members’ lines of questioning.

I start by asking a similar question to the one I asked the first panel, on the Executive’s consultation. Was the consultation fully inclusive and comprehensive? Has the Executive given sufficient consideration to the responses that it received?

Colin Armstrong (Wise Group): We were happy that the documentation was clear and comprehensive. The issues were set out very well. We responded only on one substantive issue, which we mention in our written submission to the committee. We are concerned about the regulatory burden and believe that an independent review should be carried out periodically to ensure that an undue burden is not placed on the charitable sector.

Dr Eilidh Whiteford (Oxfam in Scotland): The consultation documents were clear. Also, Oxfam in Scotland was represented on the bill reference group. Not a large number of charities were on that group, but we were. We have no complaints in that direction.

Kate Higgins (Capability Scotland): We make reference in our written submission to the fact that Capability Scotland has been here for the long haul, since the beginning of the McFadden commission. We appreciate that having such a lengthy process has been frustrating, but we think that we will get better law because of it.

The Scottish Executive has taken on the comments and views of the sector, and that is reflected in the changes that have been signposted along the way. It was particularly helpful that, following the report of the McFadden commission, working groups were set up to examine particular issues that needed further consideration and work. Capability Scotland was heavily engaged in that process as well. Generally, we hope that the long timeframe will result in a better piece of legislation being passed, which is to be welcomed.

The Convener: It has been suggested that there should be a statutory duty on OSCR to provide advice to the voluntary sector. As key players in the sector, do you think that a statutory duty on OSCR to provide guidance on governance would be appropriate?

Colin Armstrong: We would welcome any good-practice advice. In the course of its duties, the regulator will come across examples of good and bad practice. If it could give a steer to the sector on which practices are more appropriate, that would be helpful.

Dr Whiteford: I do not have a strong view on whether that should be a statutory provision. Obviously, it would be helpful if OSCR were able to give advice to charities. I am not sure whether there might be contradictions or tensions between its role as the regulator and its advisory support...
function; however, we do not have a strong view one way or the other.

Kate Higgins: We previously expressed concern about the need for a firewall between the two functions. Although we agree with Colin Armstrong that there is a need for guidance and good-practice advice on governance to be made available to charities, if it does not fall to the regulator to provide that information, who will provide it? There is a danger that, as a result of the bill, it will not be provided at all and that the issue will be left aside and will not be addressed. However, if the regulator is to play that role, there must be provisions in the bill to give it that role.

We would like there to be clear guidance about the creation of a firewall. The last thing that we want is for a charity to approach the regulator for advice that, ultimately, crosses over into issues of monitoring and regulation, so that the charity finds itself subject to the regulatory function. There must be a protocol or firewall in place.

Patrick Harvie (Glasgow) (Green): Good morning. I want to ask about the first part of the charity test—the list of charitable purposes, which is not identical to the list of charitable purposes in the UK bill. Do panel members foresee that causing any problems? If so, what might those problems be?

Dr Whiteford: We welcome the charitable purpose heads that the bill outlines, as they are a marked improvement on what has been used before. On the wider issue, hypothetically, the bill’s divergence from the UK bill might be a problem if, for tax purposes, the Inland Revenue chose to follow the charitable purposes that, over time, developed in England and Wales as the accepted heads of purpose although, in Scotland, case law had diverted from those. Potentially, although an organisation had charitable status in Scotland, it might not have charitable tax status for UK tax purposes. However, I do not think that that will be an immediate problem.

We have certainly sought to gain alignment between the UK and Scottish definitions but, at the same time, we do not think that Scotland should dumb down to go along with a lesser definition at the UK level.

Patrick Harvie: Does anyone else on the panel want to comment on that?

10:30

Kate Higgins: Capability Scotland is happy with the test and the criteria that have been set; they are a vast improvement on what was being proposed in the draft bill.

As a Scottish charity operating wholly within Scotland, we could say, “Who cares if the legislation is misaligned?” However, we understand the wider concerns of the UK-based charities with whom we work closely. Throughout the process, we have heard the comments and views being expressed by the Inland Revenue. Unless it has changed its position, it is going to go with the definition in the UK bill, so there is a case for the Scottish Parliament to speak to UK-wide bodies such as the Inland Revenue and educate them on what devolution is all about.

Patrick Harvie: I would love to.

Colin Armstrong: We are a Scotland-based charity that operates in England, so we are quite keen that there should be as much alignment as possible so that there is a level playing field in both localities. However, I confess that I have not examined the English proposals, so I cannot talk about them in detail.

Patrick Harvie: Are there any equalities issues around the list of charitable purposes? Do you believe that the list is sufficiently comprehensive in that respect?

Dr Whiteford: It is a significant improvement on what has gone before.

Colin Armstrong: We do not have any concerns in that area.

Kate Higgins: The fact that the bill does not mention equality per se is an omission. It would improve the criteria if that option was included. Other than that, the criteria are fairly comprehensive and, most important, the bill will give the general public a clear steer on what constitutes a charity in Scotland.

Patrick Harvie: Are you saying that you feel that there is a case for making the promotion of equality or equal opportunities a specific item in the list of charitable purposes?

Kate Higgins: I do not see why not. The issue did not jump out at us but we will go back and consider it, because Capability Scotland is obviously concerned with equal rights and the promotion of equality for disabled people. The organisation is well covered by a large number of the definitions, so it did not strike us as an omission. However, we will go back, have a look at the issue, do some consultation and if disabled people feel that it is an omission and that it would be helpful for that to be one of the criteria, we will certainly support such an amendment.

The Convener: Capability Scotland is an equalities organisation that has a proven track record of campaigning on such issues and is an organisation that will be affected by the legislation. If it does not feel that the proposals in the bill will give it difficulties, would it be wrong of the committee to assume that an additional criterion might not offer added value?
Kate Higgins: Capability Scotland is probably not best placed to answer that because it is a service provider. We provide care and services as well as being a campaigning organisation, so we are covered by other criteria. Perhaps the question should be put to more narrowly defined organisations that might feel that promotion of equality in a campaigning sense rather than in the sense of service provision is their raison d'être, which might mean that they do not satisfy the charity test.

Mary Scanlon: The charity test takes no account of existing case law but instead has criteria for meeting public benefit. What are your views on the public benefit test? Does it offer enough flexibility?

Colin Armstrong: I think that we are quite happy with the public benefit test. Certainly, as far as it applies to ourselves, we do not have a concern.

Mary Scanlon: Although my next question follows a favourite theme of mine, it also relates to your submission, in which you say: “The vast majority of our income comes either in the form of grants from public sector organisations ... or from contracts to deliver public services”.

Do you feel that you can still satisfy the key principle of independence?

Colin Armstrong: Yes, we are very happy that we can do that. We are not an arm’s-length organisation like some of the members of the first panel are; we are wholly independent. It is open to us to turn down a grant or contract if we feel that it is inappropriate or inconsistent with what we want to achieve.

Dr Whiteford: Similarly, we are very happy with the public benefit test.

Mary Scanlon: Section 14 allows exceptions from the registration process for charities that do not occupy any land or premises in Scotland—I think that the bill talks about a significant presence, although, clearly, that has not yet been defined. Will the provision leave a gap in the regulation of bodies that fundraise in Scotland using methods such as television or internet appeals?

Dr Whiteford: As far as I understand it from reading the accompanying documents to the bill, the changes that were made to the draft bill were made on pragmatic grounds. In the evidence that Oxfam submitted to the Executive’s original consultation, we raised the issue on the ground of the bill’s workability. We feel that there is the potential for OSCR to find itself regulating charities that have no significant base in Scotland. Obviously, Oxfam has a significant presence in Scotland and would be required to register. Our wider concern relates to the lack of specificity in the bill around the extent and limit of OSCR’s power in respect of charities that operate across the UK and that have significant operations in Scotland and in other countries.

Mary Scanlon: Could OSCR audit, monitor or regulate charities that advertise in Scotland by means of the internet, national newspapers and television but do not have a base in Scotland? I am thinking of charities whose base is elsewhere in the UK or the world. Will OSCR be able to monitor them?

Dr Whiteford: Personally, I think that that would be a major logistical challenge; I do not know how it would be done. Given the information age in which we live, I do not know how fundraising through the internet or by television advertising can be regulated. That does not mean to say that it could not be done, but it would require OSCR to have a very different capacity from what is envisaged.

Mary Scanlon: It certainly would be a challenge.

I will move on to address a point on fundraising that Capability Scotland raised in its submission. I will use my own words, but basically it said that funds that are raised in Scotland should be spent in Scotland. Perhaps that was not quite what was being said. Will Kate Higgins explain what was meant by that?

Kate Higgins: Capability Scotland is concerned about the gap that exists in the bill. We echo Oxfam’s concerns that, even if it is a logistical nightmare for OSCR, the regulation must be done. There are numerous instances of charities that are based in England spending the funds that they raise in Scotland across the border. Other charities, by signing up campaign supporters or members of their organisation, will have the capacity to carry on as they are without being subject to regulation in Scotland. If those organisations are raising funds in Scotland, we feel that they should be subject to the same regulation as all other organisations, whether they are UK-wide or stand-alone Scottish organisations.

Mary Scanlon: If we tell organisations that if they raise funds in Scotland, they must spend them in Scotland, we must take account of organisations such as Cancer Research UK, which gave a presentation to the Parliament two weeks ago. It is worried that regulation of any sort might be introduced, because the researchers in Scotland—in Dundee, Edinburgh and Glasgow—are the people at the cutting edge of new technologies for cancer, and the majority of their money is raised elsewhere in the UK. The witnesses said that if, because of devolution, we
were to say that what is raised in Scotland must
be spent in Scotland, that would mean that many
of our best researchers would have to move
elsewhere in the UK. Might not that be a
dangerous path to go down?

Kate Higgins: I say, with respect, that that is not
the point that Capability Scotland is making. The
point that Capability Scotland is making is that
there are organisations that are based wholly in
England and Wales—they provide their services there,
the locus of their remit is there and they are
registered with the Charity Commission for
England and Wales—that might have signed up
campaign supporters or members in Scotland or
might take part in UK-wide fundraising campaigns
that include Scotland, although the money goes
back down south to be spent. In our written
submission, we asked the committee to seek
clarification on whether those organisations would
be subject to regulation by OSCR, because we
feel that that is an omission. If they are raising
funds in Scotland, they should be subject to the
same regulation as everybody else is. Cancer
Research UK will be subject to the regime in
Scotland, as it is subject to the regime elsewhere
in the UK. Its situation is not the one we have
cconcerns about.

Mary Scanlon: Is it not the case that the money
should be spent at the point where it provides the
greatest utility value and the greatest public
benefit? In the case of research, that might be
either in Scotland or in England.

Kate Higgins: We do not have a dispute with
that, but we have a concern about organisations
that are not operating in Scotland but which raise
money here to spend on services that are wholly
operated in England, Wales or Northern Ireland.

Mary Scanlon: Do you accept that that works
both ways and that it could be beneficial to
Scotland?

Kate Higgins: I am sorry, but I repeat, with
respect, that that is not the concern of Capability
Scotland. We have no issue with the situation of
UK-wide bodies that apply their funds, expertise
and services across the whole of the UK. Our
concern is about wholly English-based services,
and I can give you a really good example. We
have encountered a number of times the claim
that the money that is being raised from people
living in Scotland is going to be spent on disabled
children in Scotland, and it is not.

Linda Fabiani: I might have missed my chance
to ask my supplementary question, but I will ask
Colin Armstrong about the evidence that we heard
from the City of Edinburgh Council and its arm’s-
length organisation. I know that the Wise Group is
a company limited by guarantee. Will you tell us
about the make-up of your management board?

Colin Armstrong: The board is made up of
eminent individuals who have an interest in
promoting employment. They range from
councillors to—until recently—an MSP, an MP and
Will Hutton, who is a prominent journalist.

Linda Fabiani: So you do not have a set
proportion of places—33 per cent, for example—for
people from any particular sphere.

Colin Armstrong: No. We do not have a quota
for any kind of member. The position has just
developed over the life of the organisation.

Linda Fabiani: So you do not have the same
cconcern that others might have that you could be
seen as being run by a secondary organisation.

Colin Armstrong: Some of the board members
are from funder organisations, so a link could be
drawn there. For example, we have a councillor
from Glasgow City Council and we do work with
Glasgow City Council. Is that undue influence?
The question could be raised, but I think that we
have sufficient members of the board—I am
struggling to work out whether it is a majority—
who are not in that relationship to ensure that a
member who was in such a relationship could not
dominate the situation.

Linda Fabiani: Thank you. I think that Capability
Scotland has been quizzed enough, so I shall
have some words with Oxfam in Scotland.

I was interested in Oxfam’s submission
because, apart from anything else, it let us see the
extent of the work that Oxfam does worldwide, in
70 countries. I was surprised by how many
countries you work in. I also note in your
submission that you have issues about regulation
and registration being dealt with in guidance rather
than being included in the bill. Can you clarify why
you are particularly concerned about there being a
different approach in Scotland from the approach
in the rest of the UK, given that you operate in so
many other countries and must have different
regulations and requirements to meet?

10:45

Dr Whiteford: I am happy to talk about that. In
the bill as introduced, no distinction is made
between the regulation of all a charity’s activities
and those that just happen in Scotland. We perceive that as a problem. The Charity Commission for England and Wales currently regulates Oxfam and we do not want a burden of dual regulation, whereby we have to do everything twice. That would be counterproductive to the bill’s aims of trying to improve how charities are regulated. We believe that the Charity Commission regulates us effectively and we want charity regulation in Scotland to improve standards up here. However, we do not want extra administrative and cost burdens from having to do everything twice.

On regulating charitable activities in Scotland, we argue that there is a parallel in company law, whereby if a UK-wide company is working under another jurisdiction, its activities in that country are regulated, but the internal workings of the company headquarters, wherever else those might be, are not regulated by that country. We believe that that is a relevant model. We are concerned that the bill does not provide many guarantees on regulation. We have had many helpful discussions about the bill’s intentions and the policy memorandum, and those have very much allayed our fears. However, what is in the bill currently does not reflect the discussions that we have had.

Linda Fabiani: My concern is that being very prescriptive in the bill in relation to setting up OSCR as a new organisation might restrict the flexibility that we might well want to take advantage of further down the line. Can you understand that argument? What I am trying to get at is why it is so important to you that registration and regulation provisions be in the bill rather than in secondary legislation, for example.

Dr Whiteford: There is a question about enforcement. Obviously, it is hard to get legislation that fits every situation, but a large number of UK-wide or international charities have operated in Scotland for many years and have a strong base here; nevertheless, their internal governance is elsewhere in the UK. I am certainly not a lawyer and I do not have a legal background, but our lawyers are concerned that there could be problems in interpreting the law further down the line if the bill is enacted as it is and put into practice. There are concerns that there could be problems if the limitations of OSCR’s remit with regard to UK charities are not clarified in the bill. As it stands, there would be dual regulation.

Linda Fabiani: It is useful that you are here, because Oxfam is probably one of the biggest charities that operate worldwide from the UK. Do you operate in other European Union countries?

Dr Whiteford: Oxfam International has affiliates in other EU countries. UK Oxfam has operations in 70 countries. I would need to check, but I do not think that UK Oxfam has operations in other EU countries. We have a UK poverty programme here in Scotland and in other parts of the UK. Therefore, although we have programmes, I do not think that we have other EU programmes. We perhaps have such programmes in the new, extended EU.

Linda Fabiani: That is what I was trying to get at. I wanted to know whether you are operating in the EU as a core charity rather than through affiliates. Do you come up against problems in other EU countries in relation to registration, regulations and having to fill in loads of forms?

Dr Whiteford: I would have to check that, because Oxfam in the Netherlands and Oxfam in Germany are independent and would be subject to those countries’ legislation. We might still have programmatic work going on in the new EU member states. I do not have that information at my fingertips, but I could certainly find it.

Kate Higgins: I want to comment on that, because there is a divergence of opinion on it. Although Capability Scotland plays a big role in the Institute of Fundraising, we, like all good democrats, go with the majority view. Although we share the concerns of UK-wide organisations such as Oxfam, our view is clear that there has to be equity for all charities operating in Scotland and so the regulatory framework in Scotland should apply to all charities operating in Scotland, whether they are stand-alone Scottish organisations or UK-wide ones.

Donald Gorrie: I want to pursue that with related questions on dual regulation. Is it possible to make distinctions in relation to the activities of a charity in Scotland that would be regulated by OSCR and have its governance regulated by the English Charity Commission or the equivalent French body? Is it possible to ensure that every organisation is properly regulated in a country for its basic activities and in each country for its activities in that country? That would create a level playing field.

Dr Whiteford: That is what happens with company law. An English company is subject to the Scottish regulatory framework in relation to its work on the ground in Scotland, but it is not subject to interference in its management or activities in other jurisdictions. I agree with Kate Higgins that there needs to be a level playing field, but the regulatory framework has to be proportionate—the bill team has already taken that point on board.

We welcome the duty that the bill imposes on the regulator to co-operate with other regulators. That obviously depends on other regulators’ willingness to co-operate. We are reasonably confident that an equitable solution can be found. I stress that it is important that such solutions are
found if UK charities are not to find themselves under a massively increased burden of dual regulation and having to do things twice. That would not increase public confidence in the organisations and it would not enable them to work efficiently, as we do currently. We are saying that we need a smooth transition and we do not want extra burdens to be placed on us to do the same things twice.

**Donald Gorrie:** The Wise Group does not have as much of an international problem but, in its written evidence, it makes the point that it is already audited up to its eyebrows by Companies House and does not want to be audited yet again. Would it be possible to have a system that ensured that the Wise Group and similar organisations were properly audited by a companies body and then had OSCR deal with the charitable aspects of their work?

**Colin Armstrong:** I guess that that is an option. In our submission we said that charities are such a diverse group of organisations that it was probably hard to come up with wording in the bill that would cover all the options. That is why we suggested having a regular independent review whereby the regulator would have to justify the regulatory burden that it was placing on the charity sector. If the problems that we have been discussing to do with dual regulation came to light, we would have an opportunity to revisit the situation and change practices. If Parliament believed that it would be possible to encapsulate that within the bill, we would welcome that, but we do not have a good idea of what wording would achieve that.

**Donald Gorrie:** The idea of a review is worth considering. You have no particular proposition as to how we could try to prevent mistakes being made in the first place.

**Colin Armstrong:** We could give some thought to what would suit our particular circumstances, but the charities sector is so large and diverse that what would suit our circumstances would probably not suit other organisations such as Oxfam. We wondered whether it would be possible to put something in the bill that would cover all circumstances.

**Donald Gorrie:** Does Kate Higgins think that it would be satisfactory if every charity had its accounts and governance properly scrutinised by somebody but just its activity in Scotland scrutinised by OSCR, or does she think that any charitable organisation that operates in Scotland should be open to total regulation by OSCR, no matter what regulation it is subject to elsewhere?

**Kate Higgins:** We are quite relaxed about the form that the regulation will take as long as the effect is the same. We are concerned that, as we have seen with the definition of charity, there will be divergence, even if it is not huge. Any divergence creates a playing field that is not level. We do not want Scottish charities to be subjected to much more rigorous scrutiny, higher fees or more hoops to go through than UK-wide charities have. There has to be a level playing field.

The view of the general public is most important in all this. The public have to feel confident in the operation of the sector throughout the UK. We are all well aware of how everyone gets tarnished by scandals. No one escapes when there is a charity fundraising scandal, wherever it happens in the UK. Our view is that what has to happen in order to reinforce public confidence should happen. Everything that we have said about the need for a level playing field has come from that perspective. People have to feel that everyone is subject to the same rules so they can hand over their money in the confidence that its disposal will be scrutinised in some way and that it is going to the purpose to which they think it is going.

To pick up on an earlier point, Capability Scotland is also a registered company and is audited to the hilt. To date, that has not been an issue that we have picked up on as important and we are fairly relaxed about jumping through more hoops because we have to satisfy Companies House requirements as well as the new OSCR ones. The view of our outgoing director of finance, who was heavily engaged in this process and is now engaged in the process at OSCR, was that we are already audited once, so we can soon send OSCR another copy. We do not think that there will be too many hoops to go through. Our overriding view is that if it has to happen to give the public confidence in giving to Scotland’s charities, which has suffered over the years because of different scandals, then it has to happen.

**Donald Gorrie:** In my experience, the same audit would never be accepted so the organisation would have to jump through a different hoop. It is not just about sending photocopies of one set of accounts. However, what you have said is very helpful.

**Scott Barrie:** Should there be different thresholds for accounting purposes for charities of different sizes? That would achieve some sort of proportionality for charities ranging from very small and locally based charities to huge multinational charities such as the one in which you are involved.

**Dr Whiteford:** Yes, we would expect to have to provide very full audited accounts as we do at the moment. However, that might not be proportionate for smaller charities, especially for those that have only one member of staff, or that have no members of staff and are run entirely by volunteers. That would not be a practical or fair
use of the very limited resources that such charities have. That is exactly the kind of proportionality that the bill seeks to address.

Kate Higgins: We entirely agree with Oxfam in Scotland’s view on that matter.

11:00

Colin Armstrong: We agree too but would make the additional point that the source of the income should be considered. There is a distinction between charities that receive substantial donations from members of the public for which there is no clear accounting line in respect of where the money has come from or the donor’s intention and organisations such as ours whose income is entirely derived from a grant from a public organisation or through a contract, in which case the intention behind giving the money is absolutely transparent. All the money is audited and where all of it has come from is clear.

Linda Fabiani: I must pick up on that point. I would have thought that outputs should be just as transparent and therefore that quite detailed scrutiny of how the money is spent, no matter where it comes from, is needed.

Colin Armstrong: I am suggesting that there is detailed scrutiny. People who give grants or enter into contracts with us put in place monitoring frameworks and appraisal criteria when the grant application is assessed. Audit regimes come along after the event. Therefore, there is substantial scrutiny of everything that we do. I suggest that other sources of income do not have that level of scrutiny. That takes us back to whether a double scrutiny is involved. If the regulator comes along after the event and considers a grant that has been substantially appraised, audited and monitored over a period of years, will subjecting the project or source of income to further scrutiny add anything to the public benefit?

Linda Fabiani: Are you making a case for the likes of the Wise Group to be placed on the same basis that might apply to housing associations, for example, which are already monitored by Scottish Homes?

Colin Armstrong: That would be welcome. I take Donald Gorrie’s point. Every organisation seems to invent its own audit regime and what is done must be rejigged to suit different people’s criteria. [Interruption.]

Linda Fabiani: A fire alarm test announcement is saying that we should ignore all messages until further notice, but that does not mean that I should be ignored, Colin.

The Convener: I understand that the alarm is only a test, so we should continue as normal and hope that the voice does not become too loud.

Have you concluded, Linda?

Linda Fabiani: I have—thank you.

Cathie Craigie: Part 2 of the bill aims to lay foundations for the statutory regulation of charity fundraising. Earlier, Kate Higgins mentioned public confidence in charitable organisations and people out there competing for the money that is available to be given to charities. Will the bill help to boost public confidence in charitable organisations?

Kate Higgins: I am not convinced that the public really care about the inner workings of organisations, exactly how OSCR will work and the framework that will be set. Members of the public want public confidence in the end product and it is our job to collaborate and work in partnership to ensure that the bill produces an end job that will engender public confidence, which, substantially, it will. The bill has had a long haul and a wide range of people have scrutinised it.

Eilidh Whiteford mentioned that there are still concerns about how much will be left to guidance and secondary legislation. By the same token, Capability Scotland among others might argue that, as we are in what is almost a brave new world, there must ultimately be flexibility, although perhaps some crucial issues relating to dual registration need to be covered by the bill.

The bill will create a much better framework. It will give people somebody to approach if they have concerns about charities, which was a major concern. If, as a result of the bill, the public in Scotland continue to give generously to charities that work here, throughout the UK and elsewhere, and can increase their giving and feel that we all do a good job, the bill will have achieved its goal.

Cathie Craigie: Oxfam in Scotland says in its submission that it shares the Institute of Fundraising’s concerns about the bill. Will you expand on that? I do not know whether all members are familiar with those concerns.

Dr Whiteford: I will follow on from what Kate Higgins said. In general, we support the bill, which will create a better climate. If we do not have cooperation on dual regulation, the only caveat is that that will have the capacity to reduce confidence in charities because we will spend much more on administration. That is a major issue of public confidence with which we wrestle.

We share the Institute of Fundraising’s concern that it would be unfortunate to miss the opportunity to create consistency in local authority licensing and its enforcement by ensuring that local authorities comply with the guidance that the Parliament or OSCR issues. It would be a pity if
this great new bill were undermined by being unenforceable.

**Cathie Craigie:** What leads you to believe that local authorities might not comply with the guidance that will be issued?

**Kate Higgins:** We also contributed to that evidence and we echo the sentiment. The concern is about whether local authorities must follow or refer to the guidance. The wording needs to be tightened for the duty on local authorities to heed the guidance. I do not wish to go into the argument, but we can have statutory guidance or guidance to which local authorities can refer while making up their own minds. We would prefer statutory guidance.

**Dr Whiteford:** I hesitated before answering Cathie Craigie’s question because the words that were coming to my lips were that I had experience of such a situation from dealing with other legislation. Kate Higgins’s point is well made. If local authorities do not know whether they must or should do something, that is confusing. It would be great to tighten up the provision.

**Cathie Craigie:** What criteria should OSCR specify for a designated national collector?

**Dr Whiteford:** We are pleased with the proposed flexibility. In general, we refer to the Institute of Fundraising’s evidence to the committee, which is in line with our views.

**Mary Scanlon:** The Wise Group’s submission says:

“We estimate that the burden is equivalent to five full-time members of staff.”

I will follow up Donald Gorrie’s and Linda Fabiani’s questions. Do you mean the burden of regulation from the bill?

**Colin Armstrong:** No. The reference is to the burden that we are subjected to from the various grant regimes and Companies House.

**Mary Scanlon:** Are you saying that you need five full-time members of staff to deal with regulation, administration and such matters?

**Colin Armstrong:** I am not talking about administration. Those staff deal solely with complying with the regulations that are associated with the requirements to provide audited accounts to Companies House and complying with the various grant regimes that we are involved with.

**Mary Scanlon:** So you have five members of staff to do that.

**Colin Armstrong:** We have the equivalent of five members of staff. They are not necessarily five individuals.

**Mary Scanlon:** I appreciate that. How much will regulation under the bill add to what you call a burden?

**Colin Armstrong:** That is difficult to calculate from the bill. I return to what I said earlier. The proof of the pudding is in the eating as to what will be involved in complying with the regulatory process.

**The Convener:** Have you finished your questions, Cathie?

**Cathie Craigie:** Yes. I had another question about local authorities, but it has been answered.

**The Convener:** No other members have questions, so I thank the panel for spending time with us. Your answers have been helpful.

I suspend the meeting for a five-minute break to allow a changeover of witnesses.

11:10

Meeting suspended.

11:17

On resuming—

**The Convener:** I welcome our third and final panel of the morning. We are joined by Jane Ryder, the chief executive of OSCR, and Richard Hellewell, the head of regulation and compliance at OSCR. I thank you for making time to join the committee and for your written evidence, which was received in advance of the meeting.

I will start by asking a couple of questions about the independence, or perceived independence, of OSCR. It has been suggested to the committee that the independence of OSCR may be undermined by section 2(4) of the bill, which gives Scottish ministers the power to direct OSCR on the form and content of its annual report. Do you share that concern?

**Jane Ryder (Office of the Scottish Charity Regulator):** I confess that I do not share that concern. It is appropriate for the form and content of the accounts to be directed by ministers. As we say in our written submission, there are many other opportunities for scrutiny and challenge of OSCR, which should both secure its independence and, I hope, ensure that it is seen as independent. Apart from the duty to publish an annual report, we have a duty to publish reports into inquiries and a duty to respond to freedom of information requests. A five-layered review and appeal mechanism is available to applicants. We will also be sure to embed quality assurance. We already have user panels and I am sure that OSCR intends to continue to have them. Therefore, I think that there are sufficient wider
opportunities to ensure public accountability and I am not troubled at all about the independence of OSCR.

As we say in our written evidence, in the consultation on the bill, several options for the form of OSCR were considered. There are advantages and disadvantages to all those models. From the regulator’s point of view, it was critical to get the balance right between our having sufficient authority and our having sufficient operational independence. I am content that the model that has been developed secures that.

The Convener: Could the perception of some key stakeholders in the sector that there is a question mark over your independence cause difficulties during the initial operation of the bill as it is currently drafted? If so, how will you try to address that?

Jane Ryder: We will continue to develop the approach that we have taken so far. That approach has been widely consultative, involving all our stakeholders, which include the charities and the public. We will act on the feedback that we receive, which is what we are doing at the moment. For example, we recently ran a pilot monitoring programme, which consisted of wide public consultation and involved 300 charities. We took the responses that we received into account and modified the programme. I was pleased to hear that, at the Finance Committee last week, the SCVO said that it was “delighted”—that was the word that the witness used—that we had modified our programme in response to the evaluation and the comments of the monitoring reference group of key stakeholders that we had set up.

The Convener: On the issue of independence, the committee has heard evidence in relation to section 97, which could allow Scottish ministers to make an order allowing a body to refer to itself as a charity even if it was not on the register. Do you believe that that provision could undermine the ethos of the bill and the independence of OSCR in treating all bodies equally?

Jane Ryder: My understanding is—and the section heading firmly states this—that that is a transitional provision and will be time limited. Section 97(3)(a) states that a ministerial order will apply “for such period as may be so specified”.

I am quite sure that the policy intention is that that will be a transitional provision and that it will be regarded as such in the implementation. If, for example, the bill had stated that that provision would apply to any organisation with a Scottish Charities Office number, I am not entirely satisfied that that would have caught every charity, because of potential administrative problems.

Mr Home Robertson: Paragraph 5.2 a) of your written submission states that you would like OSCR to have “a specific remit to advise Ministers”.

Have you discussed that with the Executive? If so, what reaction have you had?

Jane Ryder: We have discussed that with the bill team. The bill team was of the view that that remit was implicit; we simply wanted to avoid any doubt about it. I also felt that, as that role was explicit in OSCR’s remit as an executive agency, it would be slightly curious if it were not made explicit in OSCR’s remit as a non-ministerial department.

Mr Home Robertson: Can we take it that you would like that to be made explicit?

Jane Ryder: I would like it to be made explicit.

Donald Gorrie: As far as I can see, the bill sets out your functions but does not tell you what you are there for. Would it be helpful if some objectives or an underlying purpose or philosophy were to be included in the bill?

Jane Ryder: We have discussed that in some detail, but I am not sure that it would be terribly helpful. Our objectives have been focused on developing and maintaining public confidence. However, I would like that to be, within two to three years, ancillary to our primary purpose of helping charities to account to the public, through the regulator and directly, for the benefits of their status.

Objectives will change over time and I am not sure that it is helpful to treat legislation as a corporate plan. I am content with the functions. Certainly, the sort of objectives that the Charity Commission for England and Wales are being given are a step too far for OSCR at this stage—that subject was discussed at length in the consultation. For example, from our starting point, the commission’s objective “to promote the effective use of charity resources” goes too far from regulation into management.

Donald Gorrie: If, after a few years, the Scottish charity scene has not progressed that much, so that, although everyone is honest, it is pretty dull, would that situation be okay or do you want charities to develop so that they are not only honest but livelier and more enthusiastic?

Jane Ryder: Certainly, we would aim for that from the start, although we would do so very much in conjunction with the sector, as that is not our primary responsibility. The sector has shown how much it welcomes regulation, but also how much it believes—and I agree—that regulation needs to be proportionate and to have a light touch. The
sector needs to develop itself; it needs to stand on its own two feet.

**Linda Fabiani:** Section 1(3) of the bill says:

“OSCR may do anything ... which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.”

You have said that you would like section 1(3) to be expanded so that you are given a more specific advisory function. Will you expand on what you mean by that? How would you respond to the other organisations and umbrella bodies that have said that they are best placed to advise charities?

**Jane Ryder:** There is a spectrum, which starts with the simple exposition of the law; it starts with the statement, “This is the law. We will not give you any guidance or explanation.” That sort of Kafkaesque statement says that people should be able to understand things as they stand. The spectrum moves through to general guidance, which is a function of OSCR. We have already started to produce some general introductory guides, including one on accounting regulations and another on trust reorganisation. We are producing general guidance that is based on evidence and practice.

The spectrum moves on to offering advice, as described in paragraph 5.2 of our submission, which we discussed earlier. It is appropriate—and I hope that it is agreed that it is appropriate—for OSCR to advise, facilitate and make recommendations to charities where there is cause for concern, instead of simply exercising intervention powers. Although we need intervention powers to deal with a small number of cases, the majority of cases can be dealt with as per our current practice. I am sure that the intention for OSCR’s future practice is that we should facilitate compliance. I would much rather see prevention than cure; I would also much rather recommend than intervene.

The spectrum moves on into what I think is a cause for concern for charities, which involves OSCR giving specific advice when a charity asks us what it should do in a certain situation. However, people are already regularly coming to see us on that basis. Where we can, and where there is an obvious other reputable and assured source of advice, we direct charities to that source of advice. For example, on accounting matters, we direct charities to the Law Society of Scotland. We also send charities to the sectoral intermediaries such as the SCVO or one of the other umbrella groups, which have an important role to play.

That is the spectrum. I do not see OSCR’s role as being to engage in the direct training of trustees, for example. We would not give out that sort of direct advice. However, we regularly appear at seminars that are organised by charities or advisers so that we can give attendees the benefit of our experience to date.

**Linda Fabiani:** In relation to your capacity to advise, I agree that it is beneficial if advice can be given before someone gets to the stage that they are in trouble—in other words, at the pre-intervention stage.

Part of the discussion that we had a few weeks ago with a panel of lawyers centred on grant-making trusts. It was suggested that it would be a benefit to those trusts if potential philanthropists knew a bit more about how to give and how that money could be used. Someone on the panel felt that it would be useful if OSCR were able to be quite up front on advice in such areas. Do you agree with that?

11:30

**Jane Ryder:** That comes into the area of general advice on what the benefits would be. The issue strays into the discussion that you had with the previous panel about fundraising and the importance of the public having confidence that the funds that they give to charities will be well looked after and appropriately used. I agree that OSCR would have a role in giving general guidance, but I do not think that it would have a role in, as it were, setting up—

**Linda Fabiani:** Would that be the distinction, in your mind?

**Jane Ryder:** Yes. We would have a role because the issue of deciding whether a body meets the charity test passes to us from the Inland Revenue, which currently has a facilitative approach to that. In other words, it does not simply send an application back and say, “Try again.” Rather, it outlines its recommendations and suggests areas that might be changed. OSCR would aim to take that approach as well.

**Mr Home Robertson:** In the first paragraph of your written evidence, you say that you do not think that there is a policy requirement for the list of charitable purposes to be different in Scotland from that in the UK Charities Bill. That statement is made with reference to sections 7(2)(j) and 7(2)(k) of the Scottish bill, which relate to the provision of accommodation and care for various categories of people with special needs. Can you foresee any situations in which such distinctions arising from the fact that the two bills were not absolutely reconciled might cause difficulties for OSCR?
Jane Ryder: The difficulty is a policy difficulty for charities rather than for OSCR, which is simply interpreting the intentions of Parliament. However, the definitions in sections 7(2)(j) and 7(2)(k) are rather narrower than the English definitions. I would not disagree with the examples that other witnesses have given you in that regard or with their view that changes should be made. The wording used in the definition of the provision of accommodation is narrower than it is in the English bill, which talks about “the relief of those in need” and the definition of the provision of care leaves out “youth”, which is in the English bill. That does not cause OSCR difficulty in so far as OSCR’s job is to interpret what Parliament has set out. However, I think that it would cause difficulties in so far as the policy intention is to align with the English definitions.

Mr Home Robertson: You are saying that you could implement the provisions but that you recognise that there are problems. You have said that you do not disagree with representations that we have had that those definitions should be changed. Would it be fair to take that a stage further and say that you agree that there should be changes?

Jane Ryder: I would be more than comfortable with that.

Donald Gorrie: We have had strong representations on the wording of the definitions of charitable purposes. It has been pointed out to us that the definition of amateur sport is not as clear cut as it used to be and that the boundary between amateur and professional is grey, in that, if someone is good at an amateur sport, they get lots of money to help them to win an Olympic gold medal. Furthermore, it has been pointed out to us that people who are keen on things like recreation and play are left out of the bill. I would be interested in your views on the wording of the definitions of charitable purposes.

Jane Ryder: I must confess that I have not applied my mind to the distinction between amateur and professional rugby. However, we would liaise very closely with the Charity Commission on the matter, which is common to both jurisdictions. Moreover, although it is possible for organisations whose purpose is the advancement of amateur sport to be charities, I should point out that community sports organisations might also be eligible for mandatory rates relief. We will just have to develop guidance on the matter in practice. Indeed, we might highlight that sort of example in the guidance that we have to publish on the charity test.

Donald Gorrie: Apart from what you said in response to John Home Robertson, do you have any other views on the list of 13 charitable purposes?

Jane Ryder: We have already commented on the purposes set out in paragraphs (j), (k) and (h) of section 7(2). I have to say that I am more than comfortable with having the wider, English categories.

Donald Gorrie: Some of the religious bodies to which we spoke wondered whether, in addition to your team’s many other skills, you were competent to make a fair determination in a case involving a Christian, Muslim or some other religious organisation that was regarded by mainstream organisations in that particular faith as unsatisfactory and that held some views that non-members found pretty hostile. Would OSCR be the right body to judge whether such an organisation was a bona fide religious charity?

Jane Ryder: It would be fair to say that OSCR does not have that expertise on its staff. However, we have plans to recruit and train staff to ensure that our team is fully skilled in that respect when the charity test becomes operable. Our approach would include having discussions and liaising with the Inland Revenue, which has that remit at the moment. As our submission makes clear, we have had good discussions with the Inland Revenue and have already been able to agree the joint statement with it. We will also have discussions with the Charity Commission.

As I point out in the submission, some witnesses have stressed the importance of case law. Although case law and other precedents are important, our joint position with the Charity Commission is that, in the area of religion and in other areas in which there has been a presumption of public benefit, case law and thinking are undeveloped, even in England. Developing that area is a joint task.

Mary Scanlon: The Church of Scotland is unique in being the only religious body in the UK to have specific legislation—the Church of Scotland Act 1921—that recognises its exclusive jurisdiction over church matters. Can you override the legislative powers of the Church of Scotland or does it have unique jurisdiction that, according to the multitude of papers that it has submitted, means that no civil authority can interfere with its management?

Jane Ryder: I understand the Church of Scotland’s position. It all hinges on church matters. There is no intention either in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 or in the bill to interfere with the church’s spiritual or theological jurisdiction or competence. Moreover, OSCR and the courts have only a limited power to intervene if the organisation has
passed the charity test and if it is in a particular category of religious body.

I am perfectly comfortable with and, indeed, I welcome the removal of the presumption of public benefit in favour of any classes of charity. That approach creates consistency and, as someone else put it, a level playing field. It is exactly the right course of action to take. OSCR will exercise the powers that the bill gives it, limited as they are. The ultimate power is that to remove the designated religious status. I find it hard to envisage that that would happen, but it is possible.

Mary Scanlon: Perhaps that is for another day.

The presbytery of Abernethy and various other bodies throughout Scotland are concerned. The presbytery says:

“It is hard to imagine a power which could interfere more with matters relating to the government of the Church than that contained in Section 31(6) which confers on OSCR power to give ‘a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body’.”

I do not know about other members of the committee, but I have had letters from Orkney, the Shetland islands, the Western Isles and Abernethy. There are concerns about section 31.

Jane Ryder: Section 31 would come into operation with a religious organisation, as with any other charity, only if OSCR were satisfied that

“there has been misconduct in the administration”
or that

“It is necessary … for the purpose of protecting the property of a charity or securing a proper application of such property”.

That is about the charitable aspect, which is tied in with the strictly secular tax relief. In fact, if I were going to quote a passage of the Bible, I would say:

“Render therefore unto Caesar the things that are Caesar’s”.

That seems to me to be the most appropriate passage in this context.

Mary Scanlon: Perhaps we will render unto OSCR some of the letters that we have received and seek some more clarification and reassurance for the church, because it seems to have a genuine worry.

You have disagreed with those witnesses who think that not being able to refer to English case law will inhibit you and the courts in reaching decisions and you have referred to your positive discussions with the Inland Revenue charities unit regarding your application of the charity test without reference to precedent. Are you confident that the Inland Revenue will grant taxable benefits on the basis of your decision and, if so, do you think that it would be content to be statutorily bound to follow that course?

Jane Ryder: I am not sure whether the Inland Revenue would be content to be statutorily bound, but I do not think that it is within the Scottish Parliament’s competence to bind it. My understanding is that that is a reserved matter, so it would have to be done through United Kingdom statute.

On the basis of our discussions to date, we are confident that we would have a good working relationship with the Inland Revenue charities unit as it currently exists, so I do not envisage any problem. However, the charities unit is going to disband and the administration of the recognition of tax status will be removed to Bootle, outside Liverpool, so we would have to have discussions with that unit, but I can think of no reason why it would not be content to grant taxable benefits on the basis of our decisions. The Inland Revenue already has a good working relationship with the Charity Commission for England and Wales and, in a sense, the relationship with us is a triangulation of that relationship.

Mary Scanlon: You say in your submission:

“There is very little charity case law on independence of constitution”.

Do you envisage that it might be possible for a charity to pass OSCR’s test but not the Inland Revenue’s test or to be acceptable to the Inland Revenue but not to OSCR, or have your positive discussions overcome any such potential problem?

Jane Ryder: I cannot guarantee that we have overcome all potential problems, but the trend of our discussions with the Inland Revenue and the Charity Commission reassures me and, I hope, charities and their advisers in turn. There might be one or two hard cases, but that is almost inevitable, as there are two parallel bills and as the Inland Revenue is in a unique position—its position in relation to OSCR is different from its position in relation to the Charity Commission, which, under charities legislation, has statutory recognition that binds the Inland Revenue.

Mary Scanlon: You mentioned the two bills. Might a charity pass the charity test for the Inland Revenue and be acceptable as a charity in England but not in Scotland? You have mentioned that possibility already in answer to Donald Gorrie’s question, but are you sure that it will not happen?

Jane Ryder: It is like three-dimensional chess. I can say only that we are doing our best in discussions to ensure that there is alignment of definition and practice.
No. A large number of charities are within the designated religious bodies. Whether such charities are designated as religious charities or not, the fact that they are, in general, small in size and are controlled by a central body means that they constitute a relatively low risk subsection of the charity sector. We do not envisage that that subsection of the sector would require significant resources to regulate. That said, the act of designation and the relationship with the central body that results from it for each designated body is a positive benefit that improves regulation and makes it more efficient.

Patrick Harvie: If OSCR were given the same level of powers in relation to those organisations, would that create any practical difficulties for you?

Richard Hellewell: No.

Cathie Craigie: Chapter 3 of the bill deals with co-operation and the sharing of information. The policy memorandum states that the aim of section 20 is to reduce the additional burden of regulation on charities. To do that, it will require OSCR to co-operate with other relevant regulators and to share information."

From the evidence that the committee has taken, the conclusion that we draw is that people want OSCR to be able to share information with, and to receive information from, other regulators, but some of the charities that have given evidence worry about the additional burdens that might be created. Your submission indicates that OSCR is not content with section 20. You make some simple suggestions on how it could be changed. Will you tell us what discussions you are having with the Executive on that and perhaps talk us through why the bill is not sufficient to meet the aims that are set out in the policy memorandum?

Jane Ryder: We warmly welcome the duty to co-operate; our approach is that we do not regard it as being a burden. However, we have made the point to the bill team that the co-operation duty is one-sided; it is a case of one-handed clapping. I think that that may have been an inadvertent decision rather than a deliberate policy decision. An earlier witness made the point that the provision depends on the other organisation being willing to co-operate with OSCR. We feel strongly that the principle of reciprocity should be embedded in the bill. We have had good discussions with other regulators, but having a mutual duty in statute would concentrate everyone’s minds wonderfully. We want to be able to share information. It is appropriate that the way in which section 20 is drafted means that we are talking about the sharing of information with public bodies and other regulators.

The distinction between legal regulation and the hoops that charities and others might have to jump through to meet the funding conditions of grant givers or local authorities has not been drawn quite as clearly as it might be. Such a requirement might feel like regulation and look like regulation, but it is not regulation in the sense that legal sanctions are attached. It is not comprehensive because it is necessarily dependent on the application process and the selection of recipients. Some of the practical burdens that charities face are not regulatory burdens, but reporting burdens, which are imposed by their grant givers. That is an important distinction for the regulator to make.

Cathie Craigie: Donald Gorrie received a response from a witness earlier today about accounts being audited to meet the requirements of, for example, Communities Scotland. However, audited accounts can produce different information and come in different shapes. You say that regulation will not be imposed. Do you envisage OSCR co-operating with organisations to reach agreements that would meet the individual circumstances of an organisation and avoid duplication? If an organisation has already been audited and is answerable to Communities Scotland, will that financial information be accepted?

Richard Hellewell: The two keys to that will be the regulations for accounts that will come out under the bill, together with accounting standards at UK or international level. Together, those measures should handle any difficulty about possible dual requirements for accounts. We are certainly aware of the different sub-sectors in the charity sector and their different reporting needs. Indeed, we are already engaged with UK accounting standards that were set up with their separate statements of recommended practice for housing associations and other charities.

Jane Ryder: A distinction must be made between accounting regulations, which specify the records that charities are required to keep; audit, which is formal external scrutiny; and reporting
It is true that companies are required to lodge their audited accounts with Companies House. However, Companies House is a register; it does not re-audit the accounts, nor indeed do we intend to. For example, when we issued our monitoring questionnaire and asked charities to submit their accounts, we asked the larger charities—those with incomes of over £25,000—to answer questions to draw certain information from the accounts, but the average completion time was only an hour and a half.

Richard Hellewell: OSCR has an interest in accounts from the point of view of their compliance with regulation. It is a narrower focus than audit and it would only be in an investigation that we would go behind the accounts to look at the books of account.

Cathie Craigie: That is useful. It is obvious that OSCR wants to work in a spirit of co-operation with the public bodies and organisations that are out there. Do you think it necessary to adopt a formal protocol for co-operation between yourselves and the Charity Commission?

Jane Ryder: That is inevitable, and it is welcome. In fact, I have already submitted a draft.

Donald Gorrie: That is welcome.

Some witnesses have distinguished between the governance of a charity, which might be based in England, France or wherever, and the activities of that body in Scotland. Do you think that it is possible to draw such a distinction? Would you focus on the activities of the charity to ensure that it was acting correctly and in a charitable fashion, without duplicating the governance work done in England or elsewhere?

Jane Ryder: Yes. That is what we have done so far in the few cases where that is the situation. The Charity Commission for England and Wales would refer any complaint about the activities of a Scottish charity to us, although it does have the jurisdiction and power to intervene and to regulate Scottish charities that are active in England. There would be something reciprocal here: if a serious issue arose, we would certainly liaise with the Charity Commission on who should effectively be the lead regulator in the circumstances.

I welcome the fact that the bill has clarified which charities that are not Scottish charities are required to register with OSCR. We have just carried out a freedom of information inquiry with all 32 local authorities to find out to which organisations rate relief is granted with respect to their charitable status. That has thrown up examples of both Scottish-registered and English-registered charities. I do not have the final figures yet, but we have received more than half the returns, and it appears that around 1,000 English charities get Scottish rates relief.

Donald Gorrie: I want to make sure that I have got hold of the right end of the stick. There are two aspects to your job, as I see it. One is to verify the honesty of the people running the charity and ensure that they have not salted away money for private gain, for example. The other aspect is to ensure that the charity is acting correctly—in a charitable fashion—in accordance with the rules. Is that right?

Jane Ryder: Yes, that is right. The first hurdle, as it were, is the charity test, which means ensuring that an organisation’s constitution and actions are in accordance with that status. The second is to do with fraud. I would stress that, in practice, fraud has concerned relatively minor incidents. Our experience is that problems are much more likely to arise with general governance and how the trustees are behaving, rather than with embezzlement or the direction of funds.

Scott Barrie: Returning to the charity test, have you considered whether and when investigations or appeals relating to the charity test should be made public?

Jane Ryder: Yes. That is already before us. The question has arisen whether the existence of ongoing investigations should be made public. There is then the question of what happens at the end of the investigation. We have issued an inquiry and intervention policy, which will assist charities and the public by setting out what they can expect. Our commitment is to treat charities with respect and discretion. We have said that we will feel free to comment at any time but, in so doing, we will take into account the rights of organisations and individuals. It is hard to be more definitive than that. We cannot, for example, say that we will not comment.

Quite often, something enters the public domain, not from us, but from a complainer or a charity. It might be in the charity’s interests that we comment and say, for example, that something is not such a grievous matter, that we are simply making an inquiry or that we are not carrying out a fraud investigation. There might be issues while an investigation is continuing. The bill requires us to produce a report at the end of an investigation, to clear it with the charity involved and to publish it as we think fit. I warm to the approach taken by the Charity Commission for England and Wales, which has been publishing reports on individual investigations for the last five years or so that are
discreet and tight, with wider lessons for the sector. We recognise that it will be hard for the first Scottish charity about which a report is published, so we must handle things sensitively.

12:00

Scott Barrie: We appreciate your answer. What you seem to be suggesting is that charities would have to be considered on a case-by-case basis because you cannot be prescriptive.

Jane Ryder: We cannot be prescriptive. Quite apart from sensitivities, we have to take into account freedom of information on the one hand and data protection on the other. It is quite a juggling act.

Mr Home Robertson: We are into an area that has been lacking in Scotland until now, because the registration of charities has simply been up to the Inland Revenue. From time to time, one comes across applications for charitable status or examples of the conduct of existing charities that may be controversial—no doubt, we could all cite examples. Is it your intention to make it possible for third parties to raise objections or make representations either to the initial registration or to the continuing registration of a charity that may be controversial?

Jane Ryder: That is a procedural point and we have not got into that level of consideration. It is certainly the case that third parties have no right of appeal under the proposed legislation, and I am not sure that I think it appropriate for third parties to have a right of intervention at an earlier stage. OSCR is there for the public interest and ought to be able to act in the public interest. It is possible for a third party to complain about a charity, and we do get many such complaints, but that is rather different from objecting to the granting of charitable status. I foresee that you will get into the situation that Donald Gorrie described, where there might be sectoral politics, as it were.

Mr Home Robertson: I am not going to go to any length on this question, but the point that I am making is that it is quite possible for somebody who is promoting the case for an organisation to be registered as a charity to make their own positive case, whereas other people may have other information or concerns about what may be going on. It is quite important that they should have an opportunity to be sure that OSCR is aware of those considerations at an early stage, so that a judgment can be based on all the information.

Jane Ryder: What you are indicating is that we may well be asking for more evidence from the applicants than was the case in the past, although I know that the Inland Revenue is already asking for a little more than it did in the past.

Mr Home Robertson: Indeed. I would love to say more about that, but I will not.

Linda Fabiani: I have some concerns about section 38. As the bill is drafted, OSCR will not regulate registered social landlords that are also charities. That function will, through the Scottish ministers, go to Communities Scotland, which already regulates registered social landlords. Were you consulted about that and how do you feel about that? Do you see any chance of other regulators coming into play instead of OSCR, as I think would be allowed by the bill? Colin Armstrong suggested that charities that do not receive funding direct from the general public, as opposed to through grant-making bodies, should perhaps be treated a bit differently.

Jane Ryder: I shall start at the end of your questions and work backwards. I think that I am right in saying that Colin Armstrong was drawing a distinction between organisations that attract donations from the public and those that do not, but those organisations do attract rates and tax relief and there is no other regulator—which is one of the justifications for the introduction of OSCR—so I do not see that as a solution.

We were consulted in respect of Communities Scotland. We were clear in our original submission that that would not have been our preferred option. The difficulty, as we said in our second submission, is in striking a balance between principled consistency and pragmatism. The proposals are a pragmatic response to a sector that is, I freely acknowledge, highly regulated, and which has a regulator with intervention powers that appear to mirror those of OSCR. We can, and will, live with that pragmatic decision.

We have had some good discussions with Communities Scotland. Our concern as far as implementation is concerned is to ensure that there is a level playing field and a consistent application of charity regulation. That will be quite a juggling act for Communities Scotland, whose powers may be greater in some areas in respect of their role as regulator of RSLs, than their powers with respect to the charity aspects of the 92 RSLs that are registered charities.

You would expect me to say this, but I am not hugely in favour of further delegation to a range of lead regulators. One of the arguments in favour of the proposed legislation and of OSCR was to address the fragmented nature of the landscape. You would fragment it in a different way if you delegated to a whole series of lead regulators.

Linda Fabiani: I have a few concerns about this, although I can see the pragmatism and logic involved. One of those concerns is that many charitable RSLs use arm’s-length organisations with charitable purposes and form smaller
charities. There are two aspects to the matter. First, will Communities Scotland be able to apply the charities test in all such cases, as OSCR would apply it? Secondly, is there an issue about a charity being run by the relevant core organisation, with its committee members being drawn from that organisation?

Leading on from that, what kind of discussions and arrangements with Communities Scotland would you envisage, if any? Even the degree of pragmatism that we are discussing could involve a sign-off by OSCR to say that it is happy with the way in which Communities Scotland is organising and regulating things. That would bring all charitable organisations into OSCR’s fold.

Jane Ryder: That would be closer to the system that is envisaged for designated religious bodies. Under the bill, there would be a delegation by OSCR, rather than a delegation by ministers. It will be quite a steep learning curve for Communities Scotland. It is a fact of life that we will spend a disproportionate amount of time talking to Communities Scotland about 92 RSLs, compared to the remaining 29,000 other charities. That is the policy decision that has been taken, however, because of the current high degree of regulation and the intervention powers.

Ultimately, it is OSCR that is the custodian of the charity test. Section 38(1) says:

“It is for the Scottish Ministers”—

in other words, Communities Scotland—

to exercise OSCR’s functions under sections 28 to 35 (other than section 30)

in relation to registered social landlords. Section 30 requires us to remove a charity from the register should it not meet the charity test. The area for particular discussion between us and Communities Scotland is the question of who reviews the charity test.

Linda Fabiani: So those links for discussion are already being put in place.

Jane Ryder: Yes.

Linda Fabiani: What about the fact that OSCR would have the final sign-off in relation to the 92 charities that you mentioned, and the issue of OSCR being seen to be the overarching body?

Jane Ryder: That is possible, if section 38(1) is removed.

Linda Fabiani: So you do not see any compromise position?

Jane Ryder: In a sense, it is not for us to say because that is a ministerial policy decision. If Parliament’s decision is that that is an inappropriate delegation, it could fall back on OSCR having the power to sign off—

Linda Fabiani: You are saying that the bill would have to be amended before we could do that.

Jane Ryder: Yes.

Mary Scanlon: Section 7(3) says that although a body can satisfy sections 7(3)(a) and 7(3)(b), it does not meet the charity test if “its constitution expressly permits a third party to direct or otherwise control its activities”.

What, in your view, would constitute such direction?

Jane Ryder: I am sure that that has been mentioned in committee before. The existence of statutory ministerial directions would appear to be an example of that. From the regulator’s point of view, it is a question of what the constitution says, at the time and on an on-going basis, but not matters of custom. For example, if the issue is the NDPBs, and if the ministerial directions are simply a matter of custom, I am not sure that that infringes the section as drafted. Strict funding conditions would also not infringe the section as it is drafted. A number of local authorities have set up independent trusts that are charities and we and they would have to consider those constitutions on a case-by-case basis.

I recognise that section 7 is causing the most difficulty. Again, it is for OSCR to implement that which Parliament has legislated for, but it is a real difficulty.

Mary Scanlon: It is interesting to think about the difference between custom and direction.

As you are aware, the national collections institutions are very concerned that they might lose charitable status under section 7. Could the issue be resolved by exempting those institutions from that section, or could section 65 be amended to counter the restrictions of section 7?

Your submission emphasises that the impact will depend on the exact terms of the constitution. Is there a third possible answer to the problem? For example, would it be possible for the national collections to amend their constitutions to fulfil the criteria and requirements of charitable status?

Jane Ryder: That is possible, but I do not know quite how the amendment would work. That would be a major exercise. If you decided to do that on the spur of the moment you might get not results, but consequences, as Robert McNamara said. There is certainly enormous sympathy for the position of the national collections, and I have to declare an interest because I was previously director of the Scottish Museums Council, which is the organisation that is responsible for all the non-national museums. That is not the national collections, but nevertheless you can see where
my heart is. Along with other witnesses, I think that it would be extraordinary if the national collections were to lose charitable status as a consequence of the bill. I gave additional evidence to the Finance Committee about accepting gifts in lieu, so I think that there are enormous areas where the national collections would suffer. If I can speak for the public’s perception, I would think that it would be very much that the national collections should remain charities.

Mary Scanlon: From reading your submission there is a possibility that, although it would take a lot of work, amending the constitutions could be done.

You introduced the word “custom”; we are more used to ministerial directive. The move of Scottish Natural Heritage to Inverness was brought about by two ministerial directives, which is quite unheard of. Are we looking at two different types of public body? SNH may come under closer ministerial directive, but the national collections are based more on customary practice.

12:15

Jane Ryder: Whether the national collections are so distinct and special that it is possible to make a special case for them in the legislation is really a policy decision rather than the regulator’s decision. Making a special case for them would cause the regulator no problems because the legislation would be clear.

Mary Scanlon: With your old and your new hats on, have you discussed those issues—which are causing great concern—with representatives of the national collections? Do you see a way forward?

Jane Ryder: I have not discussed them in detail or directly, as it is inappropriate for the regulator to have such discussions with individual charities. Doing so would get one into the area of giving individual advice.

Mary Scanlon: Absolutely.

Mr Home Robertson: We had probably better stay out of the national collections issue for the reasons that have just been given, although I hope that we can make progress on it.

It is clear that the independence of charities is important, and we have got into a rather complex debate. There is the question whether having the power to appoint trustees constitutes doing away with independence—there is a way of addressing that through the number of trustees who are appointed—and there is the issue of the power to tell trustees what to do, or direct them. However, we are now asking whether earmarking funds for a particular objective constitutes direction. Recent discussion has suggested that earmarked funds from the Executive or local authorities for a particular purpose constitute direction and that earmarking funds is therefore a problem. By the same token, surely all sorts of giving to charities is earmarked. People have given lots of money for relief following the tsunami, which is earmarked money. If we interpret things in such a way, will not the situation become ridiculous?

Jane Ryder: Yes, I agree that it will and that virtually every charity would be excluded. However, the issue of direction relates to the organisation’s constitution and not to the funding agreement.

Mr Home Robertson: Okay. So we can focus on that.

Jane Ryder: Yes. I do not want to set too many hares running, but I think that the funding agreement is relevant to section 65, which deals with the duties of trustees. The trustees have a duty to act in the interests of the charity.

Donald Gorrie: I want to pursue that point. Would it be possible to reword section 7(3)(b) in such a way that some loss of total independence by the charity, which may be in the public interest, is acceptable, but that would still prevent the charity from being for the benefit of only a few people or being not in the public interest in that way? That might be oversimplistic, but is rewording that section an avenue worth exploring?

Jane Ryder: It is, if you hope to end up with a given result. I do not think the public benefit is affected, as that test is set out in section 8. I do not think that the two are linked.

Donald Gorrie: Perhaps the two could be linked, so that, as long as charities provided public benefit, section 7(3)(b) would not apply so severely.

Jane Ryder: I do not think that the two sections could be linked because all charities are required to demonstrate public benefit—that is an absolute criterion. I do not see how you could link constitution and public benefit and say that the two could be balanced out if a lesser degree of something were delivered. They are separate issues.

Donald Gorrie: There seems to be a slight element of hypocrisy in emphasising the constitution so much. The organisation’s constitution might be okay; how it operates might be totally different, but that would be within the law.

Jane Ryder: I accept that there seems to be an anomaly.

Donald Gorrie: That is how the world works. Thank you very much.
Patrick Harvie: In your submission, you say: “we understand there are concerns about the distinction between misconduct and mismanagement”, but that “it is appropriate that OSCR powers should be directed, as currently framed, against misconduct and (where appropriate) mismanagement”. Will you expand on some of those issues?

Jane Ryder: We might not have had to address this matter if the 1990 act had not contained the phrase “misconduct and mismanagement”. It is unfortunate that the term misconduct carries connotations of grievous conduct, but if we went back to the phrase “misconduct or mismanagement” some parts of the sector would be concerned that OSCR was seeking to intervene in management matters instead of dealing with governance issues. Such a balance is very difficult to strike. The matter will simply have to be tested out in practice with the appeals panel, or ultimately the courts, telling us whether we are striking the right balance, whether we are stepping too far over the mark or whether we are not going far enough.

Patrick Harvie: Do you share organisations’ concerns about the perception of an accusation of misconduct?

Jane Ryder: I understand those concerns. It all comes back to the question of managing perceptions that we discussed earlier. Key in that respect will be how we communicate with the sector, how we get those messages across and whether we are seen to act fairly, objectively and transparently in practice, not whether we are able to find another phrase for the legislation.

Linda Fabiani: There is more to this matter than simply the question of how the sector is perceived. For example, some poor soul who inadvertently mucks up on the management side might end up the subject of a lead story in local newspapers saying that he was struck off as a trustee because of misconduct. I am worried that, as a result, the local perception would be that that person had been caught with their fingers in the till or had done something really bad. The terminology raises real concerns.

Jane Ryder: I understand that. From the regulator’s perspective, we want the appropriate locus to ensure that we can intervene at an early stage, provide advice and prevent a situation from becoming a case of what might be described as genuine misconduct. That said, we must exercise such powers proportionately, fairly and transparently.

The Convener: That concludes the committee’s questioning. We are very grateful for your attendance this morning.

In a response to Donald Gorrie, you said that you had carried out an exercise with local authorities under the freedom of information legislation. We would find it helpful if you could give us sight of the results of that exercise whenever they become available.

Jane Ryder: I am happy to do so. We have a list of charities with some statistics on the number claiming rates relief.

The Convener: That would give the committee some context and allow us to find out how many charities, including English-based ones, are out there.

Jane Ryder: I am very happy to provide that information. In fact, we have to supply the answer within 20 working days of the request being made, so you should receive that information shortly.

The Convener: Thank you. That concludes this meeting.

Meeting closed at 12:23.
SUPPLEMENTARY EVIDENCE FROM THE CITY OF EDINBURGH COUNCIL

Communities Committee Evidence

I now have the further information requested by the Committee on 26\textsuperscript{th} January 2005.

First, I can confirm that the rate relief (at the level of 80\%) given to charitable bodies by the Council is recognised in the Scottish Executive’s budget settlement, where an allowance is made to compensate for the Council’s reduced income from this source.

Second, on the cost of licensing street collections, our licensing service reviewed this a few years ago, and estimated costs at about £37. This will have increased and can be expected to be more than £40 at present.

Each application is received, logged on computer, checked by licensing staff and copied to the Police. The police response is recorded, and appropriate action taken (which might on occasion involve a committee hearing) leading to a granting of the licence, with or without conditions, or a refusal. A consideration is required in finalising the decision, the applicant is informed, and a permit is issued. A return is received from the licence holder after the collection, and this is later filed.

I hope this gives an appropriate description of the process and the likely costs. On the basis of up to 300 applications being processed per annum in the city, current costs are in excess of £12,000.

David I Jack
Head of Strategic Support Services
The City of Edinburgh Council
10 February 2005
Scottish Parliament
Communities Committee

Wednesday 2 February 2005

[THE CONVENER opened the meeting at 10:04]

Items in Private

The Convener (Karen Whitefield): I open the fourth meeting of the Communities Committee in 2005. I remind all those present that mobile phones should be turned off.

Item 1 on today’s agenda concerns item 3, which is consideration of the committee’s approach to its stage 1 report on the Charities and Trustee Investment (Scotland) Bill. Do members agree to take this and any future items relating to the stage 1 report in private?

Members indicated agreement.

The Convener: I note that Donald Gorrie has sent his apologies.

Charities and Trustee Investment (Scotland) Bill: Stage 1

10:05

The Convener: The second item on the agenda is stage 1 of the Charities and Trustee Investment (Scotland) Bill. We will hear evidence from the Deputy Minister for Communities, Johann Lamont.

I welcome the minister back to the committee: it is nice to have you here in a different capacity. We have a number of questions that we would like to ask you, but I understand that you have an opening statement to make.

The Deputy Minister for Communities (Johann Lamont): Thank you. I would like to say that I am pleased to be here, but my joy is not totally unalloyed. I know many of you all too well and have been threatened, over the past few days, about past sins that I may have committed and which may come back to haunt me today. However, I expect that the current convener is establishing far better standards than I did and will not allow any such abuse of the minister by the committee. I am genuinely pleased to have the opportunity to discuss the bill with the committee.

You will know, but it is worth emphasising, the massive value that the charity sector brings to our society. Scottish charities raise some £2 billion a year to spend in our communities. The public donates about £240 million of that, and the services that are provided are probably irreplaceable. The main objective of the bill is to ensure that there is for the first time a robust, proportionate and transparent regulatory framework that protects the public interest and helps charities to flourish. I have read the written evidence that has been submitted to the committee and the discussions that you have had with representatives and it is clear that, as we all knew, the charity sector is an interesting, diverse and sometimes eccentric sector. In ensuring that we have a robust, proportionate and transparent regulatory framework, we must also ensure that we do not lose the things that we most respect about the sector.

The overall principles of the bill have been widely welcomed. That is probably unusual, but I hope that it shows some level of success on the part of the Executive. The bill sets out an overall framework that needs to be added to by significant subordinate legislation that will contain further processing details and other supporting rules. It is right that that detail is to be left to secondary legislation because it may, in the years ahead, need to be amended to keep up with changing times. Although there remains some disagreement on matters of detail, that is only to be expected and I am looking forward to working with the
committee on the issues that have been raised. For a bill on which there is so much agreement, the parliamentary process should be especially positive.

I will turn, briefly, to some of the specific issues that have been highlighted. There has been much discussion of the independence test in the bill. Jean McFadden’s report recommended that policy and suggested that it could be implemented by limiting the proportion of charity trustees who are appointed by the Government. However, that would cover only some charities and would not ensure that a charity continued to act independently. The bill includes a requirement that a charity must, in constitutional terms, be free from third-party control. Discussed has highlighted the fact that that test may be too severe and unworkable. I therefore undertake that the Executive will consider whether further clarity is required to ensure, for instance, that funding conditions’ being controlled by a parent charity, or other problems, are not obstacles.

That provision will also have an impact on charitable non-departmental public bodies. I am aware of the interest of this committee and the Finance Committee in the potential impact of the bill on such NDPBs. It is not a new issue, but it is difficult and quite different. The Executive took a view on the matter in 2002 in responding to Jean McFadden’s recommendations. I was the convener of the then Social Justice Committee, which took evidence from Jean McFadden. On the basis of the financial information that was available then, ministers decided that although the proposal may impact on some such bodies, both the policy that public bodies be directly accountable to them and the principle that charities be independent should be maintained; hence, the Executive accepted the fact that that conflict may mean that some bodies may have to lose either their NDPB status or their charity status. The position of each body was to be considered case by case.

Even since the bill was consulted on and introduced, it has become clear that the national collection cultural NDPBs—the National Museums of Scotland, the National Galleries of Scotland, the National Library of Scotland, the Royal Commission on the Ancient and Historical Monuments of Scotland and the Royal Botanic Garden Edinburgh—have developed their aspirations for future fundraising for special capital projects. Recent evidence and updated cost information that has been provided by those five bodies indicates that their plans for fundraising—which are largely dependent on their retaining charity status—amount to a total of £140 million over the next 10 years.

On average, the annual value of charity status is now estimated to be £20 million for the remaining charitable NDPBs—that is double what was previously estimated. The Executive has considered the matter carefully and has taken into account the high level of public and committee support for those bodies, which is apparent from recent communications, and their reliance on charity status to carry out the work. The Executive now agrees that those NDPBs should retain charity status.

The Executive will propose amendments during the bill’s progress to enable the five national collection cultural bodies to retain their charity status because of the national significance of their work in holding and developing assets that are of national public importance and which are part of our heritage. I cannot at this stage provide full details of what provisions might be included to achieve that because the mechanics may require complicated redrafting. I undertake to provide more details as soon as those are available at a later stage of the bill’s progress.

I note concerns from some quarters that United Kingdom charities that operate here feel that they should not have to register again with the Office of the Scottish Charity Regulator. Although we wish to avoid any undue regulatory burden, it is important that the Scottish public be reassured that any significant operation by charities here will be regulated by the Scottish regulator.

There has been a long discussion about whether our charity definition is or should be exactly the same as that in the Home Office Charities Bill for England and Wales. We set out with the intention that, in effect, it should be the same. Despite close liaison between our officials, differences in the timing of the bills have meant that there are differences in the text on charitable purposes. There is strong support for the definitions’ being compatible and I am certainly willing to consider minor changes that will bring them closer together. However, it would not be satisfactory for a Scottish bill to refer to or to be reliant on English charity law. Nonetheless, the 400 years of experience that the body of law represents will not be completely lost. OSCR, especially in liaising with the Charity Commission for England and Wales, will consider previous case law in preparing its guidance on how it interprets the charity test. Although it will not be binding on them, the case law will also be available to the appeals panel and to the courts. Specific Scottish charity case law will, of course, gradually develop.

I will touch on the public benefit test. As a result of its consultations, the Executive chose to add some criteria to the bill, which set out issues that OSCR and the courts must consider, but it is not an exclusive list. OSCR may certainly consider
other issues and must consult on its guidance. Some people have said that the test is too tough and some have said that it is not strong enough, which is why we do not feel that the test should be set in stone in the bill. It is important to recognise the significance of that. In removing the previous presumption of public benefit and requiring all charities to pass the test, we are ensuring that all charities must live up to public expectations of what a charity is. Public views evolve and the test should be able to evolve with those views. I know that OSCR is already in discussion with the Charity Commission, which is also planning how it will approach the matter.

One issue that has led to wide-ranging views being expressed is the position of independent schools and hospitals. Strong views have been expressed both in favour of and against those bodies’ being allowed to retain charity status. The decision rests on the public benefit requirement. Under existing charity law, bodies that charge for services are not automatically ruled out of charity status, but that aspect of the public benefit test will be further developed by the regulators here and in England and Wales as a result of both bills. The public benefit criteria in the bill will direct OSCR and the courts to take account of any undue restriction of potential beneficiaries’ being able to receive a charity’s benefit.

I am sure that the committee will want to cover other issues. I am happy to discuss the bill and to answer any questions.

The Convener: Thank you very much for your comments. I am sure that the committee welcomes a number of the points that you have made, particularly those on the Executive’s movement on NDPBs. I am sure that we will come back to that issue during questions.

Christine Grahame (South of Scotland) (SNP): The minister’s statement has been very helpful, but the problem is that there was a lot in it. It would have been helpful to have had—or even to be given now—a copy of the statement, because it changes the direction of some of the questions that were going to be put. There was a lot to take in and many positions have moved. I do not know what the usual procedure is when there is such a full statement, but although I am grateful that the statement was so full, it would have been useful for us to have had it five or 10 minutes in advance to give us a chance to look at it. Could we do something about that now?

The Convener: At this point we are not in a position to get a copy of the statement. I am sure that the minister will be happy to furnish us with one later today. That does not address Christine Grahame’s concerns, but I am sure that as we pursue our lines of questioning the minister will restate many of the points from her statement and give members the opportunity to explore them further.

Johann Lamont: Given that the statement was substantial, I recognise that you might ask me a question that has already been answered. However, I will be content to rehearse and reflect again on the points that I made.

Christine Grahame: If my question sounds daft, it is because I missed something—no doubt you will tell me what it was. Shall I proceed?

The Convener: Yes.

10:15

Christine Grahame: From the evidence that the committee has received, it appears that OSCR’s role will be regulatory but that OSCR will have no explicit role in relation to information and guidance. The Scottish Information Commissioner has such a role: the commission not only monitors the Freedom of Information (Scotland) Act 2002 but has an explicit role in the provision of information and guidance. Given that the bill would make trustees who did something wrong liable to pretty devastating penalties, does the Executive look favourably on the suggestion that the bill should place an explicit duty on OSCR to provide information and guidance to charities, in addition to its regulatory functions?

Johann Lamont: We are not at year zero in relation to charities. Well-respected charitable organisations—in particular the Scottish Council for Voluntary Organisations and CVS Scotland—represent and understand the sector and have worked to develop capacity in the sector. If we were starting at year zero, it might be logical to ask the regulator to do that work, but significant funding is provided to organisations that are already doing it.

At this stage, the Executive is content that the regulatory role of OSCR will be established and properly bedded in. OSCR will have a specific and important job, which is to restore and maintain public confidence that the charitable sector is what it says it is. A very committed sector already works on behalf of charities, so it is not necessary for OSCR to be given that role.

Christine Grahame: There are an awful lot of small charities—I am trying to find the numbers. I appreciate the point in relation to larger charities, but small charities pop up when people encounter something sad and decide to set up a charity. Sometimes such charities are set up just by a husband and wife or a family. The charities are bona fide, but they might fall foul of the law if they do not have access to guidance. With respect, I suggest that it might be useful if OSCR were to put
guidance in place, so that there would be a one-stop shop for guidance and regulation.

**Johann Lamont:** I understand the importance of ensuring that people who are involved in charities are supported in doing what they want to do without their falling foul of legislation. OSCR will have an important duty to co-operate with other bodies and, obviously, OSCR will not withhold information from someone who registers a charity. However, as I said, a very strong sector already gives advice and support. In the first instance, it is important that OSCR be clear about its regulatory role and areas of responsibility.

It is worth adding that section 1(2) of the bill, which sets out OSCR’s general functions, includes the function:

“to encourage, facilitate and monitor compliance by charities with the provisions of this Act”.

OSCR will not wait until someone does something wrong and then chap on their door. I do not know whether that addresses your concern about OSCR’s role.

**Christine Grahame:** You think that section 1(2)(c) could be a catch-all provision that would allow advice to be given if inquiries were made. It is useful to have that on the record.

OSCR must be regarded as an entirely independent body, but as an Executive agency one of its objectives will be to provide independent advice and information to Scottish ministers and the Scottish Parliament on regulatory matters. However, that function is not included in the list in the bill. Should the bill set out an explicit role for OSCR in giving advice to ministers?

**Johann Lamont:** The key point about OSCR is that it will be operationally independent. It will be given the responsibility to regulate the sector, it will present its annual accounts to Parliament and it will provide information directly to Parliament if that is requested, rather than via ministers. That is how OSCR is being set up.

**Christine Grahame:** I might be missing something. Does the bill explicitly state that the provision of such information is a function of OSCR?

**Johann Lamont:** If OSCR thinks that it is necessary to advise ministers, it will be able to do so. The test will be whether ministers pay attention to that advice.

**Christine Grahame:** Is OSCR’s role in advising ministers in the bill?

**Richard Arnott (Scottish Executive Development Department):** We feel that such advice would be covered by the general function of encouraging compliance.
making OSCR accountable for its use of public funds.

Christine Grahame: My final question is probably harder. Does the fact that the board of OSCR will be appointed by ministers compromise OSCR’s independence?

Johann Lamont: No. The appointments will be made under the normal public appointments procedure, which is regulated by the commissioner for public appointments. I understand that the same happens for the commissioner for public appointments. I made under the normal public appointments procedure, which is regulated by the commissioner for public appointments. I understand that the same happens for the appointment of the commissioners.

Christine Grahame: I am content with that.

Patrick Harvie (Glasgow) (Green): Good morning. The bill provides for a two-part charity test. Other members will ask about the public benefit part of the test, but I want to ask about the charitable purposes part. There are a number of differences between the charitable purposes that are listed in the bill and those that are listed in the equivalent Westminster bill. Is there a general reason why the Executive decided that it was legitimate to have differences between the two bills and why the charitable purpose tests did not need to be identical?

Johann Lamont: The intention is that the definition of charitable purposes should be identical. Even if the bills do not have a word-perfect match, there should be a general match. We did not decide as a matter of policy that the two definitions would not be the same—it is simply that the bills have undergone changes as they have gone through the different Parliaments. If the definition in our bill were to diverge too much from that in the bill for England and Wales, that would not help anybody and might cause difficulties for the sector. That approach has been widely supported.

We have already said that are willing to revisit the wording, perhaps at stage 2, if any bits look out of kilter. However, we cannot impose absolute consistency between the two bills when we have two separate parliamentary processes. The general intention is that the charitable purposes tests should be as close as possible. Where we can bring them closer, we will do so. However, it is certainly not a policy intent to identify differences.

Patrick Harvie: Are you saying that you expect to lodge amendments that will bring the wording of the two bills closer together but that, in general, you expect the bill to result in OSCR making the same decisions?

Johann Lamont: I am saying that any divergence in the definitions of charitable purpose is not because we have actively chosen to seek differences.

Patrick Harvie: I will ask you about your position on one or two specific charitable purposes. It has been suggested that “the advancement of equality” should be included in the Scottish bill, and clause 2(2)(h) of the Westminster bill mentions “the promotion of religious or racial harmony or equality and diversity”.

Do you have any views on that?

Johann Lamont: That is a provision that we will perhaps want to consider. It would support the objectives of the equality unit in the Scottish Executive, so we could look further at that.

Patrick Harvie: My other question on the list of charitable purposes is about the advancement of religion. Questions have been asked about whether that will include other forms of spiritual or non-spiritual belief systems. Is it your view that such belief systems or philosophical positions would be covered?

Johann Lamont: I think that the advancement of religion is seen to capture spiritual benefits. I understand that there is no definition of religion in law, but I expect that that is how it would be defined. I do not know whether Catriona Hardman wants to add to that.

Catriona Hardman (Scottish Executive Legal and Parliamentary Services): No definition of religion was attempted in the Charities (Scotland) Act 1990. I imagine that it would have its normal dictionary definition, so it would include other spiritual—

Patrick Harvie: The point was raised by the Humanist Society of Scotland, whose members reject the notion of spirituality or spiritual benefit and think that it does not apply to them. Do you regard that as applying to them?

Johann Lamont: If the Humanist Society of Scotland says that its organisation is not spiritual and is not a religion, it is hard to see how it could pass the test on the grounds of religious benefit or the promotion of religion, but it may be that
another charitable purpose could be identified in relation to the views of humanists.

Mr John Home Robertson (East Lothian) (Lab): Section 7(2)(d) in the Charities and Trustee Investment (Scotland) Bill refers to

"the advancement of health,"

but the equivalent in the UK bill is

"the advancement of health or the saving of lives".

I am sure that we all want to ensure that Scotland’s lifeboats and mountain rescue teams are covered. Can we establish that they will be?

Johann Lamont: That is another of the purposes that have been identified in relation to which it would be reasonable to consider amendments at stage 2.

Mary Scanlon (Highlands and Islands) (Con): As you said in your statement, the bill will lead to substantial regulation. Will you clarify how you expect OSCR to measure spiritual and moral benefit?

Johann Lamont: Perhaps that question reflects the points that I made about the challenge that we have set ourselves in trying to regulate a sector that is so diverse and which includes philosophical views, commitments and beliefs. I hope that the way the bill is presented allows flexibility and dialogue between interested parties. It is very much for OSCR to consult, to talk to people and to work with them to get definitions and a consensus around its views.

Mary Scanlon: Do you think that spiritual and moral benefit can be measured, and will that lead ultimately to public benefit?

Johann Lamont: I think that we can measure what we can measure; we do not set ourselves standards that encompass the human condition. However, in trying to ensure that we have a sector that is regulated, that people trust and that is not open to abuse, it is still reasonable to try to capture the common understanding of public benefit, of what religion is and so on.

Mary Scanlon: That will be quite a challenge for OSCR.

The phrase “unduly restrictive” in section 8(2)(b) of the bill causes me some concern. A submission from the Scottish Council of Jewish Communities quoted an MSP at the Public Petitions Committee:

“I am … very disturbed … that the charity benefits only people from the Jewish religion and with a Jewish background. That is not charitable in any way.”—[Official Report, Public Petitions Committee, 27 October 2004; c 1151.]

We may, or may not, say that many of our charitable organisations are unduly restrictive. Last week, I spoke about that at a meeting of the clans. The clans are extremely restrictive. What do you deem to be “unduly restrictive”?

10:30

Johann Lamont: OSCR will be responsible for dealing with cases charity by charity and it will be asking what the purpose of each charity is. Is it unduly restrictive for a charity to identify itself as supporting a particular religious group? It is not the intention of section 8(2)(b) to say that. If there were a very narrow group, or a group within a group, that might lead to a further difficulty.

Quentin Fisher (Scottish Executive Development Department): The minister is right. What is unduly restrictive will be a matter for OSCR’s subjective judgment. OSCR will have to consider the reasonableness of the restriction. Any charity restricts access to its benefits in one way or another. It is for the charity to justify why it restricts its benefits as it does.

Mary Scanlon: I appreciate that. I was impressed by the contribution of Jane Ryder of OSCR last week, but I want to understand what you—the authors of the bill—mean by “unduly restrictive”. Almost every charity is restrictive in some way. The phrase in the bill causes me concern and I know that it causes concern to other committee members. We need you to take more of a lead, and to offer more clarification, rather than to say that decisions are at OSCR’s discretion.

Johann Lamont: Decisions will be at OSCR’s discretion but OSCR’s view has to be seen to be reasonable. We might need to have further discussions on that. OSCR’s view would have to be in tune with the commonly held view of what was unduly restrictive.

Mary Scanlon: Let me put to you a question that has been raised by the Scottish Council of Jewish Communities. If a charity raises money within the Jewish community, from people from the Jewish religion and with a Jewish background, and if that money is then distributed among Jewish people, is that charity unduly restrictive?

Johann Lamont: For what it is worth, my instinct is to say, no, that does not seem to be unduly restrictive. I would be concerned if we were developing legislation that said that it was. That is what I would regard as a commonly held view, but it would have to be tested by the regulator, who would make a judgment that would have to be deemed reasonable. I think that that offers protection.

Mary Scanlon: Thank you. That is fine.

The Convener: One of the key principles of the bill is independence. In your opening statement, you said that the Executive was willing to look at the issue again. I would not have thought that you
would want to overhaul your ideas, but you might be willing to reconsider measures on the proportion of charity trustees who sit on a board and the way in which charities meet the requirements under the charity test. Why are the principles of independence key to the bill?

Johann Lamont: The first thing to say is that the issue is not new. We have known for a long time that the issue of independence was regarded as central to legislation on charities.

I may have misrepresented my position. I made a particular statement about the cultural NDPBs, because it became obvious that they were in a very specific situation. The view was taken that the independence of charities was so important that NDPBs would have to decide on a case-by-case basis whether to remain NDPBs or whether to become charities. If they became charities, they would no longer be subject to direction by ministers. However, some bodies are charged with responsibility for national collections and heritage. There is general acceptance that those bodies should be subject to ministerial direction. The public hold a particular view of such bodies and the possession of charitable status provides those bodies with access to significant endowments and so on.

The issue of independence has been clear for a long time. We also knew that making a commitment to that principle would create a dilemma in respect of cultural NDPBs. However, the cost of that approach was quantified only very recently. At one stage, it was believed that the Scottish Executive could bear the cost. From the evidence that has been given to them, members will know better than I that the cost that has been quantified recently is so significant that the position has become untenable. A distinction is being made for cultural NDPBs, which are in a special position.

The Executive and I believe that it is important that charities should be independent, so that people can be confident that the sector cannot be manipulated or used in any way. The Executive’s approach has been to say that the issue is not the number of trustees who sit or come from particular groups, but the fact that any trustee, regardless of where they come from, is charged with the responsibility of operating and making decisions on behalf of the charity. In acting, trustees ought not to be under direction from a third party.

I have highlighted issues on which we may want to reflect further. We do not want to end up in a position where a parent charity is not able to ensure that the local version of the charity is acting in a particular way. However, we have accepted from the beginning that the charitable and voluntary sector should be independent from both the public and the private sectors. The sector has made the case for that very strongly.

The Convener: You have touched on the issue of non-departmental public bodies, on which both the Finance Committee and this committee have heard extensive evidence. You indicated that the Executive intends to revisit the provisions in the bill that relate to NDPBs. All members of the committee welcome that. I understand that the English Charities Bill allows an exemption for national collections institutions. In your opening remarks, you said that there will be a number of amendments, which may be technical. Are you looking to create a similar exemption in the Charities and Trustee Investment (Scotland) Bill?

Johann Lamont: We need to consider what will work best for the organisations that have been identified. I do not know whether there is clarification of the exact position in England. I understand that in England a significant number of charities have exempt status, but I do not believe that members of the Communities Committee and people more broadly who have a commitment to the charitable sector want the same provisions to apply in Scotland. We want to ensure that we do not build up a significant number of exceptions, which could undermine the principles that define the sector.

The Convener: We want to be reassured that our important national galleries and art collections and the National Library of Scotland will be protected and that those national treasures and assets will be safeguarded. The issue is not simply about the money that the national collections institutions can accrue from rates relief; it is also about Government indemnity on the assets and the properties that the institutions own, so that those can be held in trust for us as a nation and for future generations of Scots.

Johann Lamont: Absolutely. As I said, people have wrestled with the issue for a long time. We took the decision that the national collections institutions should remain non-departmental public bodies precisely because we understood the importance of the responsibilities with which they are charged. The clear understanding was that a commitment to the collections through ministerial direction was required, which was why the national collections institutions were to lose charitable status. However, when we began to appreciate the cumulative effect that charitable status has for those bodies, we realised the importance to the public of their accessing funds and commitments and doing what they want to do and decided to alter the proposals. We tried to find a solution that did everything that we wanted it to do, but we suddenly became aware of the significant cost for those bodies. Our decision is the right one and it does not undermine our commitment to
independence in relation to other charities. The primary aim of the changes is to protect the national collections.

Christine Grahame: You are right to suggest that, when we start making exceptions or granting exemptions, that can be an open door to other bodies. For clarity, it is better to have a simple law. Why have you moved away from the Scottish Charity Law Review Commission’s recommendation 5 for a solution on the NDPB issue, which was that not more than a third of the trustees should be directly or indirectly appointed by ministers or local authorities? That issue has not been dealt with. The National Library of Scotland’s position is that a range of sources for appointments to the board would be perceived as a move away from third-party direction.

Johann Lamont: The Executive’s view is that that proposal would not protect charities’ independence. A charity’s independence will be protected if the trustees are charged with the responsibility to act in the charity’s best interests and not to take external direction. The proposal would not solve the independence issue; equally it would not resolve the issue that there should be ministerial direction over the national collections, which is our clear view.

Christine Grahame: The problem is that, as the SCVO’s submission points out, the founding documents of several of the national collections institutions state that ministers can direct their actions. Whether or not ministers do so, it is in those bodies’ constitutions that they can be directed. That would surely fall foul of the third-party test.

Johann Lamont: Yes. That is why, although bodies must be either one thing or the other, we must exempt that narrow group of institutions, which manage to embrace both because of their nature. That group is distinct. Simply restricting the number of trustees who are appointed by ministers would not guarantee a body’s independence, nor would it deal with the issue of ministerial direction.

Christine Grahame: Unless those bodies change their constitutions, which is possible.

Johann Lamont: If a body’s constitution says that it has third-party direction, it could not be a charity without that being removed.

Mary Scanlon: There will obviously be further discussion of the issue when the amendments are produced. I listened carefully to your answer to the convener’s question about Government indemnity. Will Government indemnity still be assured when we have agreed that the national collections organisations will maintain their charitable status?

Johann Lamont: Those organisations will be a special group: they will have charitable status, but the independence test will have to be changed because we want to retain the power of ministerial direction. If one of the benefits of ministerial direction is the protection of Government indemnity, that will remain, too.

Christie Craigie (Cumbernauld and Kilsyth) (Lab): The issue of arm’s-length bodies that have been established by local authorities was raised with the committee by the City of Edinburgh Council and other local authorities. They worry that section 7(3)(b) will impact on their ability to deliver local services. Has the Scottish Executive considered the financial implications and the implications for communities if local services are inadvertently lost as a result of the bill?

Johann Lamont: They should not be lost if the charitable purpose of the trust is to provide those services. Charity trustees are charged with the responsibility of operating in the interests of the charity and its charitable purpose, which, in such cases, would be to deliver the provisions at a local level.

There are a number of instances in which councillors sit on bodies and cannot be directed on how to conduct themselves. For example, when they sit on licensing boards, there can be no mandate on how they behave. If a body was set up with a particular charitable purpose—for example, to deliver sports and community facilities in the local community, which I know happens in some places—it would not be necessary for the council to direct the councillors to fulfil that purpose, because the trustees would be obliged to work in the interests of that purpose.

10:45

Christie Craigie: Has the Convention of Scottish Local Authorities raised the issue with the Executive and have there been discussions?

Richard Arnott: We had discussions with COSLA at an early stage. A number of local authorities welcomed the clarity that was being given, because we are emphasising that charity trustees have to act in the interests of the charity. Some local authorities said that, to emphasise that point, they already gave guidance to people whom they appointed as charity trustees. Others felt that the clarity that we were bringing would spread the word better. However, local authorities welcomed the fact that it was clear that, when a charity was set up, the people who were appointed to be trustees had a duty to act for that body, rather than to represent the people who appointed them.

Christie Craigie: So if a councillor was appointed to the board, as long as they acted independently and without direction from the council, the local authority should have nothing to fear from section 7(3)(b).
Johann Lamont: Local authorities have to recognise that there is a distinction between their delivering services themselves and establishing an arm's-length body. Those have to be two different things. Difficulties will not be created for local authorities; if independent people who are committed to a charity deliver on the charitable purposes of that body, they will be delivering what the local authority expected of them.

Scott Barrie (Dunfermline West) (Lab): I return to the public benefit test that you talked about in your introductory remarks and to which other members, Patrick Harvie included, have alluded. How the public benefit test will operate has exercised the committee since we began taking evidence on the issue. There is a view that a fair degree of interpretation will be required to enable any organisation that has charitable status to prove public benefit. What test do you think will be required for bodies to indicate that there is sufficient public benefit to justify charitable status?

Johann Lamont: Bodies have to pass the first test, which is that they have a charitable purpose, then the public benefit test. That highlights the complexity of the area. We can go into a situation with a degree of certainty that we can measure this, shape that and do this, but we begin to realise that the issues are more difficult than that. The bill is not about creating measures that prevent charities from doing things; it is about creating measures that protect charities. We think that we know what something means, but trying to find the words to say what it means is different. It is recognised that, through consultation, OSCR will develop a view on the public benefit test. However, I would not have thought that a public benefit test could be applied in a proportionate way. We could not say that public benefit is established if 50 per cent of what a body does is good works. I hope that, through consulting fully and putting out guidelines, OSCR will capture what we understand to be public benefit.

Scott Barrie: Let us be honest. What is giving some of us difficulty is the whole issue of independent schools and the level of public benefit that such institutions must prove that they provide. The local community having access to playing fields of an evening may, in some people’s eyes, be sufficient public benefit; for other people, it may not be. The issue is the degree of benefit that is provided.

I fully accept what you have just said about our not being able to impose a tariff system whereby an institution has to get to level 4 before charitable status is achieved, for example. Nevertheless, there is a difficulty in the fact that one person’s public benefit is not necessarily another person’s public benefit. The whole concept of the charity brand—which has often been talked about when we have taken evidence on the bill—depends on a large number of people being able to agree on whether an organisation is a charity in terms of what it is achieving. Some people find it difficult to accept that independent schools should have charitable status, as they do not believe that those schools operate in the same way as charities.

Johann Lamont: You are right to say that the issue is difficult. There are strongly held views on such issues, on both sides of the argument, and widely different perceptions of independent schools. That is why it is important for OSCR to have the responsibility for dealing with the matter in a way that people will accept. The bill also identifies public disbenefit as a factor. The public benefit test has to be real if we are to ensure that the charitable sector is underpinned by public confidence.

The other issue relating to independent schools is the fact that the sector is perhaps far more diverse that many of us might have realised. Some good examples of the public benefit that is provided by independent schools have been identified. Cathie Craigie has talked to me about the Craigalbert Centre, but there are other schools—such as Donaldson’s College for the deaf, from which the committee has taken evidence—on which we could gather consensus in this room. Equally, there are others that are far more contentious. It is helpful, therefore, to have OSCR, as the regulator, developing a test that people can see as reasonable.

Scott Barrie: We have touched on the “unduly restrictive” criterion in section 8(2)(b). In your opinion, could high charges or fees be construed as unduly restrictive?

Johann Lamont: They could be. If a wide range of fees was being charged, OSCR would need to explore what was causing that wide difference and what the point of it was. If the point was to ensure that only a very small group of people would apply to use a facility, that might be deemed to be unduly restrictive. However, that would be a matter for OSCR to decide. I am confident that OSCR will have such powers that people will feel that that issue has been and will be explored thoroughly. There is no presumption in the bill about who would pass or fail the test; the important thing is that there is a test and that people see that test as reasonable, rigorous and robust.

The Convener: John Home Robertson had a question.

Mr Home Robertson: That exchange has covered the point that I wanted to address. I do not want to spoil things by confusing the issue.

Linda Fabiani (Central Scotland) (SNP): Let us leave aside the special needs private schools such as Donaldson’s and look at what we might
call mainstream private schools. Are you saying that OSCR might decide that one mainstream private school should have charitable status and that another mainstream private school did not meet the benefit test and, therefore, should not have charitable status?

**Johann Lamont:** Yes. The onus is on the independent school to establish that it has a charitable purpose, which is to provide education, and that it meets the public benefit test. The Executive has not taken the view that we should set the test; OSCR will set the test and institutions will either pass or fail it. To say that certain groups of institutions will naturally fail the test is to miss the point of having a test that is reasonable and fair and that considers every individual case on its merits.

I made an obvious distinction between certain kinds of institutions in the independent schools sector. However, within what you describe as mainstream independent schools, there will also probably be divergence on commitments to, for example, special needs or the local community. There might even be divergence in founding principles. Therefore, I think that it is helpful to have a test that everybody has to meet and for which there is no presumption that a body will pass or fail.

**Christine Grahame:** The same principle obviously applies when someone pays their way to be treated in what we might call private health care. I take it that the test will be proportionate. Many of us have probably made up our minds already—I have, at least—about what we consider a charity in the hospitals or independent schools sector. However, will you just make it clear that if the vast majority—90 to 95 per cent—pay for the facilities, the institution would find it difficult to overcome the public benefit test?

**Johann Lamont:** The same test would apply in the hospitals sector. The problems in that sector will probably be less challenging and difficult for us than in the education sector. However, the test would remain the same. The bodies would have to establish public benefit. It may be a commonly held view that it would be difficult to see public benefit where it did not look as if there was much evidence of it. Obviously, that would be something that OSCR would have to—

**Christine Grahame:** Is that your view?

**Johann Lamont:** Sorry?

**Christine Grahame:** Is that your view? The private sector has said in evidence to us that, leaving aside schools such as Donaldson’s, fees are paid for 90 per cent of the children in independent schools. Is it your view that that position will make it difficult for independent schools to meet the public benefit test?

**Johann Lamont:** I will be interested to see how everybody seeks to meet the public benefit test. I am certainly committed to ensuring that OSCR produces guidelines that people regard as clear, transparent and logical and to which they can sign up.

**Christine Grahame:** Thank you.

**Mary Scanlon:** I think that this point has been covered, but I have two brief questions. Scott Barrie said that charging meant that independent schools could be unduly restrictive in terms of meeting the public benefit test. If the high charges were used to help with bursaries for less-well-off families, would that be taken into consideration when judging whether a school met the public benefit test? You said, minister, that there is quite a diversity of fees within the independent schools sector. That is certainly something that I have learned as we have taken evidence. For example, the fees for Fettes College are probably more than 50 per cent higher than those for many other independent schools in Edinburgh. Would OSCR look at the fees and make recommendations about them for independent schools, if it felt that the fees made the schools too exclusive?

**Johann Lamont:** That would be for OSCR to decide. The public benefit test will be a transparent process and if OSCR decided that a body had failed the test, it would make its reasons clear. If the body wanted to pass the test, it would have to reflect on the reasons for failing and act accordingly.

**Mary Scanlon:** The point is that, under the charity test, all the independent schools will meet the advancement of education test, whereas, under the public benefit test, we get back to the two words that cause me concern: “unduly restrictive”. If the fees for a particular school are significantly higher than those for other schools, surely that makes that school unduly restrictive.

**Johann Lamont:** I have already said that we do not presume that any school in the independent sector will pass or fail. For the example you gave, OSCR might decide that the fees were unduly restrictive, so the school would not pass the public benefit test. However, another school’s fees might not be regarded as being unduly restrictive, so that school would pass the benefit test. As I said, that will be a matter for OSCR.

**Mary Scanlon:** I think that this is an important point, so I want to be clear that, in terms of meeting the public benefit test, OSCR could make a recommendation not just on the benefits to the local community but on the basis of the fees that a school charged.

**Johann Lamont:** I would assume that OSCR would not make a recommendation about how a body was going to pass the test. A body will seek
to pass the public benefit test and OSCR, when giving its reasons why the body may not have passed the test, will say either that there is no public benefit or that it deems that the unduly restrictive charging does not have public benefit.

Mary Scanlon: That is what I meant—thanks.

Scott Barrie: Section 8, which is on public benefit, does not refer to case law but attempts to encapsulate the basic principles that have been established by precedent. Will the lack of reference to case law restrict OSCR’s flexibility when deciding whether a body operates for the public benefit?

11:00

Johann Lamont: The opposite could be argued. OSCR has the benefit of case law in other places but is not obliged to act entirely in accordance with that. The arrangement gives OSCR greater flexibility.

Cathie Craigie: I will move on to part 3 and in particular section 20, which requires OSCR to cooperate with other regulators and to share information. At our meeting last week, Jane Ryder of OSCR expressed concern that section 20 did not go far enough and said that OSCR felt strongly that the bill should contain a reciprocal obligation for other regulators to co-operate with OSCR. Could a statutory obligation to co-operate with OSCR be imposed on other regulators in Scotland? Could Westminster impose a similar statutory duty on relevant English regulators?

Johann Lamont: OSCR will have a statutory duty to seek co-operation with other regulators. The bill—rightly—focuses on the role of OSCR and how it will operate. We are not allowed or able to impose a duty on regulators outwith Scotland. The powers under section 24 will allow other Scottish public bodies, including regulators, to disclose information to OSCR. The Executive’s view is that that is sufficient to ensure that OSCR can do its work.

It is intended that other regulators that commonly deal with charities, such as the Charity Commission, will agree to co-operate with OSCR to reduce the burden on charities. We expect that to lead to protocols or memorandums of understanding about investigations, the exchange of information and common formats of information collection.

The Executive’s view is that that is sufficient, given a general commitment to supporting the charitable sector, an understanding of the sector’s importance and a wish not to work against the bill’s aim, which is to underpin the charitable sector with public confidence.

Cathie Craigie: I am sure that the Executive has undertaken much work on and put much thought into the matter. However, when OSCR strongly recommends something to the committee, we must sit up and listen. Could the Executive liaise with colleagues in England to make a reciprocal arrangement in the Charities Bill there to deal with public bodies that are based in England?

Johann Lamont: As I said, we can discuss with Westminster colleagues and others the mechanism for that. We will seek the commitment to working together, which could be dealt with through a protocol and memorandum of understanding. Conflict does not arise over what we are looking for at the other end of the process. What is in the Charities and Trustee Investment (Scotland) Bill is sufficient to meet people’s concerns.

OSCR will report to Parliament and will be in dialogue with ministers—we have discussed that. If OSCR appears to have difficulty in obtaining co-operation from any group as the process moves on, we will revisit the matter.

Cathie Craigie: I am sure that the committee will watch the matter, minister.

I keep trying to call you “convener”, although you are on the other side of the table now.

Johann Lamont: If you had done that, I would have told you to be quiet and called somebody else to speak.

Cathie Craigie: I might have to seek the chair’s protection on that, minister.

Under section 38, Communities Scotland will be excepted from reporting back to OSCR, which accepts that organisations regulated by Communities Scotland have already been subject to a rigorous process. Could the Scottish Higher Education Funding Council be included in that provision?

Johann Lamont: As we want efficient, proportionate regulation, we have rightly sought to delegate certain regulatory functions to Communities Scotland. However, I should point out that the organisations that it regulates have to register first with OSCR. Communities Scotland’s regulation of registered social landlords covers not only money and funding, but governance, how RSLs deal with tenants and so on. Such an approach is quite distinct from that of SHEFC.

We must strike a balance. Although we do not want bodies that are already heavily regulated to face further regulation, we also do not want desperately to offload everyone onto other bodies. The very clear case that has been made for Communities Scotland could not be made for SHEFC. We must ensure that the objectives of
setting up OSCR are met, and we know from its work that Communities Scotland will meet those objectives. Indeed, it is very important that Communities Scotland and OSCR co-operate to ensure that that happens.

**Cathie Craigie**: Do you expect OSCR to hold discussions with SHEFC to ensure that colleges do not duplicate certain aspects, such as accounting practices?

**Johann Lamont**: Although we have proposed something different for Communities Scotland, we will ensure that a whole range of other measures support our commitment to proportionate regulation. The Office of the Scottish Charity Regulator has already been working very closely with other relevant regulators and it is important that their information can be used in the form in which it is provided, instead of having to ask people to redo things. Many sensible measures can be taken in that respect, and I know that Jane Ryder from OSCR has been working on the matter.

**Linda Fabiani**: Although I completely understand why you want to give Communities Scotland certain regulatory functions, I am slightly concerned about the fragmentation of the charity sector. Could Communities Scotland and OSCR reach some agreement that would give OSCR full responsibility for charities by allowing it to sign off the charitable purposes aspect?

**Johann Lamont**: The organisations in question first have to register with OSCR, and their regulation is then delegated to Communities Scotland. That should meet your concern that Communities Scotland might do something completely different. OSCR will still make the initial decision about whether an organisation is a charity.

**Linda Fabiani**: So if RSLs want charitable status, they will have to apply to OSCR.

**Johann Lamont**: Yes, and then Communities Scotland would ensure that they comply with the rules. However, as I have said, the two bodies need to work together to ensure that they are fulfilling their statutory roles.

**Linda Fabiani**: I just feel that OSCR should have ultimate responsibility for all charities and that we should find a way of achieving that with regard to RSLs without giving it much more work. What about the hands-off organisations, that also have charitable status, that RSLs tend to create within communities?

**Johann Lamont**: Any hands-off body that had been created by an RSL and had charitable status would be regulated by OSCR. They cannot fall into a black hole in which no one regulates them.

**Linda Fabiani**: Unless I picked the whole thing up wrongly last week—I will look at it again—I think that everyone involved requires clarification.

**Johann Lamont**: The bill is trying to capture what the sector looks like. It appears that RSLs have set up other wee groups, but any such group that is independent from and is not regulated by an RSL will need to be regulated by OSCR. The power to decide whether an organisation has charitable status or not remains with OSCR. That is probably a sufficient bottom line from which people should get comfort.

**Linda Fabiani**: Right. I shall look at that again.

I refer now to some of the other evidence that we heard last week. I worry about the information that charities are obliged to give. We heard from Oxfam in Scotland about the potential difficulties for an organisation that has its head office in one country but operates in many other countries. The Oxfam representatives quoted the Companies Act 1985, and their view was that it should be possible for the work that is being carried out within a country to be regulated, but for the internal machinations of the parent office to be subject only to the jurisdiction of the county in which it is based. I would like your views on that.

**Johann Lamont**: My views on the Companies Act 1985 are scant.

**Linda Fabiani**: Forget the act. What is your view on the general point?

**Johann Lamont**: I shall ask Quentin Fisher to give some information about the act first, and then we can talk about the general point.

**Quentin Fisher**: In the first instance, when OSCR requires information from charities, primarily in the form of accounts—and I imagine that is what the concern was directed at—it will be quite happy to accept accounts that refer only to that body’s activities and structures in Scotland. Of course, many charities might find it onerous to try to drive a wedge between their Scottish operation and their operations elsewhere, so OSCR will also be able to accept unified accounts. In other words, where a body wishes to return accounting information about only its Scottish functions and operations, it should be able to do so.

**Linda Fabiani**: That is interesting. However, there is a deeper point about the level of regulation. I am not saying that it was Oxfam’s intention, but I have picked up from the evidence that we heard that some larger charities think that it will be an absolute bother to be regulated in Scotland to the same extent as they would be regulated in England. I am trying to get confirmation of your intention—is it to stay as it is
in the bill just now, or are you looking to relax that requirement?

**Johann Lamont:** It is a question of balancing being proportionate and not creating onerous and unnecessary work for people—and the bill has tried to do that—against ensuring that charities are regulated if they are operating in Scotland, have premises in Scotland, and so on. That is reasonable. OSCR would need to be alive to complaints that the regulation was burdensome and was creating difficulties. We recognise that there must be a balance, but we think it has been struck.

**Linda Fabiani:** Another issue that arose concerned small charities that have limited staff and resources. There are concerns about the public asking for information all the time and about the amount of staff time that it would take to put together sets of accounts. The view was expressed that it might be possible for OSCR to be the point of contact for people who wanted to ask for information about a charity's constitution or accounts.

**Johann Lamont:** All charities have to maintain proper accounting records, so those should be available. However, the nature of the report that they have to make to OSCR will vary depending on their size. It is right that we understand that there are not the same pressures on big charities on their size. It is right that we understand that they have to make to OSCR will vary depending...

**Scott Barrie:** OSCR will have powers to investigate any charity and also any bodies controlled by that charity. For example, it will be able to look into the activities of a non-charitable trading arm of a charity. What would be the process for reporting on such inquiries and do you think that OSCR should be placed under a duty to report on them publicly?

**Johann Lamont:** Where the body that is being investigated has been found not to be guilty, OSCR should report the findings of the inquiry, if the body requests that. It should be for the body that is being investigated to make that decision, because it might judge that having its name in the press, even if it is being exonerated, does not do what it wants. Where there has been a problem I would expect the findings to be made public—that would be important. The only caveat is that where a body has been cleared, the report should be published with its permission. That is in the interests of transparency and bodies have nothing to fear from that.

**Scott Barrie:** That is useful clarification.

**Christine Grahame:** I am approaching accounts with trepidation, as you did company law. I appreciate what the minister said about members of the public being entitled to see the accounts of various charities. I understand from section 45(5) of the bill that regulations will be brought in that will do different things to different kinds of charities. Will you elaborate on that? I presume—you will, no doubt, clarify this—that a major organisation such as Oxfam, which has enormous accounting teams, will have different obligations to the two-person animal welfare charity that was set up to rescue wee birds. Will the accounts that all charities produce have to conform to the statement of recommended practice?

**Johann Lamont:** The SORP—you have said what it stands for—applies only to charities producing fully accrued accounts. Although the regulations will set out the detail and thresholds, the intention is that smaller charities will produce accounts on a receipts-and-payments basis.

**Christine Grahame:** I refer to the supplementary evidence from the Institute of Chartered Accountants of Scotland, which states that accounting thresholds should be lower than those in England and Wales. Is that what you are saying?

**Johann Lamont:** The first point is that larger charities will have to give more information than will smaller charities.

**Christine Grahame:** Absolutely. I understand that.

**Johann Lamont:** There is a view that the thresholds set in England and Wales are not appropriate to the Scottish charity sector and are too high to allow a reasonable number of charities to be audited, given the nature of the charitable sector in Scotland, which comprises more, smaller charities. We would want to capture more charities, because the principle of transparency and public confidence in the system might be undermined if there is not sufficient auditing.

**Christine Grahame:** One of the points that the institute made was that we do not know the financial situation of many charities in Scotland. I was surprised by that, because I thought that charities had to be registered with the Inland Revenue and that there would be a database of their financial position. Will you clarify what we know about the income of various charities? What information is available?

**Johann Lamont:** I will go back to first principles. We introduced the bill because the financial position of the sector cannot be tracked in the way...
that you are suggesting. There is evidence that the Inland Revenue’s lists are incomplete—the SCVO mentioned that—and that they include charities that no longer operate. There has been no such tracking and monitoring of what charities are doing, which is what we are attempting to do now. Through the regulator we will begin to address those issues, get a better sense of the size of bits of the sector and develop an understanding of the demands of the sector.

Christine Grahame: What is your view of the Institute of Chartered Accountants of Scotland’s recommendation that charities that are not companies, and charities with an income of £25,000 or less, should not require an independent examination?

Johann Lamont: The main thing to say is that we will consult on that, as we acknowledge that that is an important decision that must be made.

Christine Grahame: Obviously you have seen the submission.

I will move on. Should auditors have a duty to report wrongdoing to OSCR, to protect them from legal action for breaking client confidentiality, as the Institute of Chartered Accountants of Scotland suggested?

Johann Lamont: Section 25 will remove any restriction on auditors or independent examiners that would prevent them from “disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions”, which provides enough protection to allow auditors to report possible wrongdoing to OSCR. Therefore the inclusion in the bill of a specific duty is unnecessary.

Christine Grahame: Are you saying that concerns of the Institute of Chartered Accountants of Scotland are unfounded?

Johann Lamont: I did not say that. I said—

Christine Grahame: I know that you did not.

Johann Lamont: I certainly would never say that an auditor’s views were unfounded. Perhaps we need further discussion on the matter. If movement is possible on the issue, we would be happy to explore that.

Christine Grahame: Obviously, auditors think that they will find out whether they are protected only when they are taken to court. That is a huge problem.

Johann Lamont: It is certainly important that auditors and independent examiners should be able to disclose information. We would not want to do anything that prevented that from happening and, if it is suggested that that might be an unintended consequence of the bill, I will be happy to explore the matter further.

Christine Grahame: Thank you.

Patrick Harvie: On designated religious charities—

Johann Lamont: Are you saving the easy questions for last?

The Convener: What makes you think that that will be the final question, minister?

Patrick Harvie: Notwithstanding OSCR’s ability to remove designation, which would be a fairly serious step to take, why will designated religious charities be exempt from many of the powers of OSCR and the Court of Session?

Johann Lamont: Designated religious charities must have particular internal governance structures, which ensure that we can be confident that the charities are being appropriately regulated.

Patrick Harvie: Is there a specific reason why that approach should apply to religious charities, rather than to other large charities that have their own internal processes?

Johann Lamont: The concept of designated religious charities is taken from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under the existing law, religious charities that satisfy strict criteria may be granted exemption from some of OSCR’s regulatory controls. A feature of such charities is a long-established system of internal controls and some charities have a special status in law.

I suppose that we are capturing a recognition of the role of religion in society. We are addressing the regulation of what are deemed to be charities and, in regulating designated religious charities, we recognise such charities’ systems of internal governance. The status of religion in society underpins that approach. The bill is intended not to address that status but to reflect it and to regulate charities on that basis.

Patrick Harvie: The bill stipulates that a designated religious charity should have “the regular holding of public worship as its principal activity”.

Would the provision cover religions that do not necessarily worship something but that perform other rituals or ceremonies?

Johann Lamont: It will not be compulsory for an organisation to seek to become a designated religious charity; it could be a charity without being a designated religious charity. If a group did not meet to worship, it would have to satisfy the test for a designated religious charity in other ways, if it wanted to be so designated.
Patrick Harvie: The provisions on the designation of religious charities would apply to some types of religion, but not to others.

Johann Lamont: It will be for religions to choose to seek designation if they take the view that their system of internal governance is such that they are able to regulate the charity themselves.

Patrick Harvie: Do you accept that the test that a religion would have to meet to become a designated religious charity could discriminate against some religions, because of the nature of worship? Some religions would not satisfy the test.

Johann Lamont: The bill does not define the nature of worship, it simply refers to people meeting, which is a reasonable test.

Patrick Harvie: The bill uses the word "worship".

Johann Lamont: The test will be the same as the test in the 1990 act.

Patrick Harvie: I raise another matter that the committee has considered. If OSCR considers that there is a problem with a single congregation that is worthy of investigation, will it be required to remove designated religious charity status from the entire family of charities of which that congregation is a member in order to intervene?

Johann Lamont: Ultimately, that could happen; however, the expectation is that it would not. A range of powers would be open to OSCR, but we are not working on the assumption that it would go to point Z immediately. There is a whole range of places in between.

Patrick Harvie: But the state of removing designation could apply to the entire church, rather than to only one congregation.

Johann Lamont: Yes.

Patrick Harvie: Right. I think that other members will want to pick up on that, so I will leave it at that for the moment.

Mary Scanlon: We have received a significant amount of written information from the Church of Scotland. I am sure that you have had the opportunity to read that, minister. The bill is concerned with the charitable status and the internal management of churches. How does it specifically affect the Church of Scotland Act 1921?

Johann Lamont: We should make it clear that, if somebody wanted to do something about the powers that the Church of Scotland has under the Church of Scotland Act 1921, there would have to be a repeal of the 1921 act. That is not the intention of the bill. The bill's intention is to regulate charities and to find an interface with all the churches in relation to their charitable status.

There is recognition of the fact that the Church of Scotland has a particular place in law. It is not the view of the Executive that, in attempting to ensure that there is a regulatory framework for charities, we should impinge on the internal matters of the church. We are saying that, if an institution is a charity, there are certain obligations and duties that go along with that which must be fulfilled. Through the designation of religious charities, we have sought to recognise the fact that there is strong internal governance in a lot of churches in dealing with their charitable work. However, ultimately, if a body seeks charitable status and acts in relation to that, there is an accountability that goes with that even if, because it is a designated religious charity, only a very light touch is required. The bill does not address the place that the Church of Scotland occupies in Scottish society, as reflected in the 1921 act.

Mary Scanlon: I understand that. Nevertheless, would the part of the bill that encroaches on the internal management of the Church of Scotland supersede the elements in the 1921 act that deal with the internal management of the church in relation to its charitable status?

Catriona Hardman: There is no straightforward answer to that. It would be presumed that, in general legislative terms, the two acts could sit together. The terms of the bill specifically concern the regulation of charities, whereas the Church of Scotland Act 1921 is a general act. The two should be able to sit together. Whether a problem would arise in a particular instance would, possibly, be a matter for the courts to determine. It would be for the courts to decide whether what was happening under the new act impinged on the earlier act. There are all sorts of rules about implied repeal, which it would not be appropriate to go into in this forum. It is a complicated matter. Generally, however, the presumption would be that the two acts could run along together and be compatible in most respects.

Mary Scanlon: Minister, have you or the bill team had discussions with the Church of Scotland to oversee any misunderstanding in that respect?

Johann Lamont: During the consultation period, changes were made to the draft bill to address some of the anxieties and concerns that the Church of Scotland had, and the Minister for Communities met the Church of Scotland last week or the week before. I expect that there was dialogue over time.

A fallback power on the part of OSCR to intervene in the internal workings of any church is precisely that, because of the recognition that internal governance covers the charitable work.
Nevertheless, it is reasonable to have a power that says that, ultimately, if it is evident that action is not being taken, as a regulator of charities OSCR has the right to intervene. It will intervene, not in the business of the church, but in relation to its operation as a charity.

11:30

Mary Scanlon: Thank you. The issue will probably come up later, but that explanation has helped enormously.

Although we have already considered 7(3)(b), on third-party direction, I will ask the minister about the suggestion that congregations might be deemed the subject of third-party direction from or control by church authorities. I refer to the written submission from the Church of Scotland Trust, which raises concerns that

"all Congregations of the Church of Scotland are charities in their own right … but, in terms of the current Bill, they would not pass the charity test because their parent body 'the Church of Scotland' is a 'third party' which, in terms of their constitution, is permitted to direct or otherwise control their activities."

The submission adds that a number of such charities might be affected. It states:

"This could include voluntary organisations such as Guides, Scouts and Girls and Boys Brigade."

The submission also mentions that members of the Church of Scotland Trust

"are appointed by the General Assembly of the Church of Scotland, a separate charitable body which is distinct from the Trust."

The submission continues:

"if OSCR considers the General Assembly does have an element of control over the Trust the Trust would fail the charity test."

Are the concerns that the Church of Scotland expresses about the charity test reasonable?

Johann Lamont: There has been some discussion about how the independence test might be inappropriately interpreted. I would be happy to explore further the issues that Mary Scanlon raises, particularly in relation to control by a parent charity—that is perhaps how we could describe the relationship of an individual church to the General Assembly or whatever. That relationship has parallels in other churches.

I am happy to consider the issue further because we do not intend to screen out such bodies. If we end up screening out a large number of bodies that we would all view as charities, the framework would obviously not be right. We will be happy to reflect on what the committee says in its stage 1 report and what has been said in the evidence that has been provided to consider how the provision could be refined.

Mary Scanlon: That is very helpful, particularly given the internal structure of the Church of Scotland.

Do you foresee that section 66, which regulates the remuneration of trustees, might pose difficulties for churches because in many—if not most—cases, a church’s ministers or priests are charitable trustees?

Johann Lamont: I do not foresee a difficulty with that section. Perhaps someone else can explain why—I know the answer, but I cannot find it.

Richard Arnott: I will try to explain the situation. We must be clear that section 66 provides that in certain circumstances charity trustees can be paid for their services. We must also be clear that, in the example that Mary Scanlon gives of a church minister being a charity trustee, the church minister also has a number of other roles. Perhaps there needs to be clarity about whether he is being paid for being a charity trustee or whether he is being paid for some of the other roles that he carries out. I understand that a lot of ministers receive a stipend, which does not count as pay. There are complications around that area.

Mary Scanlon: Being a trustee is an integral part of the role and job description of a minister.

Johann Lamont: This issue follows on from a point that I made earlier. If, in our general commitment on remuneration, we have captured bits that we did not mean to capture, we would have to revisit the matter to give people confidence.

Scott Barrie: I want to pursue the issue of charity trustees. You will have seen the evidence that we have taken on the offences of misconduct and mismanagement. Most of us appreciate that one sounds like partial incompetence and a mistake, whereas the other sounds more serious and suggests that people have been at it. Various witnesses expressed alarm about the possibility that trustees will be found guilty of misconduct, which might deter people from becoming charity trustees. Why are those offences considered equal in the bill?

Johann Lamont: After I have made some general points, I will say something about the anxieties surrounding the two terms.

The sanctions are in place to deal with serious breaches of the law relating to charities and will not be used in all cases. OSCR will use its powers of intervention in a proportionate manner and will report cases to the procurator fiscal only when there is evidence of wrongdoing, which is a substantial test. The procurator fiscal will prosecute a case only when they believe that it is in the public interest to do so. Scott Barrie
suggests that at some point making a mistake could become dereliction of duty, if a trustee has not paid attention to mistakes that they made previously. We wish to ensure that there is a sanction where there has been misconduct. That is important to ensure that there is confidence in the sector.

I agree with Scott Barrie that, if we use words that suggest to people that we are setting an extreme penalty, we will deter them from becoming involved. That is not the intention of the bill. I would be happy to work with the committee to determine whether we are capturing what we mean or whether we are creating anxiety about a problem that does not really exist. There is a hierarchy of responses that OSCR can make. At the same time, we must protect people’s commitment and not deter them by suggesting that, if they make one mistake, they will end up in poky. I am happy to work with the committee to find language that addresses our needs, indicates that different things can cause charities difficulties but does not deter people from volunteering.

Christine Grahame: I refer to section 31, which is entitled “Powers of OSCR following inquiries”. The test is

"where OSCR is satisfied, as a result of inquiries".

That appears to be quite a tough test—it will not be sufficient for OSCR to have reasonable concerns. Do you think that OSCR’s concerns about the test have merit? What is the evidential test? Is it the balance of probabilities or beyond reasonable doubt?

Johann Lamont: OSCR should be in possession of enough information to be satisfied that there has been misconduct or that it is necessary or desirable to act to protect the charitable assets of a charity. Section 31 allows OSCR to intervene when it believes, following investigations, that there is a threat to those assets. We do not believe that it should be able to exercise the significant powers in section 31 to protect charitable assets without being sufficiently convinced that there is good reason to suspect wrongdoing.

Christine Grahame: What is the evidential test for OSCR?

Richard Arnott: I am not sure that this counts as a legal term, but we would expect OSCR to be reasonable. I do not know whether the test would be the balance of probabilities or beyond reasonable doubt.

Christine Grahame: There is a big difference between the two. We are talking about the possibility of criminal offences and suspension—quite draconian measures. An evidential test based on the balance of probabilities is much less demanding than one based on something being beyond reasonable doubt. Will OSCR take action if it believes that it is likely that there has been mismanagement, or will there be a higher test?

Catriona Hardman: I cannot say what the test will be. However, the wording in the bill implies that OSCR will have to be satisfied that there is evidence that there has been misconduct.

Christine Grahame: I know, but I am talking about the level of evidence. Such investigations will be serious. I seem to recall—I may be wrong—that when OSCR gave evidence it was concerned about the degree of satisfaction that must be reached. Obviously, there could be serious consequences for OSCR if it goes in and takes action, such as suspending accounts, but, because the test is not clear, there is an appeal by the charity or by individuals.

Johann Lamont: Protection comes from the fact that there is an appeal and that if there was a report to the procurator fiscal, the fiscal would judge whether to proceed.

Christine Grahame: We are talking about procurators fiscal, so we are getting close to the principle of beyond reasonable doubt. We are not talking about the balance of probabilities but about criminal law.

Richard Arnott: It depends on the case on which a decision is being taken. If the case will result in criminal action, presumably OSCR will look more carefully.

Christine Grahame: I see. I am not trying to be difficult—I am seeking clarification. If OSCR thinks that there has been some criminality, the evidential test will be different. If the issue involves a lesser level of mismanagement—perhaps just that someone lacks capability—the test will be different. My point is that, if the issue involves a muddle rather than a fiddle, the consequences for the trustee are the same. Section 31 is difficult and confusing.

Quentin Fisher: The powers for OSCR that section 31 sets out are powers of suspension, powers of interdict and powers to protect property. They are not powers that result in a criminal conviction. If a criminal conviction were being sought by the procurator fiscal, they would have to satisfy the standing burden of proof that is associated with criminal cases. Section 31 refers to a different set of powers. We are talking about the powers of OSCR to suspend people or tell a body to stop behaving in a particular way. Before taking that action, we would expect OSCR to believe that there had been misconduct. When we say “is satisfied”, we mean that OSCR should have that belief.
Christine Grahame: I am sorry, but “have that belief” is different from “is satisfied”. There is a higher test in being satisfied than in having a belief. Having reasonable grounds for believing something as a result of inquiries is a different test from “is satisfied”.

Johann Lamont: If you believe something, are you not satisfied?

Christine Grahame: It is an important phrase. Having reasonable grounds for believing something is a lesser test for OSCR than “is satisfied”. You can believe and be wrong, but you cannot be satisfied and be wrong.

Richard Arnott: You can.

Johann Lamont: I think that you can, but the very fact that you think one way and we think another perhaps means that we need to clarify the section, because we all want to do the same thing. The issue is one of tightening up the language.

Mr Home Robertson: I want to address reviews and appeals, which are dealt with in sections 73 to 77. Under schedule 2, the Executive will have a duty to appoint the Scottish charity appeals panel. How can that panel be perceived as independent if its members are appointed by ministers? A similar point was covered earlier, but let us address the appeals panel specifically.

Johann Lamont: In appointing panel members, ministers will have to follow the Nolan principles, guaranteeing independence. What is important is how panel members act once they are appointed; it is also important that the panel scrutinises cases in a way that is independent of OSCR and the charity involved. Ministers may appoint, but they cannot direct. Under the Nolan principles, a panel member taking on that responsibility would be charged with acting independently.

Mr Home Robertson: Fine. So the Executive would appoint an independent body. Is there any risk of claims against OSCR if appeals are upheld? If that were to happen, who would indemnify OSCR?

Johann Lamont: I do not know whether there is a risk of claims; the intention is that we would not expect the appeals panel to award costs, but I do not know whether people could then pursue the matter elsewhere. The appeals panel is designed to be a simple and cheap way to appeal for those who are affected by OSCR’s decisions. Although charities and trustees might wish to take legal advice, it is intended that that will not be necessary and it should therefore be possible to appeal without incurring large costs. There is also recognition that OSCR operates in the public interest and in the interest of the charitable sector, so such matters will not be seen as conflicts, and conflict might be implied if costs or compensation were sought.

Mr Home Robertson: I raise the point because there is a possibility that an organisation might apply to OSCR, be turned down, suffer losses as a consequence and then go to appeal, which might be upheld. In such a case, there could be an argument about losses that had occurred in the intervening period. That is something against which OSCR might need to be indemnified. I ask the minister not to worry about that just now, but it may be something that—

Johann Lamont: The suggestion has been made that a non-ministerial department might be covered, but we might want to explore the technicalities further.

Mr Home Robertson: Okay.

Should third parties be able to appeal decisions by OSCR?

Johann Lamont: The appeals panel is designed to give those who are directly affected by OSCR’s decisions a simple, cheap and accessible way to appeal. Third parties who wish to challenge OSCR’s decisions will be able to do so through the existing avenue of judicial review or, if they believe that criminal wrongdoing is involved, they could report the matter to the police. The appeals panel is concerned with the relationship between the charity and OSCR and it provides a way for the charity to appeal. The charity has the right to appeal because OSCR’s decision will have an impact on it. Other people may have opinions on that, but we already have structures that allow them to express their views and pursue the matter.

Mr Home Robertson: On a related point, will there be a mechanism for public notice of applications for registration as a charity? My question goes back to another part of the bill, but the point is related because there are rare occasions on which something controversial is put forward as a charity. I found myself reading Hansard of 8 November 1988, when the then MP for East Lothian—I cannot remember who he was—raised questions about a particular charity. Under the system at that time, there was no way to challenge registration as a charity. The concern was about the Atlantic Salmon Conservation Trust (Scotland)—I will not go into that now, but occasionally there are controversial applications and there is a case for notifying the public that an application has been made and for allowing people to make representations.

Johann Lamont: First, the register will be public. I know that I am talking about the next stage, but it is significant that the register will be public. Secondly, on the specific point that you make, OSCR will have to devise guidelines and so
on and it may be that we will want to reflect on the issue at that stage. We are saying that OSCR will have to make decisions, as we identified earlier, in relation to the public benefit test, charitable purposes and so on. Those decisions will have to be transparent and open, so I expect that OSCR will perhaps consider whether there should be a process of notification. I am not sure how the process would work if someone had information that would affect a transparent decision that OSCR had made, but we might ask OSCR to reflect on the matter.

Mr Home Robertson: I would be grateful if you could reflect on it as well. You understand the point; obviously, a body that applies for charitable status will want to put the best possible spin on their case, but someone else may well be aware of other factors that OSCR should take into account, and there needs to be some mechanism to allow that information into the system.

Johann Lamont: I suppose, though, that the granting of charitable status is not a once-and-for-all opportunity. OSCR might deem an applicant a charity based on the information that it had. However, after that, somebody might come along with evidence that suggested that the applicant had misled OSCR or was operating in a way that they should not. OSCR would have power to act on that basis.

Linda Fabiani: The minister will be glad to know that we are nearly at the end of the session—I think that I am the last member to ask questions.

We have heard concerns about differences in how authorities apply provisions on public benevolent collections and fundraising. Should local authorities have a duty to follow guidelines from OSCR, to obtain consistency?

Johann Lamont: We are always in favour of consistency, provided that it is matched by not seeking uniformity when that would be inappropriate. After consultation last summer, the bill was strengthened to include a duty on local authorities to have regard to guidance that OSCR issues on public benevolent collections or goods collections. That is intended to improve the consistency with which such collections are regulated. That in itself will be sufficient.

I understand that if an authority has to have regard to guidance, it must explain any departure from guidance. Nevertheless, it is important to have that wee bit of flexibility, because people operate in different environments in different parts of the country. I am happy to have that flexibility while recognising that we expect authorities to have regard to standards.

Linda Fabiani: The financial memorandum estimates that a typical local authority receives 100 applications a year, which cost it £500—that is a fiver a throw for an application. The City of Edinburgh Council felt that that was an underestimate. Where did the information for the financial memorandum come from?

Johann Lamont: The figure in the financial memorandum was based on numbers that several local authorities provided in response to a request that the Executive made to all local authorities. The averages from the figures that were provided were of 100 applications per year and of 20 minutes per application. I am aware that the City of Edinburgh Council has said that it processed 250 to 300 applications per year. That is much higher than the figure of 122 that it provided us with.

Linda Fabiani: Section 86 is on designated national collectors. Subsection (3) of that section says:

“OSCR must publish any criteria specified under subsection (1),”

which are the criteria for obtaining and retaining designation as a designated national collector. Will ministers have input into those criteria? Will they be brought to the Parliament or a parliamentary committee?

Richard Arnott: If my memory serves me, when OSCR publishes the criteria that it will use, that will in effect be like its guidance. OSCR will consult on whether people agree with the criteria, which will not be set out in statute.

Linda Fabiani: Should the criteria come before the committee?

Johann Lamont: I suspect that we could not prevent the committee from considering things that it wants to consider and that it will act accordingly.

The Convener: I will ask about charities that are not regulated in Scotland but which collect money here. The committee has heard evidence from many people in the voluntary sector who have expressed concern about a possible loophole in the bill, because some organisations will be able to fundraise in Scotland but will not be regulated by OSCR, as long as they have no premises in Scotland. Many people in the sector believe that that is unfair and are concerned that a loophole might need to be addressed. I am interested in the minister’s comments.

Johann Lamont: The fundraising regulations cover bodies that are not charities. However, on the broader point about charities that fundraise in Scotland but which will not be regulated in Scotland because they do not have premises here, such charities will be obliged to say how and where they are regulated. They will need to say, for example, “We are a charity that is regulated in England and Wales.” They will be able to provide that information to folk who sought it from them.
The Convener: I suppose the sector is concerned about adverts that sometimes appear on television or on billboards advertising the work of a charity. People give money to the charity in the belief that the money will, for example, address issues of animal welfare or children’s rights in Scotland, but they then discover that none of that money will be spent in Scotland. There are questions about accountability in respect of that money and such situations are at the heart of why the Executive has introduced the bill. We wanted to make regulation and accountability of charities transparent.

Johann Lamont: The first point is that it is obviously up to individual charities to decide where they spend their money. When people give money to a charity, they can judge how much information they have about where they can expect their money to be spent. I think that we all probably donate to charities when it is evident that they will not spend the money in Scotland. Charities that spend their money outside Scotland will be subject to the same provisions as other charities are when fundraising. However, the bill will allow OSCR to require a charity to change its name if OSCR feels that the name is misleading.

For example, if a charity’s name created the impression that it was raising funds for poorly treated dogs in Scotland but, in fact, no such dogs in Scotland benefited from the funds, OSCR could take up that issue. However, if a charity pitched itself as being one that raised money for animal welfare and was doing that, the onus would be on donors to ensure that the charity was doing what they thought it was. I suppose that OSCR’s test will be whether a charity presents itself in a misleading way, which would be a reasonable responsibility for OSCR.

The Convener: I have only another couple of questions about finance. The Finance Committee has completed its report, which was given to the Communities Committee only last night. The Finance Committee has concerns about the significant costs of the bill and the fact that the bill has come about because of two rather well-publicised cases of indiscretion within the charity sector. Given that the bill was to a degree inspired by those cases of impropriety, will there in the future be a possibility that any new regulatory regime will be able to recoup any money that is lost through such impropriety?

Johann Lamont: I will perhaps ask one of the officials to deal with the second question. There must be a balance; I acknowledge that two well-publicised cases rang alarm bells for people in the charity sector and beyond and that that had an impact on charitable giving in the short term. However, we know that huge amounts of work were done by bodies in the sector to redress the situation and to rebuild confidence.

The bill is not driven by crisis. In my view, people had been talking about such a bill for a long time. The two instances to which you referred alerted us to the fact that we needed the bill. We had to grapple with difficulties, but the bill is about a far broader benefit, which is that bodies that are deemed to be charities will be in tune with what people in Scotland feel charities should be. Things should not be going on in the charity sector that sap people’s confidence in the important role that the sector plays. We must get the balance right. We should not imply that there is a terrible crisis and that, if we do not get the bill through, everybody’s money will be put in somebody’s hip pocket and they will head off down the road—that is not how the sector operates. As I said, the charitable sector makes a huge and significant contribution not just to delivering services, but to the broader well-being of communities in Scotland. That said, I ask Richard Arnott to say whether there is a view on the specific question about recouping money.

12:00

Richard Arnott: I will try. We have to accept that, no matter what laws are set up, we can never stop people breaking the law. It is also worth emphasising that we are trying to set up a preventive regime that will improve transparency in the sector and provide wider powers for OSCR to take action when necessary. For instance, the bill provides for OSCR to have increased powers of inquiry and action on bodies that are connected to charities—we talked earlier about those arm’s-length bodies.

Those powers, had they existed, may well have assisted in preventing some of the cases that have happened to date. It would not be wise to say that we can prevent such impropriety happening or that we can recoup any of the moneys that were lost. We are trying to improve public confidence in the charitable sector by preventing problems like that from happening in the future.

The Convener: My final question—based on the Finance Committee’s report—relates to the differing evidence that this committee and the Finance Committee heard about the costs that the new regulatory regime in Scotland will place on Scotland-based charities. Anne Swarbrick gave evidence to both committees. She suggested that a significant cost would result to Scotland-based charities in trying to defend their charitable status. However, SCVO said that it was less certain that there would be such costs. As there seems to be a divergence of views, what is the minister’s view of the conflicting evidence that the Finance Committee and this committee received?
Johann Lamont: I am content that the financial memorandum identified the costs to the extent that it was possible to do so. From the small example that the City of Edinburgh Council’s evidence raises, we can see how such a divergence from the figures that the Executive was given could be created. The one obvious difference relates to the impact on the cultural bodies—the national collections institutions. When minds were concentrated and we started to think about the costs, a broader picture of which we had not been aware until that point began to emerge.

I am content that the financial memorandum gives a proper estimate of the costs. As OSCR develops, the dialogue between it and Parliament will provide the opportunity for OSCR to highlight issues in its reports to Parliament, including the issue of its resources not matching what it seeks to do. It is important to stress the direct relationship that OSCR will have with Parliament in its reports to Parliament.

The Convener: I think that the concern that some witnesses expressed to both committees was not so much about the costs of regulation that the regulator will bear, but the costs to individual charities of complying with the new regulations. Both committees heard conflicting evidence on that. The underlying concern of the witnesses is that, although the new regulatory burdens are proportionate—it will not work against the interests of the sector. In the making of all regulation, however, we must be aware of impacts. If a disproportionate impact is felt by smaller charities—that is not the bill’s intention—I would expect OSCR to revisit the provisions. Indeed, if that sort of impact results from creation of the regulatory framework, some of the principles of the bill will have been undermined. After all, the bill is about supporting the sector and ensuring that it does what we need it to do, but transparently and openly.

Christine Grahame: I return to Anne Swarbrick’s evidence. She refers to what she calls “The repeal of case law”.

We know that OSCR is starting out with a clean slate. The presumption is that a charity must meet the statutory charity test that is set out in the bill. She goes on to make the serious point that “The Charity Commission will form their guidance by reference to the existing law, but OSCR’s guidance would have no such foundation and would be open to attack in court because of the lack of any legal basis.”

That was with regard to the public benefit test. She then says:

“Far from being authoritative, no-one (including OSCR) will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session.”

That seems to me to be fundamental, and I would like your legal team to answer that point.

Johann Lamont: I shall make one point, but I hope that if I have it wrong you will expand on what you mean. The guidance that is to be developed by OSCR will have to be followed, unless it is deemed in court to be wrong.

Catriona Hardman: It will depend on whether the guidance is reasonable and whether it falls within the terms of the statute. As was said earlier, although we will not have the basis of case law, the courts would—in the absence of any Scottish case law being available—look at case law in other jurisdictions in particular circumstances. There is probably a policy issue here, which is not really for me to answer, about how OSCR will go about making its guidance. I assume that it would examine existing guidance from the Charity Commission for England and Wales, as well as basing its own guidance on the new legislation. There is information on certain things in guidance, and OSCR would be able to consider examples of existing charities when deciding on public benefit issues.

Johann Lamont: It would be fair to say that there would be an expectation that OSCR would refer to case law from other places, but that it would not be bound by it.

Christine Grahame: No. Such case law would be persuasive but not precedent. My point is that the concern is about there being tests of that guidance. It will be tested by charities and perhaps rejected. The point that is being made in written evidence—I am not saying that I agree with it, but it is serious—is that “Far from being authoritative, no-one (including OSCR) will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session.”

Is that right or wrong?

Richard Arnott: It is wrong.

Catriona Hardman: It is partially right, in that it is—

Christine Grahame: There are two legal opinions here.

Richard Arnott: Mine is not a legal opinion.

Catriona Hardman: We do not have a real basis of charity law here at the moment. The legislation is new and there is new legislation in England as well, and English case law will
obviously change. You either have that or you say that all existing English case law is to be—

**Christine Grahame:** That is not my point. I am just asking you to say whether or not it is true that

"no-one will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session."

Is that right or wrong?

**Johann Lamont:** I would have thought that, if somebody were to issue guidance that was drawn from legislation, people would have to follow that guidance. If somebody decided not to follow that guidance, that would be tested in court, but one does not wait until something is tested in court to decide whether or not to follow the law or the guidance that is drawn from it. In regard to other legislation, that would not make much sense.

**Christine Grahame:** So Anne Swarbrick is right?

**The Convener:** I think that—

**Christine Grahame:** I just want to know whether Anne Swarbrick is right or wrong.

**The Convener:** I think that the minister has answered the question and has made it quite clear that she does not think that it is as straightforward as a simple yes or no answer. Officials and all members of the committee will need to reflect on those points.

There are no further questions, so I thank the minister and her officials for attending. I know that you were scheduled to be here for just over an hour but you have been here for two hours. We are grateful to you for your full evidence.

**Johann Lamont:** I would not want to hear members’ views brought back to me if I had dared to try to leave early.

12:09

*Meeting suspended until 12:15 and thereafter continued in private until 12:56.*
WRITTEN EVIDENCE FROM ASSOCIATION FOR CHARITIES

Definition Of Charity

It has become increasingly clear that neither SC VO, the Scottish Executive nor any one else can predict with any certainty the scale or scope of the impact of changing the definition of charity in Scotland. This is not because these bodies haven’t done their jobs but because not enough information is known about charity in Scotland. The Scottish Executive have previously indicated that they will put forward the same definition of charity as is used in England and Wales so as to avoid all the unknown problems that will result from trying to invent a new definition and freeze it into a statute.

These problems will result in charities which cannot obtain tax reliefs and non charities which can. This is because tax reliefs are not a devolved matter and follow the law of England and Wales. The public understands that charities and tax reliefs are synonymous – anything else would be confusing and damaging to the sector.

If the Scottish Executive approve an Act which alters the wording in any way from the definition of charity in the law of England and Wales then the courts will inevitably find real differences and anomalies will be created. Altering the definition even slightly is like being only a little bit pregnant. You either is or you ain’t. For these reasons we urge that the Bill exactly duplicates the England and Wales Act in s7(2) on charitable purposes. We also urge that the equally important public benefit definition in s8 should be omitted so that the definition is left exactly where it is – defined by existing case law. This does not prevent Scottish charity law progressively changing from that of England and Wales as the two court systems interpret law for local conditions, but it does mean that it won’t suffer a sudden shift in meaning in Scotland without the knowledge of what effect that will have.

The logic of this approach suggests that any charity registered elsewhere in the UK should automatically be deemed to have passed the charity test and we recommend to the Committee that the Act includes such a statement.

We can appreciate this course of inaction will be frustrating to the Scottish Executive but we urge the Committee to stick with the principle as even minor tinkering will cause real problems of unknown size and nature in the sector.

Independence Of The Regulator

We regard it as axiomatic that OSCR should be able to operate without interference by the Scottish Parliament, the Scottish Executive, other statutory bodies or the Scottish civil service. The reputation of charity in Scotland is an enormously important social asset and it is proper that charities should be overseen by a powerful regulator. But the reputation of the regulator is intrinsic to the reputation of charity. Unless OSCR is seen to be operating without political interference its reputation will go the same way as the Charity Commission’s to the detriment of charity. If the Minister and the Executive want a strong charity sector they are going to have to promote a Bill which keeps their hands off it.

We are therefore very concerned to see that there are thirty provisions within the main part of the Act (not including the Schedules) where the Minister is given various powers. Most of these are to make regulations which need to be more easily amendable than the Act or are concerned with transitional powers. Many of the remainder could be resolved within the Act and some of them are of real concern.

For example, can their be any justification for allowing Ministers to exempt some charities in s23(3) from supplying their Report & Accounts or Constitutions to the public who pay for their tax exemptions. We urge the Committee to carefully review all of the powers in this Bill which are reserved to a Minister. Many of them individually seem innocuous but collectively, we believe, they add up to close political control over OSCR which will undermine charity’s confidence in their regulator and the public’s confidence in charities.

Office Of The Scottish Charity Regulator

We welcome the establishment of OSCR but urge the Committee that the Bill includes a specific duty to act reasonably, proportionately, in accordance with natural justice, and with openness and transparency in its decision making. A powerful regulator is necessary to protect the good name of charity but that power must be tempered by such concepts as fairness. We are totally
unconvinced that merely relying on the general duty of public bodies to act this way is sufficient in the charity sector where the scales are massively weighted in favour of the government and its regulator against the little charity.

Role of a Charity Regulator s1

The whole of s1(2) describing OSCR’s general functions is unobjectionable and totally inadequate. Nowhere in this Bill is there a description of why OSCR is to exist or what objects it is there to achieve. The only justification for this Bill and all the additional bureaucracy it will impose on charities and government is that it will, overall, much improve the efficiency and effectiveness of charity as a whole, not least by effectively discouraging incompetence and dishonesty in the management of charity with a concomitant increase in public confidence and support for charity in Scotland. Unless OSCR is to be given clear purposes which serve this greater end then it will be difficult to hold it to account for a performance which produces no greater good. We urge the Committee to give OSCR proper objects.

We are surprised that OSCR has such a narrow role. Modern regulators should be pro-active in seeking compliance. We suggest the following duties are added:

- to advise ministers,
- to use its resources efficiently and effectively,
- to have regard to the principles of good corporate governance,
- to have regard to principles relating to public bodies
- to give advice and guidance on the requirements of charity law and good practice.

The Role And Regulation Of Trustees

Penalties for Misbehaviour

We believe the drafting of the Bill in s65 is profoundly wrong and urge the Committee to re-think it. The draft Bill criminalises activity which should be a civil offence and it brings down automatic penalties with no hope of relief on trustees who have made innocent mistakes or have been ensnared in circumstances not within their personal control. Asking a trustee to have the care and diligence of one acting on behalf of another is inconsistent with requiring zero errors under the threat of criminal sanctions. The latter standard cannot be attained without professionalising trusteeship by law. We urge you to re-think this and suggest the following principles for your consideration.

- Trustees who are ensnared in circumstances they do not control, such as the untimely death of an auditor leading to the late submission of accounts, should be subject to no penalty.
- Trustees who make innocent mistakes should be advised how to avoid them in future.
- Trustees who are uncaring or incompetent should be banned and replaced.
- Trustees who deliberately misbehave should be brought before the criminal courts.

We further recommend to the Committee that OSCR, the Panel and the courts should have the specific power to relieve a trustee of penalty.

Without a different approach in these areas we confidently predict some very bad publicity following gross injustices and a resulting serious shortage of charity trustees in Scotland. People who are freely giving their time for society will not be bullied into better performance – they will walk away first.

Power To Deal With Wrong Doing

Inquiries

In s33(4) Reports on Inquiries we consider that sending a copy of a published report to the subject charity is insufficient. The Charity Commission routinely publish one-sided reports which appear to have little function but justifying their investigation, and which often do considerable damage to the subject charity. We expect no more of OSCR, and suggest that all persons and organisations mentioned in a report to be published should be invited to co-sign the report and, alternately, invited to submit a dissenting response to be published as an appendix with the report.

Appeals against OSCR and the Panel

We support OSCR having considerable power to ensure compliance with charity law but we are fiercely opposed to this power being without effective check which, in the case of the Charity Commission, has led to occasional gross abuse. We are pleased to see the proposal for an Appeals Panel which is the only practical mechanism for obtaining redress against unjust decisions by OSCR,
the courts having long since priced themselves out of the reach of ordinary people. But this Panel will be useless unless it can be accessed quickly, simply and cheaply on all matters to which a trustee, charity or other interested party may wish to appeal against the decisions of OSCR.

We therefore strongly recommend to the Committee that this Bill incorporates the principle that trustees, charities and any other person or body impacted upon by any decision of OSCR should be able to appeal the decision to the Panel and the courts. This would include non-decisions such as a refusal to investigate a charity against which there had been a complaint. It would allow complainants to appeal to the court after appealing to the Panel as well as appealing directly to the court instead of the Panel.

Appeals to Scottish Charity Appeals Panel
We applaud in 75(6) that the Panel may not award expenses but we urge the Committee to make it clear that the Panel itself may not charge fees.

Furthermore, we urge the Committee that when one of OSCR’s decisions is quashed the Panel should have power to award financial compensation against OSCR where their decision has caused losses to the charity.

Powers of Court of Session
In s37 the court may order costs against one or more of the trustees of a charity instead of the charity. This is iniquitous and intimidating. In unincorporated charities the trustees already stand behind any debts of the charity. But if this were applied to incorporated charities it effectively lifts the veil of incorporation and is unsound in principle. We urge the Committee to omit this section. An alternative might be to also give the court power to award costs against individual employees or members of OSCR.

We urge the Committee that the power to order compensation to a charity, trustee or other party against OSCR should also be available to the court.

In s34(4)(c) we recommend to the Committee that judicial factors be paid for by OSCR. This will prevent a common abuse in England and Wales where the Charity Commission routinely appoint Receiver and Managers at the charity’s sometimes very considerable expense rather than taking the much quicker and cheaper option of advising the trustees on sorting out the problem. This will ensure that judicial factors are appointed only where essential. This is not academic. In the debate at the second reading of the Westminster Bill, the House of Lords heard about the Cancer Care Foundation which has been obliged to shoulder the costs of a Receiver and Manager to the tune of at least £325,000 and their trading company a further £300,000, all in a context where it appears that the trustees had made no significant errors in their governance of the charity.

The Mcfadden Principles
We are disappointed that two important principles enunciated by the McFadden Committee have been so poorly observed in this Bill.

Exempt Charities
We regret that McFadden’s own principle that all charities should be subject to OSCR was watered down when it came to large churches. But the further proposals in this Bill to exempt social landlords in s38(1) and any other charity the Minister fancies in s 19(8) and s38(7)* has the potential to damage charity in Scotland. Every charity not required to be registered with OSCR will undermine public confidence in charity as a whole, and the more there are the more will confidence be undermined. We urge the Committee to delete this damaging nonsense.

* s38(7) is actually a power for OSCR to delegate to the Minister supervision over any charity but the Bill places OSCR so firmly in the Minister’s hand that it is clear who will really make the decision.

Independence of Charities
Charities which are controlled by persons who are not the trustees undermines confidence in charity generally as pinpointed by McFadden. Most such charities are under the control of central or local government and we urge the Committee to have the strength to put a stop to this abuse now.
COMMUNITIES COMMITTEE, 1ST REPORT, 2005 (SESSION 2) - ANNEX E

Coordinator
Association for Charities
15 February 2005

WRITTEN EVIDENCE FROM ASSOCIATION OF CHARITY INDEPENDENT EXAMINERS

Background

The Association of Charity Independent Examiners (ACIE) is a UK-wide organisation providing support, advice, training and the possibility of a professional qualification to those who act as independent examiners of charity accounts under the Charities Act 1993 and under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under current legislation, independent examiners are able to act for charities up to £100,000 income or expenditure in Scotland, and up to £250,000 income or expenditure in England & Wales (due to increase to £500,000 under the Charities Bill at Westminster).

In numerical terms, only a small proportion of charities have a sufficient income to require a full audit, and the vast majority of charities are thus eligible to have their accounts independently examined. This is particularly true in Scotland where OSCR has estimated that out of 18,000 registered charities; two thirds of them are small charities, i.e. with receipts and payments of less than £25,000.

ACIE has a significant number of members in Scotland and provides training in independent examining under Scottish charity law. ACIE’s Scottish members are brought together as ACIE Scotland which is convened by a Scottish chartered accountant, Adrienne Airlie CA.

The Association has over 500 members. Associate Members receive ACIE’s support and advice but do not have any professional status. Full Members and Fellows, who have to demonstrate substantial experience in charity accounting and the duties of independent examiners, are awarded a professional qualification.

ACIE members are a mixture of professional accountants with specific expertise in smaller charities, accountancy practitioners within the voluntary sector providing services to other charities (often called "community accountants"), voluntary sector advice workers, and a significant number of people who act as independent examiners on an entirely voluntary basis.

General Comments

In general terms we wish to give a warm endorsement to the Charity and Trustee Investment (Scotland) Bill. We believe it will mark a huge step forward in modernising charity law in Scotland, particularly for small/medium charities and we hope that the Bill will be enacted speedily.

The following changes, introduced between the Draft Bill and the real Bill (as introduced), are particularly welcomed:

- the use of the term “charity trustees” to enable common terminology throughout the UK and a clear statement of their duties (clause 65)
- clarification of the circumstances for use of the word “charity” in relation to charities established in different jurisdictions (clauses 13-14)
- inclusion of clear criteria in relation to trustee remuneration (clauses 66-67 – which are worded in a much simpler language than the corresponding provision in England & Wales)
- some further clarification around designated religious charities (clause 64).

Our comments on specific issues below are therefore made in the context of very positive support for the Bill as a whole.

Charitable Purposes (Clause 7)

We welcome the statutory definition of charitable purposes. But we continue to remain concerned that the minor differences of wording between clause 7 and those in clause 2 of the proposed Bill in England and Wales could cause problems, especially given that the understanding of “charity" for tax
purposes in the same UK-wide. The wording should therefore be exactly the same in both Bills. The
Scottish courts may, of course, interpret the purposes differently from the courts in England & Wales,
but a common starting point will clearly help.

**Accounting Requirements (Clause 45-46)**

Overall we believe clause 45 is well worded, and will facilitate the implementation of an effective
charity accounting regime, which can subsequently be updated without the need for primary
legislation.

However, it is vital that careful consideration is given during to passage of the Bill to the nature of the
detailed Regulations for charity accounting and for scrutiny of charity accounts, which the Scottish
Minister will make under subsection 45(4). From our information the draft regulations have not been
issued and as such we feel it is difficult to have a proper debate of this section.

Some of the sessions already convened by the Committee show that there is great confusion as to
how the accounting provisions will work. For example Donald Guthrie on the 15 December 2004 stated
“I want to ask about smaller charities and their accounts” [Col 1545]. In this discussion there was no
specific mention of independent examination of charity accounts even though this concept already
applies since the Charities Accounts (Scotland) Regulations 1992.

Paras (a) to (d) of subsection 45(1) set out the four separate issued to be addressed, namely:

- Regulations on accounting records
- Regulations on the form and content of the published annual accounts of a charity
- Regulations regarding auditing or independent examination of charity accounts
- Regulations regarding the submission of accounts to OSCR.

It is likely that most of the regulations will be concerned with the second and third issues, and these
need to be considered separately.

**Form And Content Of Accounts – Regulations Under Para 45(4)(B)**

We note the intention of Scottish Ministers and OSCR that the regulations on the form and content of
charity accounts should link to the requirements of the Charities SORP – which we welcome. But the
SORP does not specify the actual thresholds at which different requirements arise – that is a matter for
these regulations. Moreover, the SORP is only concerned with accounts prepared on an accruals
basis, seeking to give a true and fair view, but it is already accepted in Scotland (under the 1992
Regulations) as well as in England & Wales, that very small charities should be exempted entirely from
the need to produce accruals accounts – and should be allowed to prepare accounts on a receipts and
payments basis. But the current Scottish threshold, which requires accruals accounts for all charities
over £25,000 income, is extremely onerous.

We believe the new regime should allow for three levels in terms of the presentation of accounts:

- Small charities to £100,000 income, should be allowed to prepare accounts on a receipts and
  payments (R&P) basis
- Medium sized charities below the audit threshold (£250,000 income we suggest, initially, rising
to £500,000 in due course) should prepare accounts on an accruals basis, in accordance with
the SORP, but with the ability to apply all the simplifications which the SORP permits for such
charities.
- Charities above the audit threshold should be required to apply the SORP in full.

The Regulations should include some specific requirements even for R&P accounts. Without being too
onerous, some specific statement in the Regulations on what is required for R&P accounts would
serve to clarify matters – for example, at the very least it must be clear that even the smallest charities
must properly distinguish restricted funds.

The current provisions of clause 45 are silent on the issue of Annual Reports. It is now well
established that charity accounts can be meaningless if not accompanied by a Trustees’ Annual
Report. This is clearly built into the SORP and is a statutory requirement for registered charities in
England and Wales. Whilst the new regulations could in theory use the same approach as the 1992
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Regulations in requiring an Annual Report to be attached to the Accounts, it would be much clearer to include this directly in the Bill. A simple Annual Report needs to be mandatory even for charities producing R&P accounts.

Scrutiny Of Accounts – Regulations Under Para 45(4)(G)

It seems now to be clearly accepted, that depending on size and income, there are four possible levels of scrutiny appropriate for charity accounts:

- For the very smallest charities, it is unrealistic to expect them to engage any formal kind of external scrutiny, and approval of the accounts by the charity trustees themselves should be sufficient. (In England & Wales, this applies for charities up to £10,000 income – or, somewhat absurdly – up to £90,000 if they are constituted as companies. In Scotland at present even the smallest charity should technically have an independent examination under Reg 8 of the Charities Accounts (Scotland) Regulations 1992, but this is not widely observed.)
- For small to medium sized charities, an independent examination of the accounts is appropriate – however, as at present, this must be done in accordance with clear regulations, and the independent examiner must be demonstrably independent and have appropriate ability, experience and competence.
- For medium-sized charities subject to independent examination, it is appropriate to require that the independent examiner holds a relevant professional qualification (such as being a Fellow of the Association of Charity Independent Examiners, or members of other accountancy bodies if they have relevant charity experience)
- For larger charities it is appropriate to require a full professional audit of the accounts by registered auditors.

The detailed regulations for this need drafting with considerable care – in particular it would help enormously in the training of independent examiners if their legal duties can be the same north and south of the border. In England & Wales, s43(7)(b) of the Charities Act 1993 empowers the Charity Commission to issue Directions (not just guidance) on the carrying out of independent examinations, and a similar power to OSCR would therefore be helpful. We understand that OSCR and the Charity Commission would then work together to issue common directions.

The current definition of an independent examiner as:

- an independent person who is reasonably believed by the charity trustees to have the requisite ability and practical experience to carry out a competent examination of the accounts [Charities Accounts (Scotland) Regulations 1992 – reg 8(1)]

has worked well, with the same definition used north and south of the border – it should certainly be continued in the new regulations.

A Suggested Regime Under Clause 45

We believe that the regulations made under this clause should as soon as possible lead to accounting requirements which are effectively identical to those in England & Wales (E&W). This objective is especially important as many charities will need to be registered with OSCR as well as with the Charity Commission. This aim for standardisation is strongly supported by our members in Scotland as being in the best interests of enabling Scottish charities to operate effectively, with realistic (but not excessive) financial regulation.

Nevertheless, we recognise the specific issues in Scotland where there has been such a long period without effective charity regulation As a result of this we agree that a move to take the audit threshold from £100,000 (currently £250,000 in E&W) to £500,000 (the proposed new threshold in E&W ) is too large a jump. We would suggest that this should be achieved within 5 years. In the intervening period transitional arrangements will have to exist.

Mindful of the specific size of the sector in Scotland and its current regulations we therefore support the following initial thresholds - based on the total income or expenditure of the charity. (These indicate the minimum requirements at each level – a charity could elect to do more.)
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Up to £10,000: Charity must keep proper accounting records and prepare annual accounts which may be in a receipts and payments (R&P) or accruals format. No requirement for independent scrutiny, but the accounts must be approved by the charity trustees collectively (not just by an individual).

£10,000 to £100,000 As above, but the annual accounts must be subject to independent examination, as outlined above.

£100,000 to £250,000 As above but with a requirement to prepare annual accounts on an accruals basis, complying with the Charities SORP (apart from those aspects of the SORP where smaller charities are exempted). Recommendation for the independent examiner to hold a suitable professional qualification.

Over £250,000 (initially) Accounts at this level to be subject to a professional audit (subject to directions to auditors written into the regulations). After a transitional period the Scottish audit threshold would increase to £500,000 and at that stage (in keeping with the current proposals in the E&W Charities Bill) the requirement for charities in the £250,000 to £500,000 band would be: independent examination, but with a requirement for the independent examiner to hold a relevant professional qualification - the list of qualifications to include Fellows of the Association of Charity Independent Examiners.

We would further argue that the accounting requirements should apply to all Scottish charities, including SCIOs, and charitable companies: at present there is considerable confusion with charitable companies being subject to accounting requirements under the Companies Acts which are much less rigorous than those for other charities.

Association of Charity Independent Examiners (ACIE)
January 2005

WRITTEN EVIDENCE FROM BRAKELEY LIMITED

I am writing in response to the call for evidence to the Communities Committee of the Scottish Parliament on the Charities and Trustee Investment (Scotland) Bill. Brakeley is one of the leading firms specialising in fundraising consultancy and our consultants bring many decades of practical experience of how fundraising works in the UK, particularly in the higher education and cultural sectors, where private fundraising has been gradually introduced in a major way in the last 20 years to supplement public funding.

I should make clear that we do have an interest in this, in that our firm is currently doing some fundraising advisory work for the National Library of Scotland, which is one of the bodies, which would be affected by the provisions of the Charities Bill. However in this context, our comments are equally applicable to the other bodies affected.

We have considered the likely impact on private fundraising of the possible loss of charitable status on the various National Collections Institutions in Scotland, given the way the Charities Bill currently being considered is drafted. Our understanding is that this is a very real possibility because as the Bill stands, it appears that bodies that are deemed to be controlled by third parties, which could include ministers in the Scottish Executive, would fail the Charity Test and would, therefore, lose charitable status in the eyes of the Inland Revenue.

In our considered professional opinion, loss of charitable status would so dramatically limit these bodies’ ability to fundraise that we would not recommend any of them proceeding with the various campaigns which are currently underway or in the planning stage. The reasons for this very negative assessment are as follows.

- Many charitable trusts in the UK would be prohibited from giving money to the Scottish NCIs by their own statutes, which often limit their giving specifically to bodies with charitable status. Many wealthy private individuals channel their giving through charitable trusts and so this very important source of funding would also be denied to them.
Since the simplification of the rules governing the application of Gift Aid to monies donated to UK charities in 2000, the use of Gift Aid has soared to the extent that a charity is considered negligent if it is not ensuring that 80-90% of its giving is being 'gift-aided'. This has been accompanied by a process of donor education which means that major donors especially now expect that all donations should be gift-aided, and therefore the inability to offer this to donors would be sufficient to deter all but the most passionate supporters of the various institutions in an increasingly competitive philanthropic environment.

No fundraising would be possible in the United States, as Americans expect to be able to obtain a tax deduction on their donations, and it might not be possible to create the necessary American-registered charity, if the institutions no longer had charitable status for UK tax purposes. Those institutions, which have already established 501 c 3 vehicles for US IRS purposes, might even find themselves having to deregister them, causing great problems with existing US donors.

The institutions would of course lose the additional 28%, which charities can normally reclaim from the Inland Revenue on any individual donations, which are made.

The reputational loss associated with the actual loss of charitable status by these bodies, as opposed the situation of political parties and campaigning groups which have never had it, may be very severe and cause donors to question whether there was some implied sanction being imposed by the Scottish Executive.

The competitive position compared with the equivalent cultural organisations in England and Wales, which would retain their charitable status, would make it even harder to attract funds from south of the border.

The only area relatively unaffected by the change in status would be corporate sponsorship, but since this is now likely to be a relatively small part of any capital campaign, is a decreasing part of fundraising generally, and may in any case be affected by the reputational issues noted above, this does not provide any comfort.

In summary, although it is emphatically not our belief that people give many primarily for tax advantages, if the Bill's provisions do indeed cause the NCIs in Scotland to lose their charitable status and therefore their ability to participate in Gift Aid, the effect will be to render private fundraising for these important Scottish institutions impossible, leading to a greater dependence on the public purse and ultimately a severe curtailment of their activities and ambitions. We find it hard to believe that this is the intention of the Scottish Executive.

My colleagues and I would be happy to answer any further questions the Communities Committee might have on this important issue.

John Kelly
President and Managing Director
Brakeley Limited
20 January 2005

WRITTEN EVIDENCE FROM BTCV SCOTLAND

Thank you for inviting our comments on the Charities Bill as introduced.

This response to your consultation about the Charities Bill is based on our experience as a charity registered with the Charity Commission in England and Wales, and operating throughout the UK with a substantial presence in Scotland, and with activity in many other countries. BTCV is a company limited by guarantee and has extensive experience of controlling or working with a wide variety of charitable and non-charitable organisations of many legal structures and in many legal jurisdictions. We are the umbrella body for several thousand small charitable groups of varying legal structures.

Broadly, we are very pleased and impressed by the Bill, but concerned that some of the principles emanating from the McFadden Report have been diluted, and there are some matters of detail which we think could be improved.
These numbered sections follow the pattern of the consultation document with cross-references to clauses in the Bill where appropriate. But first we comment on the purpose of the Bill and the confusion of principle within it, and what the Bill might achieve for good or bad.

Purpose of the Bill

The only rationale for the Bill is that it will result in charities and charitable activity in Scotland being better managed than hitherto. There are some technical issues in the law such as investment restrictions, which presently make more difficult the good management of charities. The Bill addresses some of these and that is to be welcomed.

More importantly, the Bill introduces a stronger regulatory framework, principally through OSCR, because of widespread concern, which we share, that the present framework too easily permits abuse. Such unchecked abuse erodes the reputation of charity generally and is likely to result in a decline in public confidence and consequent public giving. Charity is enormously important to society and it is founded on faith that charities are properly run. It is in everyone’s interest that the sector is regulated with sufficient rigour to maintain that faith, but not so much that it stifles good works. We are therefore very concerned that the Bill fails to adequately follow through some of the McFadden principles.

We support the McFadden principle that all charities with charitable activity in Scotland should be registered with and report on their activity to OSCR, and that charities should be independent of external control. But we have five concerns about the way the Bill delivers this.

(a) Small Charities – In England and Wales charities with an income under £1,000 (soon to be £5,000) are not required to register with the Charity Commission although they are subject to its regulation and may describe themselves as a charity. It appears that the Bill will not allow such organisations in Scotland to describe themselves as a charity unless they are registered with OSCR. We think this attempt to prevent people describing small charities as such will be widely resented, ignored and circumvented, or if rigorously enforced will result in OSCR having a huge workload of tiny charities that will suffer an unreasonable level of regulatory bureaucracy. We urge the Committee to reconsider this matter, perhaps giving OSCR authority to not register organisations below a £5,000 income threshold.

(b) All Charities to Register – We support the McFadden principle that all charities operating in Scotland should register with OSCR and be subject to its regulation, and deplore McFadden’s own backsliding when they recommended that large churches be exempt from this principle. We urge the Committee not to extend this exemption to any other charities. Such exempt charities and the abuses of charity law which, in our opinion, follow, damage the reputation of charity generally. The avoidance of multiple regulation is the usual reason advanced for such exceptions, but this is sophistry. All large organisations are already subject to multiple regulators for different parts of the law - see below. And the idea that regulators other than OSCR have or are going to have the necessary expertise in charity law, which is notoriously complex, or that they will interpret charity law exactly as OSCR does, is mistaken.

(c) Independence of Charities – The independence of charities from outside interference is crucial to the reputation of charity as a whole. For example we have seen recently how a Minister has been able to order a charity to re-locate its head office against the wishes of the people who are supposed to be its trustees, and is now apparently considering converting that charity into a non-charity, an action which we consider to be against charity law which is founded on the protection of charitable assets. Such events besmirch all charities and should be stopped. We urge the Committee to stand fast on the principle set out in s7(3)(b) that no charity may be controlled by a person other than its trustees.

(d) Ministerial Discretion – In contrast to the Bill before the Westminster Parliament, this Bill is littered with opportunities for Ministerial interference in the regulation of charities. A quick search
revealed 27 opportunities for Ministers to interfere in the regulation of charities, not including the Schedules and minor technical matters. Many of these 27 are the making of regulations but some of them give the Minister the power to set aside the principles of this Bill and interfere in the regulation of individual charities. For example s38(1) exempts social landlords from OSCR’s regulation and puts it firmly into the hands of the Minister. There is little which undermines confidence in the regulation of charity more than special cases that are not subject to the general law, especially when those cases are government agencies masquerading as charities. We urge the Committee to delete this clause and to revise with a sceptical eye all powers reserved to the Minister in this Bill.

(e) Multiple Regulation – All organisations of any size are subject to multiple regulators. For example, BTCV is subject to regulation by the Charity Commission, Companies House, Inland Revenue, Customs & Excise, Health & Safety Executive, Data Protection Registrar and many others. But each of these is regulating us for a different body of law. The problem for charities registered outside Scotland, such as ourselves, is that we face the prospect of regulation by two regulators for essentially the same body of law. We are told by SCVO that around 10% of charity in Scotland is thought to be delivered by charities registered with the Charity Commission. That is a lot of charitable activity that this Bill has the potential to make much less efficient. We have read conflicting opinions about the way this Bill will impact on charities registered outside Scotland and are presently not confident that this Bill will not result in considerable additional bureaucracy. We are very happy to register with OSCR and report our activity to them. But we do not want to prepare additional information that we do not already prepare for the Charity Commission, nor prepare the same information in a different form. We urge the Committee to amend the Bill so that either OSCR has a duty to generally minimise additional bureaucracy for charities registered elsewhere in the UK, or that specific rules are introduced for such charities whereby they are deemed, for example, to pass the charity test and that compliance with Charity Commission reporting standards will be automatically accepted by OSCR. By extending this principle to give OSCR a degree of flexibility in the details of the bureaucracy of how it regulates various parts of the charity sector in Scotland, it should be possible to enable it to carry out its functions without exempting any charities from its reach.

The Charity Test, Charitable Purposes and Public Benefit

The Charity Test
We are very pleased that the charity test is to be applied to every charity registered with OSCR but remain concerned that this does not seem to apply to those charities exempt from registering. Such an arrangement will damage charity generally and we urge the Committee to review this matter.

Charitable Purposes
We urge the Committee to amend the Bill so that the charitable purposes are identically worded with the Westminster Bill. Anything else will result in courts interpreting different words to have different meanings and produce anomalies whereby some Scottish charities cannot obtain tax reliefs and some Scottish organisation attracting charity tax reliefs cannot register as charities or use that title. Even worse it may result in some existing types of charity ceasing to be charities. It has become obvious that the present state of knowledge about the charity sector in Scotland means that no-one has much idea of the nature and scale of the changes that might be brought about by altering the definition of charity from that in the Westminster Bill. We appreciate that the Scottish Parliament may wish to make its mark on this devolved matter, but to make such fundamental alterations to the meaning of charity in law without knowing what that means in practice would, in our view, be irresponsible.

Public Benefit
Similarly, we are very concerned that the Bill abandons, at least partially, the common law definition of public benefit, by introducing a statutory process in s8. It would be very convenient if the definition of public benefit could be put into a few paragraphs on a Bill. But this cannot be done without altering the definition in ways that are presently unknown because of the shortage of information about charities in Scotland. We do not think that those organisations that have called for a statutory definition appreciate the potential and unknown consequences of this action. We urge the Committee to reject this part of the Bill.

Oscr and Regulation

Purpose of OSCR
There is nothing wrong with the purposes of OSCR as described in s1, but they are totally inadequate. There are three additions that we would urge the Committee to adopt.
(a) **Natural Justice** – The charity sector is founded on ethics and morality. To regulate merely to the letter of the law is insufficient. The sector needs a regulator that achieves fairness and equity tempered with understanding and compassion. When giving evidence to the Joint Committee on the Westminster Bill the Chair of the Commission agreed that charity law is now so complex that there was hardly a charity that was always in full compliance and hardly a trustee who knows all the requirements. We have observed the Charity Commission sometimes acting towards charities and trustees with secrecy, bullying and spite, sometimes doing great damage to charities for little reason. We have no reason to believe that the civil servants in OSCR will behave differently from their counterparts in the Commission. We urge the Committee to add to the face of the Bill a clause requiring OSCR to act fairly, proportionately and with natural justice. We are totally unconvinced that relying on the assurance of Ministers that there is a general requirement for all government agencies to act in this manner is sufficient. Paragraph 2 of the Policy Memorandum accompanying the Bill states that the purpose of the Bill is to provide a "robust, proportionate and transparent regulatory framework" but the Bill does not tell OSCR to deliver that.

(b) **Giving Advice** – We find it odd that OSCR has not been given specific authority to give advice. Apart from giving advice to individual trustees and charities, OSCR could give general advice to the sector. This is of two types – advice on what OSCR thinks the law requires coupled with what OSCR deems satisfies this requirement, and more general advice on what constitutes good governance and management. Only OSCR can give the former type of advice and it is important that it be given the duty to do so. But we are not aware that OSCR or its staff have the experience to give first class advice on governance and management. We urge the Committee to give OSCR the powers to give advice.

(c) **Supporting the Sector** – The purpose of OSCR is to deliver in part the purpose of this Bill (described above) which may be summarised as strengthening the charity sector. We find it extraordinary that this is not on the face of the Bill. The functions described in s1 are entirely about powers and means, rather than about purposes and the ends themselves. To provide the legitimate grounds on which OSCR may be challenged over its use of its powers it is essential that the Bill describes the purposes that these powers must serve. We urge the Committee to include proper purposes for OSCR in the Bill. Whilst we do not think it the ideal answer, we commend the approach in the Westminster Bill which is reproduced here.

7 The Commission’s objectives, general functions and duties

After section 1A of the 1993 Act (inserted by section 6 above) insert—

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1B The Commission’s objectives
(1) The Commission has the objectives set out in subsection (2).
(2) The objectives are—
1. The public confidence objective.
2. The public benefit objective.
3. The compliance objective.
4. The charitable resources objective.
5. The accountability objective.
(3) Those objectives are defined as follows—
1. The public confidence objective is to increase public trust and confidence in charities.
2. The public benefit objective is to promote awareness and understanding of the operation of the public benefit requirement.
3. The compliance objective is to increase compliance by charity trustees with their legal obligations in exercising control and management of the administration of their charities.
4. The charitable resources objective is to promote the effective use of charitable resources.
5. The accountability objective is to enhance the accountability of charities to donors, beneficiaries and the general public.
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**Governance**

We believe that the Bill will result in a gradual improvement in the standards of charity governance in Scotland. But we base our views on how this might be done on three principles.
(a) **Competence of OSCR** – We do not regard OSCR or the Scottish Executive as having any particular knowledge or competence in charity governance. This subject is more complex and significantly different from good governance in either the governmental or commercial sectors.

(b) **Legal Compulsion** – We are profoundly opposed to the principle set out in s65 which turns any innocent administrative mistake into misconduct and makes that a criminal offence with conviction and fines to follow. If actually implemented this will result in a real shortage of people willing to serve as charity trustees. If not implemented it will bring the Act into disrepute. The principle governing breaches of the Act should be that

I  Well meaning trustees who make innocent mistakes should be assisted by OSCR to put them right.

II  Incompetent trustees should be removed and banned.

III  Dishonest trustees should be charged with criminal offences.

We urge the Committee to address this issue.

(c) **Supporting Improvements** - If the Scottish Parliament truly wishes the charity sector to improve its standards of governance then it should be prepared to fund initiatives for training charity trustees. Criminalising innocent people who make mistakes when they give their spare time for free won’t work — it will merely drive them away. Providing support for better governance will start to improve the situation. We urge the Committee to encourage the Executive to give such support.

**Fundraising**

We make no comment on fundraising, as there are plenty of organisations with far more expertise in this matter than ourselves.

**Consequences Of Enactment**

Generally we believe that this Bill will strengthen a rather weak regulatory regime which will be good for charity in Scotland. But we are concerned that, if unamended, the Bill will leave several areas that will tend to undermine the integrity of charity in Scotland. The primary ones are listed here.

(a) **Definition of Charity** – Any variation from the definition in England and Wales in charitable purposes or public benefit will produce unintended consequences, the scale or nature of which cannot be known at present because of the lack of information about the sector in Scotland.

(b) **Exempt Charities** – Any substantial charity not required to be registered with OSCR will undermine public confidence in charity, and the more there are the more will confidence be undermined.

(c) **Independence of Charities** – The existence of any charities that are under the control of persons or organisations other than their trustees undermines public confidence in charity generally. This is going to take determination by the Parliament because the Scottish Executive and local authorities are the problem. But McFadden rightly identified that the independence of charities is crucial to public confidence.

**WRITTEN EVIDENCE FROM CANCER RESEARCH UK**

A submission from Cancer Research UK to the Communities Committee’s Call for Evidence on the general principles of the Charities and Trustee Investment (Scotland) Bill

**General Comments**

Cancer Research UK Scotland has been actively involved in the development of this legislation since the McFadden Commission in 2001. In general we welcome the reforms to charity law proposed in the Bill, and strongly support the implementation of the legislation as soon as possible, taking account of the changes proposed to charity law in England and Wales to avoid contradictions and repetitious, rather than complementary, regulation.
We are supportive of attempts to clarify the definition of charity, and for it to be aligned more closely to that for England and Wales, the creation of the Office of the Scottish Charities Regulator, the right to regulate fundraising and the duties of the charity trustees, as key issues in securing public confidence and trust in the voluntary sector.

The principle of securing public confidence in the value of charities is our key consideration in responding to the Bill consultation. In addition, we believe there is the need to apply consistency and clarity wherever possible.

We note, and support the simplified charity test, the use of ‘trustee’, as opposed to ‘steward’, their remuneration, the form of the SCIO and the recognition of charities registered in other jurisdictions.

Running through our submitted comments there is a concern around the potential for increased regulatory burden due to dual regulation. We note that the exception in Section 14 has been qualified to exclude charities who occupy land or premises in Scotland or in the interests of control and gaining greater public confidence undertake office or retail activity which would ensure both large and small charities regulated in England and Wales. We note that a key principle for the Scottish Executive in relation to this Bill is one of “proportionality” and we hope our comments help identify those areas where there is a risk of the regulatory burden being disproportionately increased.

**Key Points**

**Office of the Scottish Charity Regulator**

We reaffirm our support for OSCR to encourage or facilitate and monitor compliance with charity law, investigate misconduct and provide information/assistance to the public and charities alike (Part 1 Chapter 1 Section 1). We support OSCR being able to consider applications of a charity to reorganise rather than all matters be referred to the Court of Session. Naturally we are concerned at the consequent exclusions at Part 1, Chapter 5, Section 43 of charities established by Royal Charter.

OSCR’s proposed powers are relatively wide and accordingly, as an independent statutory regulator, we consider good governance to be vital in order to reassure the public and the sector of OSCR’s impartiality and accountability.

We would also encourage the continued development by OSCR of strong links with the charity sector, as evidenced by the consultation exercises, to encourage accessibility and ensure that the lines of communication and consultation remain open.

**Dual Registration**

The question that remains for Cancer Research UK when considering the Bill’s proposals is whether the effects of dual registration (as mentioned above) will prove administratively burdensome for charities operating across the UK. It would be helpful if given the provision of Co-operation (Part 1, Chapter 3, Section 20), designed to limit the burden of dual registration, reciprocal recognition could be given to a charity, registered in another jurisdiction with a recognised regulatory body even if it occupies land, uses offices or retail premises. Clarification of the exception and detail, required for reciprocal recognition would be welcome.

**(a) The Charity Test & Guidance**

While we welcome a test for eligibility for charitable status, given the criteria for establishing ‘public benefit’ in Scotland (which is designed to be less prescriptive, allow definition of ‘charitable’ to develop over time and is yet to be coherent with respective tax regimes), we remain unclear as to how a charity operating across the UK will be certain as to whether it will pass the separate tests required by both the laws of Scotland and the laws of England and Wales in order to qualify as a charity in both jurisdictions. Consequently, what transitional measures are proposed to permit recognition in both jurisdictions?

We note the steps taken in the Bills to ensure both jurisdictions should have a clear, shared framework to assess what is, and what is not a charity, rather than rely on the outcomes of proposed ‘Co-operation’ (Part 1, Chapter 3, Section 20). The definitions proposed in each country are in many respects identical S1(2) (4) similar to S7(2)(m) but they still appear to rely on interpretation based either on existing case law (which is not the same in each country) or on new tests (which may not be
identical or may not be applied in a similar manner, particularly as in the Bill the ‘charity test’ is less prescriptive and requires satisfaction of a wider test). In the consultation document it is also not clear as to the position of a charity that is approved and recognised as a charity in one UK jurisdiction and is not recognised in another (Part 1 Sections 7&8). This is a serious concern for us. We appreciate the provision relating to the use of ‘charity’ are in step to remove uncertainties, however, the majority of charitable groups will have fundraising operations based in Scotland.

(b) Charity Names and Status - Objectionable names, Change of Name, Changes which require OSCR’s consent and Power of OSCR to require charity to change name

We note the terms of these provisions, which suggest that Cancer Research UK will be subject to supervision by two regulators. We would like clarification on the consensual powers: whether it is intended that any clearance given, for example, to a change in name or a change in constitution, requires the approval of both the Charity Commission and OSCR. If this is the intention then we are concerned at the increased administration burden and we would wish to raise the issue as to what happens if only one of the regulators approve the change or if they are approved at different times (Part 1 Section 10, 11, 12).

(c) Supervision of Charities

The terms set out in Chapter 4 continue to raise the issue of dual regulation of charities. As noted in the Consultation response, Cancer Research UK is a high profile charity that operates to the highest standards and is content to be open to scrutiny from the public and all other interested parties. However, it would be dismaying to donors if a charity found itself having to incur an increased administrative/cost burden as a result of having to satisfy regulators in both jurisdictions applying the same methodology to reach different conclusions about the same issues (where an activity is restricted under a direction in one UK jurisdiction and is permitted in another jurisdiction). We would welcome clarification as to how the supervision of charities ‘cross border’ will be co-ordinated, particularly given the powers introduced in Clauses, 31 and 34 of ‘a body controlled by a Charity’, and, the use of suspension (Clause 31) against disqualification of a trustee.

Cancer Research UK is primarily interested in ensuring the integrity and reputation of the charitable sector and is acutely conscious of the harm that rogue charities have done and can do to the image of the sector as a whole. Therefore, insofar as an increased regulatory burden seems necessary to achieve this aim, we remain willing to co-operate with both OSCR and the Charity Commission in this regard. We would, however, be concerned if we found that the regulators were paying less attention to bogus fundraisers (whether charities or not) and allegations of fraud by disreputable charities as they were to large charities that are operating in more than one UK jurisdiction. Equally it would be unfortunate if bogus fundraisers merely relocated their activities to another jurisdiction when challenged in one and the whole process of review and challenge had to start all over again.

Subject to the clarification of the above points, Cancer Research UK welcomes the increased authority for OSCR and the consequent extension of the type of OSCR decision that may be appealed and the time limits for so doing. Nevertheless, it would be helpful to have a ‘catch all’ that any decision affecting a charity or charity trustee regulated by OSCR is capable of being appealed to that body in the first place and not to the Court of Session or other judicial (Sheriff’s Court) or quasi-judicial body, given the uncertainty that may arise from a possible ‘dual regime’ in the months immediately following the Act and prior to all subsidiary regulations having been enacted. The general thrust of the Bill towards raising the standards of charities and fundraisers in Scotland (Part 1 Chapter 4 Sections 28-393) is supported.

References to charitable status

The Cancer Research UK Group of charities and its predecessor’s charities have a long history in both Scotland and in England and Wales. Following consultation it would appear still necessary from the terms of Section 13 that the Charity will have to either describe itself as a “Charity Registered in Scotland” if it retains an English registered address unless it is managed or controlled wholly or mainly in Scotland or alternatively relocate its registered office to Scotland in order to become a “Scottish Charity” or a “Registered Scottish Charity”. See earlier comments on use of ‘charity and exceptions. It is still not clear to us what benefit is served by distinguishing between charities in this manner, unless, it is to enable people to show some preference towards one rather than the other. We continue to regard such a development with concern and would urge that the descriptions applied to charities that operate in Scotland do not distinguish between them on the basis of their degree of "Scottishness" (Part 1 Section 12).
Information about charities, liability for costs etc

We would urge consultation if the public is to have access to information, via the proposed Register (Part (Chapter 3, Section 21), that is not currently in the public domain, for example charity trustees’ addresses in England and Wales are not disclosable (see related comment below on SCIO’s and Chapter 6). The restriction of publication of a charity’s address for security reasons is welcomed. We believe these should be consistent and not create a ‘dual regime’ of production, access and entitlement to information which appears to continue to be the case for a charity’s financial information and the liability for our an ‘appointed person’. We note that a charity is not required to produce information that is not disclosable according to the confidentiality grounds applied in the Court of Session however, we believe such an obligation should be respected if made under the laws of a different jurisdiction the laws of another jurisdiction. We would welcome an opportunity to consult on this seeing that steps for a ‘unified’ disclosure process is identified in Sections 21 and 25 (Co-operation and Information ) (Part 1 Sections 20-21). In this connection, we are concerned at the intention and practical effect of the deletion of ‘in that person’s possession and control’ in relation to documents requested by OSCR to be produced. We also suggest that to minimise ‘dual regime’ issues the sub clause at the end of Clause 30 be reintroduced so that OSCR is required to notify a charity of its removal and the reasons therefore not simply upon request.

Scottish Charitable Incorporated Organisations

It appears beneficial that an alternative to a company limited by guarantee is available for an ‘incorporated’ charity. We welcome clarification of the steps required to create a SCIO and enter it in the Register (Part 1, Chapter 7, Sections 54 and 55). Nevertheless, it would be helpful if any further detailed proposals in subordinate legislation compliment the company forms that already exist and the legislation in relation to registration, control and management in the various jurisdictions in the UK and that the proposed changes to the charity regulations adopt a consistent approach in respect of governance, registration, regulation, winding-up, insolvency or dissolution. For example, although Trustees’ home addresses are provided in the Trustee Details submitted to the Charity Commission in England and Wales, the names are not made public. It would be desirable for this to be reaffirmed in the Scottish legislation for both trustees unincorporated associations and directors of SCIO’s the exclusion of a charity address for security reasons is appreciated. If there is to be publication of home address a procedure, similar to that under the Companies Acts, for confidentiality orders will be required.

In addition, why is it thought necessary for a SCIO to have two or more members when, as with the Cancer Research UK Group, another Charity Company is often the sole member? This is also important for the practical appointment of the conversion and amalgamation of SCIO’s.

We continue to query the use of the title “Scottish Charitable Incorporated Organisation”. Will it be possible for a charity to be both a Scottish Charitable Incorporated Organisation and a Charitable Incorporated Organisation in England and Wales? If so must it use both titles on documents? (Part 1 Section 49)

Regulating relating to SCIOs

We note the proposals to regulate the conversion and amalgamation of charities to SCIO’s and the transfer of SCIO properties to other SCIO’s included since the Consultation Chapter 1, Section 54-62. Cancer Research UK has subsidiaries in Scotland and in other jurisdictions in the United Kingdom. We trust that the the position where charities registered in England and Wales are merging with charities registered in Scotland will be clarified and that the process will be as straight forward in such arrangements as it would be for an amalgamation between two SCIO’s ( Part 1 Section 42).

For a procedure that is prompt, consistent and efficient, we support OSCR being able to approve reorganisations without the necessity of approval from the Court of Session. We would welcome clarification of the circumstances in which OSCR will apply to the Court in addition to charities under Royal Warrant – will his be based on value or assets, capacity of trustees?

Charity Trustees

We welcome the renaming of charity stewards as charity trustees for consistency and ease of ‘public’ understanding in the charity sector, together with the provision from investment powers regulating remuneration (Part 1, Chapter 9, Sections 66 and 67 in particular), albeit a date upon which these are
to become effective and transitional provisions will need to be considered to ensure no conflict arises with any specific subsisting provision in the charities’ governing documents. The opportunities for trustees to serve on the OSCR Board is welcomed.

Fundraising & Funding for Benevolent Bodies – Preliminary & Control of fundraising

We very much welcome these provisions which promote a positive move toward increasing the public’s trust and confidence in the sector. With regard to Section 80 we note that secondary legislation will contain the detail of the required statements to the public and the content of the relevant agreements between charities and Professional Fundraisers and Commercial Participators. We note some further detail has been given which is vital to the successful implementation of Section 80 and the promotion of the public’s confidence in the sector. We would have hoped that further detail would be included in the Bill itself rather than waiting for secondary legislation (Part 3 Sections 60-64). It is appreciated that this may result from trying to ensure consistencies in approach across the UK.

Public benevolent collections

We are extremely encouraged by the sections on public benevolent collections which are straightforward and should prove to be less administratively burdensome than the current proposals under the English Bill. In particular we are pleased to see that there will be no need to obtain a Certificate of Fitness from Local Authorities and that there will be provision for “designated national collector” status. We look forward to being consulted on any criteria OSCR proposes as being necessary to obtain and retain the designation of a designated national collector (Part 3 Sections 80-71).

Clause 90: Regulating the collection of goods

Cancer Research UK Scotland welcomes the current proposal in the Bill not to regulate door-to-door collections of goods for charity shops.

During the discussions at the Advisory Forum that preceded the publication of the draft Bill, stakeholders including local authorities, the police and charity fundraisers agreed that the collection of goods for charity shops posed no particular issues of capacity, public trust or nuisance. Such collections are also very different in nature to street collections or door-to-door collections of money. For the most part goods collections are impersonal, involving the dropping off and collection from doorsteps of collection bags. These collections often need to be scheduled at short notice due to stock shortages in the local shop. We therefore feel that the current proposals in the Bill represent a proportionate approach.

We further support the provisions in the Bill giving the power to Scottish Ministers to make further regulations (such as a notification system) for such collections if this is proved necessary in the future. However, we would urge the Committee to support the view that any notification system for the collection of goods introduced in the future should be as simple as possible. It should also aim primarily to control bogus collection activity, and not put goods collections by genuine charities at risk due to burdensome compliance requirements.

In taking this position, we share the view of the Association of Charity Shops and endorse their submission to this call for evidence.

About Cancer Research Uk

Cancer Research UK is the UK’s leading cancer research charity supported by over 30,000 volunteers. This year we spent over £19 million on world-class research in Scotland on all aspects of cancer. Cancer Research UK supports the work of scientists, doctors and nurses in research institutes, universities and the major hospitals in Aberdeen, Dundee, Edinburgh, Glasgow and St Andrews. The Cancer Research UK group is made up of not only the larger charity of Cancer Research UK but a number of smaller subsidiary charities such as War On Cancer and the Gibb Fellowship Fund which provides, among other things, fellowships for Scottish-based research. Accordingly we are interested in the issues which effect both small and large charities.

Cancer Research UK has offices in Edinburgh and Glasgow which enable us to focus fundraising efforts and maintain awareness of cancer and the need for research, particularly Scottish-based
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research, to the press and public. We have over 100 local committees in Scotland who fundraise all year round. There are also 80 Scottish shops which help to generate income by selling new and high quality donated goods.

Lesley Conway
Public Affairs Officer
Cancer Research UK Scotland
24 January 2005

WRITTEN EVIDENCE FROM CHARITY CHECK

We refer to the Agenda for the Meeting of your Committee on 15 December 2004, and in particular to the written evidence on the Charities and Trustee Investment (Scotland) Bill.

In the item from Institute of Fundraising (in) Scotland, there is a reference to a body whose name is given, as quoted on Page 39 of your document COM/S2/04/31/4, as “The Public Fundraising Regulatory Authority (PFRA)” – [our italics].

The name as shown there must give readers the misleading impression that PFRA is a public authority, which it is not. The correct name is “The Public Fundraising Regulatory Association” – [our italics].

We understand that, as mentioned in the Report of the McFadden Commission, the Institute of Fundraising took a leading part in founding PFRA, and there remains a very close connection between them.

May we also draw to your attention an Early Day Motion in the House of Commons, EDM 516, which “urges caution in dealing with [PFRA] on the part of all those in local authorities, town centre management and retail groups with authority to allow direct debit collections for charity…”. That EDM also “… regrets the false impression that has been widely spread that PFRA is a public authority, because its name has often been incorrectly shown as an authority rather than an association.”

For further reference, we attach a note giving the text of the Motion and some background. Similar material can also be found on our newer website, www.charitycollections.org, in the section labelled “PFRA – Commons Motion”. That website and a connected one at www.charitycheck.org.uk include further information which may be of interest for comparison on the regulation of fundraising.

The newer website mentions the significant role of the pioneering Dundee Report of June 2000, which I was pleased to note at the time referred, on Page 20, to an article I had written in The Guardian on 1/4/98. It was unfortunate that the Dundee Report's evidence on why self-regulation would not work in this field were apparently overlooked in what seemed to be a research howler by the Prime Minister's Strategy Unit, whose advocacy of self-regulation ended up incorporated in the Charities Bill currently going through the Westminster Parliament. This research howler, in that the authors of the Unit's recommendations do not seem to have read the Dundee Report at all, is described in a letter of mine published in Voluntary Voice, the text of which is copied in the Media Comment section of www.charitycollections.org.

We ask you to draw this message to the attention of your Committee, and to include it if possible as evidence for the purposes of your Committee’s consideration of the Bill.

You are welcome to let me know if you would like any further information.

Philip Cowen
Director
Charity Check
11 February 2005

www.charitycollections.org and www.charitycheck.org.uk

Among those who have endorsed, worked for, or helped to publicise the Charity Check system and/or its proposals for reform: Asda Foundation; Association of London Government; British Retail Consortium; Canary Wharf Group plc; Children's Day; Company of Management Consultants; London
Voluntary Service Council. Some 230 MPs of various parties or none have signed at least one of six Common Motions commending the Charity Check system. In the National Assembly for Wales there has been a similar move signed by about 90% of Assembly backbenchers. The London Assembly passed on 1st November 2000 a unanimous Motion which welcomed the support already shown for the Charity Check system by licensing authorities and retail managers.

**Website 300105 EDM 516 and grounds 110205**

**Early Day Motion No. 516**

17th January 2005

Public Fundraising Regulatory Association And Charity Collections

Tabled by Adrian Sanders MP

That this House urges caution in dealing with the Public Fundraising Regulatory Association (PFRA) on the part of all those in local authorities, town centre managements and retail groups with authority to allow direct debit collections for charity, because in spite of its name, PFRA does not operate any serious regulatory standards on the way its member bodies run such collections; notes that its main functions appear to be to promote bookings for direct debit collections by its member bodies, and to do general lobbying; further notes that its voluntary code of conduct is at variance with, and falls far short of, the good practice recommended by the Home Office in its Statement of Guidance issued in November 2003 on the declaration of fundraisers' expenses in collections; and regrets the false impression that has been widely spread that PFRA is a public authority, because its name has often been incorrectly shown as an authority rather than an association.

(Click here (/ http://www.charitycollections.org/PFRAMotionComments.html ) to see Charity Check's comments and background notes on this Motion, if not already shown below.)

Comments and background notes on EDM 516

Commons Motion tabled by Adrian Sanders MP on the Public Fundraising Regulatory Association ("PFRA")

This note contains

1. **For comparison, the Home Office Statement of Guidance and PFRA's voluntary code of conducts**

2. **A quotation from an article in "Third Sector" magazine summarising PFRA's functions**

3. **Some examples of the use by various bodies of the incorrect version of PFRA's name.**

In detail:

**Comparison of Home Office Statement of Guidance and PFRA's voluntary code of conduct**

a) **Full text of the Home Office Statement (issued November 2003)**

The exact position is this. If a professional fundraiser solicits money or other property for a charity, the solicitation has to be accompanied by a statement. Among the things that the statement has to clearly indicate is "(in general terms) the method by which the fundraiser's remuneration in connection with the appeal is to be determined" (section 60(1) of the Charities Act 1992). In practice this means that the professional fundraiser does not strictly speaking have to say how much he is receiving but has to say how his payment is worked out. The Home Office and the Charity Commission have always encouraged professional fundraisers to be as informative as they can about their remuneration as a matter of good practice, but if fundraisers choose to stick to the letter of the law they can get away with saying things that are really not very informative at all. For instance, if a professional fundraiser was getting £40 from the charity for every person he signed up to a direct debit he wouldn't have to say "I
will receive £40 if I sign you up as a direct debit donor”. He could satisfy the law by saying something like: "I am paid on a fee-per-donor basis". If you refer to para. 5.39 of the Government's response to the Strategy Unit review, the Government makes it clear that we are going, through an eventual Charities Bill, to change the law to require the statements made by professional fundraisers to be as accurate as possible. We have recognised that the present law is too general and vague and we think that it ought to be tightened up. END of Home Office statement.

A summary by Charity Check of the above Statement is here. (/ at http://www.charitycollections.org/homeofficea.html)

b) PFRA's voluntary code of conduct (Code of Practice) (as shown on PFRA's web site, 20th January 2005)

"Abridged Institute of Fundraising Code of Practice for the Personal Solicitation of Committed Gifts ("Face to Face" Fundraising)

We always tell potential donors clearly that we are paid to speak with them, and that we are not volunteers -- if this is the case -- and we explain the basis on which we are paid.

We always carry and display ID so that any potential donor can verify who we are, whom we are working for and on whose behalf we are fundraising.

We always represent our charity or Not for Profit Organisation (NPO) at the time, in the place, and in the manner that has been previously agreed both with the charity/NPO and with the relevant site owner or local authority, and as directed by our Team Leader or other responsible agency personnel.

We always explain to a donor how the charity or NPO will communicate with them after subscribing, and if they are likely to receive a follow-up phone call we inform them of this.

We always ensure that forms with personal details provided by donors are handled at all stages in a secure manner.

We always end a conversation in a polite and respectful manner as soon as we are asked to.

We always ensure, wherever possible, that if a member of the public has a complaint, a full and accurate record of the complaint and the complainant's contact details are taken so that action can be taken promptly and appropriately. We will also offer the complainant contact details for a person in authority who can respond to their concerns.

We never say or do anything that could pressurise or harass people and we do not use manipulative techniques.

We never confuse or mislead the public and we never say, do, or display anything for which we have not been given permission by the charity or NPO.

We never behave whilst on duty in any way that might bring the charity/NPO or our employer into disrepute.

Street and door-to-door fundraisers receive initial and ongoing training from the charity/NPO and from their professional fundraising organisation (where applicable). The quality and standards of their work are subject to monitoring and review." END OF PFRA CODE OF PRACTICE.

Charity Check's note on the above code: To elucidate the meaning of "basis on which we are paid" in para 1. of the above code, see below

a) A corrective item in The Times, published at PFRA's request on March 19, 2004, :

"The Public Fundraising Regulatory Association; Correction

The Public Fundraising Regulatory Association (PFRA) points out that face-to-face fundraising (article, November 26) is vital for many charities, and that in 2002-03 690,000 new donors committed to contributing £240 million over the next five years - a return of 5:1. A Centre for Voluntary Management
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report says that over 90 per cent of those covered by their study are happy with the face-to-face approach. PFRA has a rigorous code of practice under which fundraisers must inform prospective donors that they are paid, but not the proportion of the donation they or their agencies receive. However, all charities already publish details of amounts spent on administration and fundraising."

b) Note by Charity Check on the Times corrective item of March 19, 2004:

The corrective item apparently confirms that PFRA's code of practice differs sharply from Home Office Guidance

The "rigorous code of practice" mentioned by PFRA presumably means the one shown on its website (noted 14/4/04). That code is said by PFRA, in the third sentence of the Times corrective item above, not to require fundraisers to state the proportion of the donation which goes to fundraisers, although the Charity Commission considers that it is a legal obligation to state that proportion; see the reference, in a note above, to the Charity Commission's leaflet CC20.

If fundraisers merely state "that they are paid" (the PFRA formula quoted in the Times corrective item of 19/3/04), or even "the basis on which [they are paid]" (the formula given in Para. 1 of PFRA's Code of Practice), without giving any numerical clue, that seems to be exactly the sort of thing that the Home Office criticised in its Statement of Guidance on the subject issued in November 2003.

The report mentioned in the second sentence of the Times corrective item of 19/3/04 can be contrasted with the survey of 2,020 adults conducted for Cancer Research UK in 2002, which revealed that only 20 per cent found face-to-face acceptable, as reported in an article in Third Sector of 14/1/04. (Indeed, the result of the Cancer Research UK survey may need some adjustment, to allow for what the public might have thought if they had been fully informed about fundraising expenses, as mentioned in e.g. the three items published in The Times of 26/11/03.)

The final sentence of the Times corrective item of 19/3/04, stating that "all charities already publish details of amounts spent on administration and fundraising," presumably refers to overall figures for each charity published in its annual accounts.

(PFRA's Code of Practice, mentioned above and shown on its website, is there sub-headed ' Abridged Institute of Fundraising Code of Practice for Personal Solicitation of Committed Gifts ("Face to Face" Fundraising) '.)

c) Item b) is a note which appears at the end of a summary of a front-page article in The Times of 26th November 2003, which article is itself reproduced in media comment. (/http://www.charitycollections.org/press3.html)

A quotation from an article in "Third Sector" magazine summarising PFRA's functions

The PFRA is a rare thing: a collective body set up by competing organisations for the purpose of ensuring a sustainable future for a revenue stream that is vital to the future of each and every member.

("Third Sector" 29th October 2003, page 19)

The name of PFRA has often been incorrectly shown as the "Public Fundraising Regulatory Authority", instead of "Public Fundraising Regulatory Association", for example, in these documents all of which are in the public domain:

a. The Home Office's consultation paper of September 2003, headed "Public Collections for Charitable, Philanthropic and Benevolent purposes", page 47, in Annex A, para. 10 (i);

b. Written evidence from the Institute of Fundraising, which founded PFRA, to the Joint Committee on the Draft Charities Bill, document ref DCH 70, printed in that Committee's Report, Volume II, page Ev 98;

c. Written evidence from MIND to that Committee, document ref DCH 293, printed in the same Report, Volume III, page Ev 614; MIND has a representative on the executive of PFRA – a point noted here on 11/2/05;
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d. Written evidence from the Institute of Fundraising Scotland to the Communities Committee of the Scottish Parliament, as referred to in that Committee's Agenda for its meeting on 15 December 2004, document ref COM/S2/04/31/4, page 39;

e. Petition to Brighton & Hove City Council on 25th November 2004 from the local Business Forum, the text of which referred to "the Public Fund-Raisers Regulatory Authority" and recorded some 160 complaints about direct-debit collections. See here (http://www.charitycollections.org/specialdownloadsBrighton.html) for the Petition and associated complaints

The incorrect name has also appeared in the media and elsewhere.

The Joint Committee on the Draft Charities Bill, in its recent report, apparently did not question or notice the strange use of two different names for PFRA in the evidence presented to it (namely "Public Fundraising Regulatory Association" and "Public Fundraising Regulatory Authority").

WRITTEN EVIDENCE FROM THE CHURCH OF SCOTLAND TRUST

Re-Organisation Of Charities

I would firstly emphasise that I would welcome any provision which will make it easier for charity trustees to reorganise and thereby allow the funds under their control to be used to better effect for charitable purposes. There are innumerable funds which are currently "frozen" because the fund in question is not a public trust and, therefore, the trustees cannot utilise the provisions of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 or where the public trust's income just exceeds the statutory limit and the Trustees have insufficient funds to make an application to the Court of Session.

However, I would like to raise some concerns regarding the drafting of the reorganisation of charities provisions in the Bill. Sections 40-43 deal with the reorganisation of charities and the initial issue is that the reorganisation provisions are only open to "charities". I have been involved with numerous applications under Sections 10 and 11 of the 1990 Act and in almost all cases none of the public trusts being reorganised appeared on the Scottish Charity Index and, therefore, they did not have their own charity number. All the Trusts being reorganised were funds held to benefit the work of a charity which itself appeared on the Scottish Charity Index and had a Scottish Charity Number. In one case 66 small public trusts were amalgamated to form a new charitable trust. None of the 66 trusts appears on the Scottish Charity Index. If the Bill is passed in its present form and I was undertaking a similar reorganisation all 66 trusts would have to become registered as charities before their trustees could use the provisions of Section 40. If the application was successful all 66 'new' charities which OSCR had just added to the Charity Register would have to be deleted from the Register and the charity formed by the amalgamation would need to be added. This would be a large and costly administrative exercise with no benefit to OSCR, the charity/ies involved and the taxpayer who will be funding OSCR.

I would, therefore, suggest that Section 40 be amended to allow the reorganisation provisions to apply to (i) charities and (ii) the public trusts, bequests and funds they hold for their charitable purposes. Thereby, there would be no necessity for every fund and bequest under the control of a charity to be separately registered. Further, if it became necessary to register all such funds the Register would not accurately reflect the composition of the Scottish charity sector and there would be increased administration for both the trustees and OSCR. There would also be double accounting as it would be necessary to prepare separate accounts for each fund with a Charity Number but the funds would be incorporated into the main accounts of the 'parent' charity to give an accurate account of its financial position

The Church of Scotland has thousands of such funds, the vast majority of which do not have separate charity numbers. All these funds are incorporated into the Church of Scotland's or Congregations annual accounts but due to their size none are individually identifiable. However, there is an audit trail for each fund.

I agree that the trustees of public trusts not on the Charity Register should still be able to use Sections 10 and 11 of the 1990 Act but the public trusts/bequests I have been referring to would not be able to
use the provisions of the 1990 Act because their purposes would “enable the trust to be entered in the Scottish Charity Register”.

Secondly, it is not clear if it intended to impose financial limits in the Regulations. It would be in the interests of the charitable sector if all charities were able to reorganise under the provisions of the new Act if they fulfilled the criteria laid down. If, however, it is the intention to impose financial limits these should be set at a level which will allow a large proportion of the charitable sector in Scotland to avail themselves of the provisions, if required.

The Bill lays down the framework for reorganisation but it will be the Regulations on Reorganisations which will clarify if these provisions will enable trustees to reorganise in a cost effective manner thereby allowing them to release funds for the valuable work undertaken by the charitable sector in Scotland.

Charity Test

I wish to make comment on the inclusion of Section 7 (3)(b) in the Bill:- “a body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if - ....(b) its constitution expressly permits a third party to direct or otherwise control its activities.” “Third party” is defined as “a member of the body in question” or “a person who would, if that body was a charity, be one of the charity trustees.” I would interpret that a third party could be either a natural or legal person and in many cases the third party could be a charity in its own right. I am sure that this was not the intention when this clause was drafted.

The inclusion of sub-section (b) could have serious repercussions for a number of charities.

To take an example, Section 64 of the Bill deals with designated religious charities and Section 64(1)(e)(i) states that to be a designated religious charity the charity must have “an internal organisation such that one or more authorities in Scotland exercise supervisory and disciplinary functions in respect of the component elements of the charity.” The Church of Scotland is currently a designated religious body and has had to show it has such supervisory and disciplinary controls over its component elements to be so designated in terms of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. At present all Congregations of the Church of Scotland are charities in their own right with their own Scottish Charity Numbers but, in terms of the current Bill, they would not pass the charity test because their parent body “the Church of Scotland” is a “third party” which, in terms of their constitution, is permitted to direct or otherwise control their activities. I would envisage that there are a number of "parent” charities which would be affected by this sub-section. These would include voluntary organisations such as the Guides, Scouts and Girls and Boys Brigades.

This sub-section would also affect the statutory corporations of the Church of Scotland, one of which is the Church of Scotland Trust. Its members are appointed by the General Assembly of the Church of Scotland, a separate charitable body which is distinct from the Trust and, therefore, has the potential to be a third party in terms of the Bill. The General Assembly also has power to remove any member of the Trust, appoint a Chairman and Vice-Chairman etc. Therefore, if OSCR considers the General Assembly does have an element of control over the Trust the Trust would fail the charity test.

There are numerous Trusts where Trustees are appointed by other bodies, some of which will be charitable, which could be struck at by this provision.

As I have indicated, I am quite sure this was not the intended effect when the Bill was drafted. It would be best to remove any possible ambiguity by either removing this sub-section or making an amendment to the sub-section in the following terms:- "(b) its constitution expressly permits a third party, unless that third party is a charity, to direct or otherwise control its activities."

Jennifer Hamilton
Secretary and Clerk
The Church of Scotland Trust
24 January 2005
WRITTEN EVIDENCE FROM EAST LOTHIAN COMMUNITY DEVELOPMENT TRUST

Call for Evidence – Charities and Trustee Investment (Scotland) Bill

We write on behalf of the East Lothian Community Development Trust. This Trust was established by members of the East Lothian District Council on 26th October 1989 for the benefit of the inhabitants of East Lothian. The Trust is registered as a charity having Scottish Charity No SCO 07172.

Trustees are appointed in accordance with the Declaration of Trust. Two trustees are appointed by virtue of offices held with East Lothian Council; one trustee is the MSP for East Lothian; and the other two trustees presently in office have served since the establishment of the Trust. Their replacements will in due course be selected by the other trustees then in office.

The trustees are aware of the terms of Clause 7 of the above Bill, as introduced into Parliament, and in particular the terms of Clause 7(3)(b).

The trustees do not believe that the terms of that paragraph would be such as to cause the Trust to fail the “charity test” as presently drafted, the trustees being of the view (on advice) that no third party is in a position to direct or otherwise control its activities.

If the Committee takes a different view, or if the legislation were to be amended or interpreted so as to cause the trust to be in danger of losing its charitable status, then the Trustees would be very concerned and would wish to have an opportunity of making further representations to the Committee.

If the Committee wishes further information we would be pleased to provide it.

Turcan Connell
Agents for the Trustees
24 January 2005

WRITTEN EVIDENCE FROM FAIRBRIDGE IN SCOTLAND

Evidence from Fairbridge in Scotland on the general principals of the Charities and Trustee Investment (Scotland) Bill

Fairbridge in Scotland is a growing charity that specialises in offering challenging young people the opportunity to develop personal skills, work based skills and their potential through a holistic package of activities and courses in an informal learning environment. As such we were delighted to have the opportunity to further respond to the development of this important legislation.

We are grateful that some of our earlier concerns have now been addressed and submit the following as evidence on the general principals of the Bill.

The Creation of OSCR and obligations of registered charities

We understand the need to demonstrate a charity’s OSCR registered status on all correspondence, however this could prove extremely expensive. If an existing charity were given a new charity number, or an “OSCR registered” handle, this would require a reprint of not only all office stationary but also all public affairs material. We would strongly urge both the Executive and the OSCR to allow existing Scottish charities to keep their designated charity number as it appears on existing material i.e. Fairbridge in Scotland: Registered charity number: SC021126. Or at the very least allow charities the opportunity to change their stationary and materials over a period of time.

The structure and operation of OSCR

We accept the creation of OSCR as a non-ministerial department. In order for OSCR to operate effectively and serve the sector to the best of its ability; the OSCR must have former charity workers within its ranks. We believe that the Bill should stipulate that at least 50% of Ministerial (non Executive) appointments be made from candidates either currently in or with recent experience of working within the Charity/voluntary sector.
Governance of Charities

We believe that in Section 15 denoting those categories of people barred from becoming charity trustees; that which stops “People convicted of an offence involving dishonesty” is still too broad. Arguably, any offence could at some level be deemed dishonest. Some charities already have former clients or beneficiaries on their boards, and in some cases these people may be ex-offenders. It is foreseeable that in the future, Fairbridge may wish to appoint a former client to its board and if, as is the case with many Fairbridge clients, they have a criminal record, this clause may still preclude their appointment as a charity trustee.

We are grateful for the inclusion of subsection 4 in this section and understand that this may allow OSCR to permit such an individual to take up a position as a trustee. However we feel that to preclude a person subject to OSCR waiving the disqualification will stigmatise any individual convicted of a crime many years ago, who has served their sentence and been rehabilitated. As such we feel that that subsection 4 (a) (i) in Section 15 should be suffixed with a period of limitation i.e. (within the last 10 years).

Powers of OSCR

We warmly welcome the moves within the Bill to speed up the processes of investigation, action against and appeal of failing charities. We particularly welcome the provision within the Bill to make the process of appeal free of charge and direct to the ad hoc appeals committee rather than through the courts. We seek assurances from the Executive that in the event of OSCR freezing the assets and bank accounts of a charity, that provision be made to safeguard the payment of; employee salaries, bills and other financial obligations that could other wise lead to more problems for the charity, at least until the appeal process is concluded.

Operating environment

In the event of a charity being wound up, we agree with the principal of dispersal of any remaining assets amongst similar charities. We would however like to see provision within the Bill to ensure that the stewards and staff of the charity being wound up are closely consulted throughout this process.

Once again we’d like to express our appreciation for this opportunity to respond to what is on the whole a very positive and forward-looking Bill. We would be delighted to assist in its further development at any level that you deem appropriate. Please do not hesitate to contact me if you have any further queries regarding this matter.

Alex Cole-Hamilton
Policy and Communications Officer
Fairbridge in Scotland
24 January 2005

WRITTEN EVIDENCE FROM FETTES COLLEGE

We have read, with interest and some concern, the transcript of the Stage 1 witness proceedings conducted on 12th January 2005 (as published under the Community Committee’s section of the Scottish Parliament’s website).

Much of the session on 12th January was devoted to the issue of public “benefit” and to the alleged elitism of the larger fee paying schools. As Fettes was cited in the proceedings, we feel compelled to challenge some of the views expressed by members of the committee and to offer some views of our own that the committee might, we hope, find useful in their deliberations.

All schools provide public benefit by their educational purpose and the witness statements and previous submissions provide much evidence in support of this. The financial benefits are no less compelling. Even on the most optimistic estimates of the tax advantages we receive and the most pessimistic estimates of the direct financial benefits we give back, the fiscal balance is neutral. Indeed it is our firm opinion that the balance is in fact far more weighted in favour of the public benefit (by as much as three to one).
Boarding schools are the most expensive of the independent schools because they face different cost challenges compared to day schools. We provide 24 hour, 7 day a week cover for the pupils in our care. We have more buildings and grounds to manage and maintain. Much of our estate is of historic interest and correspondingly more expensive to run, insure and refurbish. We are driven by cost, not profit, and the level of fees that we charge reflects the costs we incur. We constantly strive to contain them and to minimise the fees we do have to charge. If our costs increase because the tax advantages we enjoy are withdrawn, we will simply become more exclusive than we have to be (by dint of the need to charge fees).

At our school 25% of pupils receive remissions exceeding £1.0m annually which is equivalent to 12.5% of gross fees. Less than a quarter of remissions are financed by ring-fenced funds and full-fee paying parents support the balance. Selecting pupils for remissions on the basis of their academic or other aptitude, as well as their ability to pay, is the only reasonable way to manage awards. If the selection criterion was reduced in all cases to the ability to pay alone there would be no incentive for the support we receive from parents and in the case of restricted funds we might be in breach of the original donations’ terms.

Please remember that the loss of the tax advantages and, we believe, the loss of the ethos that charitable status confers, would impact not simply on direct operating costs but also on the ability of schools to fund-raise towards future capital developments and new scholarship and bursary funds. It is a mistake to assume that independent schools could shrug off the loss of the advantages currently available to them without very serious potential consequences for the quality of education they provide, the inclusion they manage to deliver to less well off pupils and the maintenance of often important national landmarks. This is true irrespective of the size of school and the distinction drawn by some members of the committee between large and small schools (with the latter somehow being less noxious) is invidious.

Education is not free however it is delivered. The government’s own figures suggest that the cost of educating a pupil in the maintained sector exceeds £4,000 a year (excluding centralised administration and capital costs). Irrespective of any views on universal taxation, the independent sector saves the public purse substantial direct costs in this regard.

The independent sector is an important part of the education system in Scotland. It contributes actively to the totality of education in this country. It employs substantial numbers of people. It adds to the attractiveness of Scotland to companies locating to this country.

Boarding schools in Scotland enjoy an enviable international reputation which is also important to the Scottish economy. Over £2.5m of our current annual fees are from overseas sources. This illustrates how little parents of boarding pupils are constrained by geography. As a school with 70% of pupils boarding, we are very concerned that the apparent divergence between the Scottish and Westminster Bills could very well mean a loss of pupils, in the long run, to schools south of the border (if those schools operated under a different regime). Indeed we fail to understand why such divergence is at all necessary. The Westminster Bill modernises and clarifies charity law. It removes the presumption of public benefit without undermining the flexibility provided by existing case law. Why is it necessary for the Scottish Bill to abandon that principle?

It will never be possible for independent schools to avoid entirely the charge of exclusiveness and elitism simply because they need to charge fees. We honestly believe we provide public benefit and that our hard-working colleagues, parents and pupils deserve more than the implied charge of elitist and selfish privilege.

We strongly support the remarks made by David Mobbs of Nuffield Hospitals that fee charging charities are an alternative to the public sector providing complementary services to, or services not provided by, the public sector. It is simply not possible to provide the high standards that they do by fund-raising alone. If the political will and intention is that there should be no fee-charging charities that should be said outright so that we can think about alternatives that can be put in place. It would be disastrous for the sector if a cloud was left hanging over it for a protracted period, tying up resources in its defence and inhibiting long range planning and development.

We would like to extend an invitation to any or all of the members of the committee to visit our school, to discuss and see what we do and to develop a truer understanding of what we are. Equally we
recognise that no system is perfect and we are prepared to work in any reasonable way possible with the Scottish Parliament to improve and develop education in Scotland.

M C B Spens
Headmaster

M A Tolhurst
Bursar

Fettes College
9 February 2005

WRITTEN EVIDENCE FROM HOSPITAL BROADCASTING ASSOCIATION

Charities and Trustee Investment (Scotland) Bill

The Hospital Broadcasting Association (HBA) welcomes the opportunity to respond to the Communities Committee’s call for evidence on the above bill.

HBA is a membership organisation registered as a charity with the Charity Commission for England and Wales. We support and promote hospital broadcasting within the UK. Our members are independent hospital broadcasting organisations providing services to patients in their local hospitals and old people’s homes. Almost all of our members are registered charities. We currently have 27 members based in Scotland and another 222 members based in England and Wales, Northern Ireland and the Channel Islands.

The vast majority of our members have an annual income below £10,000 per annum. Many have an income well below that figure – many sustaining their services on an income of only a few hundred pounds each year. To the best of our knowledge, all of our members are reliant entirely on volunteers, with no paid staff.

We are pleased to note that some of our concerns with the content of the Draft Bill have been addressed in the Bill as introduced to the Scottish Parliament. However, we would like to take this opportunity to raise a number of our outstanding concerns.

Dual Regulation of English & Welsh Charities

As a charity registered with the Charity Commission for England and Wales, but operating, albeit to a limited extent, in Scotland, HBA expressed concern to the Scottish Executive about the extent to which we would be subject to dual regulation under the terms of the Draft Bill.

We are unsure whether, under the Bill as introduced, it would be necessary for us to register with OSCR or not. HBA does not own or rent any offices. All our volunteers “work” for the charity from their homes. Currently, these include two volunteers living in Scotland – our Chief Executive (who is also a Trustee) and one other. Our only other activities north of the border are the holding of meetings of members, and the periodic holding of annual national conferences. We are inclined to assume that working from a “home office” would not fall within the terms of clause 14(b)(ii), and thus, as long as we ensured that all correspondence referred to our being registered as a charity in England and Wales, that we would not need to register with OSCR.

Accounting and Reporting Requirements

HBA welcomes the provisions in the Bill requiring that charities openly and transparently report on their work and make available their accounts. We also welcome the statement in the consultation document that the requirements will be based on the Accounting Standards Board’s Statement of Recommended Practice (SORP) wherever appropriate.

Guidance as to the preparation and presentation of “Receipts and Payments” accounts, as used by most small charities has been removed from the draft SORP 2005. The Charity Commission for England and Wales have stated that they are intending to publish their own guidance on the preparation and presentation of such accounts. HBA hopes and assumes that OSCR and the Charity Commission will be working together on the preparation of such guidance, as unnecessary differences will only cause confusion, and that the regulations to be issued by Ministers under clause 45(4) will refer to this guidance.
Scottish Charitable Incorporated Organisations

HBA welcomes the proposal to create a new class of incorporated charity, the SCIO. The SCIO may be an appropriate legal form for a number of our larger members to adopt. A very small minority have already made the switch to a company limited by guarantee. The availability of the SCIO would enable them to retain the advantages of incorporation whilst reducing the administrative burden placed upon them by having to comply with the overly-bureaucratic Company Law, which is not well-suited to organisations such as our members. Likewise, the lessening of the burden may encourage a number of our members who are currently unincorporated associations to incorporate.

The draft model constitutions made available by the Scottish Executive are most useful in helping us to gain an understanding of the current thinking as to the contents of the detailed regulations to which SCIOs are to be subject. We look forward to being involved in future consultation on these regulations.

Reorganisation of Small Charities

HBA notes that Chapter 5 of the Bill has been considerably simplified, with a single regime covering reorganisations being defined for all charities, albeit with the possibility for Ministers to make provisions, by regulations, about the details of the process and how it will be applied to different types of charity.

We hope that “different types of charity” includes charities of different sizes. It would be unfortunate if the same process was applied to all charities regardless of size. The Charities Bill introduced into the Westminster Parliament provides for small charities to transfer property, replace their purposes and modify their powers or procedures under a “light-touch” regime with minimal intervention by the Charity Commission. We would commend such a regime to the committee.

Remuneration of Charity Trustees

HBA welcomes clauses 66 and 67 of the Bill, allowing the remuneration of Charity Trustees for services provided to a charity. We feel, however, that there is a need for a clause similar to that inserted as clause 73C(2) of the Charities Act 1993 by section 35 of the Westminster Bill, making it clear that those benefiting (or who might benefit from) such remuneration are not allowed to participate in the associated decision-making process.

A related pedantic point is that clause 67(2)(a)(ii) includes an unmarried partner of either sex of a Charity Trustee, but clause 67(2)(b) only includes the spouse of a child, parent etc. There should be consistency between these two clauses.

Liability of Charity Trustees

HBA is disappointed that there is no provision in the Bill that provides for OSCR to relieve a Charity Trustee (or an auditor or independent examiner) of the liability associated with any breach of trust or duty, where he has acted honestly and reasonably, in the same way that Clause 36 of the Westminster Bill provides for the Charity Commission. We recommend that a similar power be given to OSCR. Given the voluntary nature of the work of Charity Trustees, it is important that, where it is clear that they have acted in good faith, they are able to be absolved of a lifetime's liability.

For similar reasons, we are not happy with the way that the Bill merges the previous terms “mismangement” and “misconduct”. It is quite possible that, without any malicious intent, a voluntary Charity Trustee may not fulfil a particular requirement for a variety of reasons. Where such cases come to light, it is only right that the regulator should be able to administer a “slap on the wrist”, but it appears inappropriate to treat such failings in the same way as if there had been malicious intent.

Public Benevolent Collections – Local Authority Consents

HBA feels that it would be beneficial to make a few changes to the provisions surrounding the application for, and determination of, local authority consents for public benefit collections.

We would much prefer that the form of the application for consent be consistent across the country and not “in such form as the [local] authority may determine” (clause 85(1)).
Clause 85(4) requires that the local authority gives the organiser notice of its decision to either grant or refuse consent for a collection “no later than 14 days before [the proposed collection date]”. Such a short notice period is clearly unworkable. Charities need to be able to plan fundraising events months in advance secure in the knowledge that they have all the appropriate permissions. Arranging volunteer staff at this short notice will be very problematic.

Finally, we note that, under Clause 86(9), local authorities have only one month after notification to prohibit a collection by a Designated National Collector. Whilst in this case there is less background checking to be performed, it seems inequitable that a national charity can ascertain that it is able to collect in a particular local authority area 17 months before the collection is due to take place, but a local charity could find out the fate of its proposed collection as late as 2 weeks before it is due to take place, potentially after all the best dates and locations have been requisitioned by Designated National Collectors.

Nigel Dallard
Secretary
Hospital Broadcasting Association
20 January 2005

WRITTEN EVIDENCE FROM INTERNATIONAL PLAY ASSOCIATION AND PLAYRIGHT SCOTLAND TRUST

Charitable Purposes: Play and Recreation

Evidence from the Scotland Branch of the International Play Association (IPA) and the Trustees of the PlayRight Scotland Trust.

Charitable purposes
There is no reference to recreation, play or leisure-time occupation among charitable purposes in the Bill. Large numbers of organisations are engaged, and will in the future be engaged in these areas as their main purpose such as playgroups, playgrounds, village halls, holiday schemes and recreational clubs. Play and recreation should be specifically mentioned like education, health, the arts, amateur sport, etc. Out of some 50,000 voluntary organisations in Scotland, 18% or 9,000, are active in the ‘culture and recreation’ field of work and a high proportion of these will be in play and recreation. Only ‘social care’ (42%) is a larger category (SCVO statistics 2002)

Significantly the provision of recreational activities and other leisure time occupation is currently legally recognised as charitable under the Recreational Charities Act 1958 for England and Wales. It is not in Scotland.

An amendment is therefore needed in the charitable purposes in the Bill and it is suggested that the words “play or recreation” be added to ”the advancement of amateur sport” so as to read: “the advancement of amateur sport, play or recreation.”

The UN Convention and the International Play Association
IPA campaigns in over 50 countries around the world for the implementation of Article 31 of the UN Convention on the Rights of the Child -the child's right to rest and leisure, to engage in play and recreational activities and to participate freely in cultural life and the arts. As a signatory to the Convention, the Government accepts the duty to promote its implementation.

As an international NGO, the governance and objects of IPA are not recognised as charitable by the Inland Revenue. The Scotland Branch therefore established an associated Trust, the PlayRight Scotland Trust, which was recognised by the Inland Revenue as a charity with the Scottish Charity number SCO26909.

The purposes of the PlayRight Scotland Trust
The Trust's purposes are: ”To provide or assist in the provision of facilities and programmes for play and recreation and other leisure time occupation for children and young people in Scotland and internationally in the interests of their social welfare or which will advance their education, encourage their personal development and further their health.”
The Recreational Charities Act 1958

The above purposes of the PlayRight Scotland Trust are based on the provisions of the Recreational Charities Act 1958. The preamble says it is:

"An Act to declare charitable in the interests of social welfare of facilities for recreation or other leisure time occupation, to make similar provision as to certain trusts heretofore established Within the meaning of the Miners' Welfare Act, 1952, to enable laws for corresponding purpose to be passed by the Parliament of Northern Ireland, and for purposes connected therewith"

Section 1 (1) of the Act says:
"Subject to the provisions of this Act, it shall be and be deemed always to have been charitable to provide, or assist in the provision of, facilities for recreation or other leisure time occupation, if the facilities are provided in the interests of social welfare."

Section 6 (2) of the Act says:
"Sections one and two of this Act shall affect the law of Scotland and Northern Ireland only in so far as they affect the operation of the Income Tax Acts or of other enactments in which references to charity are to be construed in accordance with the law of England and Wales."

Proposals for England and Wales

Notwithstanding the provisions of the Recreational Charities Act 1958, the proposals for legislation in England and Wales do not presently include reference to the advancement of recreation, play or other leisure time occupation as charitable purposes. There is an understandable desire to achieve alignment between the two sets of proposal north and south of the border. Consequently any amendment in Scotland should be included in legislation for England and Wales and IPA has made representations to this effect.

Alan Rees MBE
Secretary and Trustee
Scotland Branch
International Play Association (IPA) and PlayRight Scotland Trust
18 January 2005

WRITTEN EVIDENCE FROM KEEP SCOTLAND BEAUTIFUL

Introduction

It has been recognised for some years that charity law in Scotland is in need of reform. The charity sector in Scotland is large and diverse. With over 28,000 charities in Scotland, of which around 65% have an annual income of less than £25,000, it is essential that any form of regulation can cope with a diverse sector. Public confidence in Scottish charities must be maintained if the charities are to be able to achieve their objectives. Scotland is part of the United Kingdom and it is essential that the relationship with charities registered elsewhere in the UK be clarified. The Charities and Trustee Investment (Scotland) Bill is a very welcome development which, if made law, will greatly benefit the charity sector in Scotland. The following comments address some of the general principles of the Bill.

The Office of the Scottish Charity Regulator (OSCR)

This is a very significant development and one which has been required for some time. It would be difficult to criticise the Bill’s provisions in relation to OSCR. The Bill gives OSCR considerable powers to supervise Scottish charities. These powers, which ought to be adequate to enable OSCR to effectively supervise Scottish charities, are checked by the Court of Session and the Scottish Charity Appeals Panel to provide the necessary safeguards.

The Charity Test

The McFadden Commission recommended that all charities should operate for public benefit. This axiom is of fundamental importance if the public is to have confidence in the Scottish charity sector. The Bill will remove the existing presumption of public benefit for charities working to relieve poverty or for the advancement of education or religion. Instead, all Scottish charities will have to demonstrate that they actually provide public benefit. Importantly, this public benefit need not be provided in
Scotland. The Bill proposes a two-part charity test. The first part lists 13 charitable purposes, within which a charity must be able to categorise itself. The second part is a public benefit test. The Bill also provides a valuable safeguard to prevent a body which has a purpose meeting one or more of the charitable purposes and which provides public benefit from meeting the charity test in certain clearly defined circumstances. Following Public Consultation, broad criteria for interpreting public benefit have been included in the Bill. OSCR will be required, following consultation, to provide guidance on how it will determine whether a body meets the charity test. These are very useful and welcome developments.

References to Charitable Status

This important matter has been effectively addressed in the Bill. Charities registered elsewhere in the UK will not necessarily be required to be included on the Scottish Charity Register, but, if this is the case, they will be required to make this clear. The Bill has provided a useful approach which should meet the needs of Scottish charities and those registered elsewhere in the UK.

Scottish Charitable Incorporated Organisations (SCIOs)

The imaginative proposals contained in the Bill will help certain charities to simplify their structure. At present there can be confusion between Incorporation status and requirements and Recognised Scottish Charity status and requirements. Of course, not all Scottish Charities will choose to Incorporate by this means, but the option to do so is a very useful development. The subordinate legislation which will provide further details will be awaited with interest by many Scottish charities.

Charity Trustees

The provisions regarding the duties and liabilities of Charity Trustees are very helpful indeed and will form a useful statutory minimum upon which Scottish charities can base their own internal governance and operating procedures.

The change of title from ‘Charity Stewards’ in the draft Bill to ‘Charity Trustees’, following Public Consultation, is a helpful development and will assist colleagues from England and Wales to easier understand the Scottish terminology. Potential confusion with trust law ought to be minimised by the use of the full term ‘Charity Trustees’ rather than the abbreviated form of ‘Trustee’.

Investment Powers of Trustees

In the present-day financial world, safe and successful investment requires speed and flexibility, coupled with the ability to easily switch between types of investment. It could easily be argued that the present provisions, contained in the Trusts (Scotland) Act 1921 and the Trustee Investments Act 1961, do not allow Trustees sufficient scope to manage their investments as effectively as could be the case. The amendments to the Trusts (Scotland) Act 1921, proposed in the Bill, are straightforward and, at a stroke, will provide Trustees with a much more appropriate investment regime.

Conclusion

The Charities and Trustee Investment (Scotland) Bill is very welcome and comes not a moment too soon. It contains many provisions which will enhance public confidence in the charity sector in Scotland. The provisions of the Bill will also provide many benefits for Scottish charities.

Keep Scotland Beautiful is the trading name of Environmental Campaigns (Scotland)
Scottish Charity No. SC030332.

John P Summers
National Director
Keep Scotland Beautiful
24 January 2005
WRITTEN EVIDENCE FROM LLOYDS TSB FOUNDATION FOR SCOTLAND

There is a strong welcome from Lloyds TSB Foundation for Scotland to the content of the Bill. We would like to bring the Committee’s attention to the different nature and contribution that Trusts and Foundations such as ours play within the development of the voluntary sector in Scotland.

- It is important to underline that Trusts & Foundations are charities in their own right whilst they also give grants to charities and voluntary organisations.

- The currently Scottish Trusts & Foundations award grants to the value of £40m to charitable and voluntary organisations in Scotland.

- It is our hope that the subsequent Act will help encourage philanthropy and grant making to charitable organisations in Scotland.

We would like to illustrate to the Committee the distinctive nature of being a grant making trust. Trusts & Foundations add something different to the funding and in some cases the innovative and long-term support of voluntary and charitable activities in Scotland. Trusts & Foundations may often be able to fund work that public bodies might not be able to support. Risky or marginal projects which have become mainstream have often been firstly funded by Trusts & Foundations e.g. in the fields of drug rehabilitation and for those with special needs or disabilities.

Trusts & Foundations often have distinctiveness in their ease of application, assessment and reporting procedures. Operationally this can make them appear from comments received (surveys, feedback forms and attendance at funding seminars) to be positively different to deal with compared to statutory funders. Beyond essential audit and compliance and taking care to see that the money was spent for the purpose for which is awarded, reports required of those organisations who receive grants from Trusts & Foundations are usually not too complex.

As a member of the Scottish Grant Making Trust Group we are aware that there is a case to be made for turning more information from Trusts & Foundations into shared knowledge, e.g. improving evaluation methods for charitable organisations. Additionally, individual Trusts & Foundations have been developing mutual working relationships and with others e.g. Universities and the Scottish Executive.

We would like to bring to the Committee’s attention to the fact that there is a bigger prize to be achieved in both encouraging philanthropy and giving but also in encouraging UK Trusts to spend more of their finds in Scotland. A 1% increase in UK Trust’s (usually based in England) grant making into Scotland would represent £60m per annum to Scottish charitable and voluntary organisations.

In response to the main headline areas listed, we hope that the following comments are helpful in addition to our previous submission.

- **The Charity Test and Public benefit.** With regard to respecting the independence of Trustees for action, there maybe issues of encouraging philanthropy around interpretation of Section 7.3.b. re the independence of Trustees and third parties. This needs to be worded in a manner that does not detract from the establishment and development of new grant making Trusts & Foundations.

- **OSCR and the Regulation of the Charity sector.** It would be helpful if Trusts and Foundations had comparable methods of registration in both jurisdictions e.g. OSCR and the Charity Commission. This should have the effect of encouraging UK Trusts to be more active in Scotland.

- **Governance.** While Trusts & Foundations accept that grant making is a risky business, the risk management of grant givers is different from those who operate public services. The consequences of the procedures as outlined being too strictly applied to Trusts and Foundations may inhibit the development of new services and programmes for often much marginalised groups and unfashionable causes.
Communities Committee, 1st Report, 2005 (Session 2) - ANNEX E

- **Fundraising.** We welcome more rigorous management of fund raising by charitable organisations in Scotland.

Mary E Craig  
Chief Executive  
Lloyds TSB Foundation for Scotland  
24 January 2005

WRITTEN EVIDENCE FROM MARY MACKENZIE

Memberships, Subscriptions, Annual Information, Small Charities

- Rely on committee/trustee members to carry out the objects.
- Many who undertake this task are unaware of their legal responsibilities.
- All small charities, therefore, require to be issued with a guiding booklet on registration.
- Plain English, purely factual advice will help.
- AGM/EGM notices:-  
  a. to membership  
  b. prior to AGM/EGM  
  c. sample provision eg.

<table>
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<tr>
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- Apologies for absence
- Minutes of previous AGM/EGM – approval
- Matters arising.
- Hon Secretary – name – report – approval
- Hon Treasurer – name – report – approval
- Convener – name – report – approval
- Election of Committee (state number)  
  Name each present committee member and date of retiring including office bearers.  
  State if eligible for immediate re-election.
- Any other business.

Hon Secretary Signature  
Date

Such a similar basic information will encourage members interest in the performance of the Charity.

- An enclosed copy of the previous AGM/EGM minutes, also a copy of the accounts ie. the Hon. Treasurer’s report adds to members understanding, particularly if a charity draws membership from an extended area. (a request for these can be encouraged by an SAE to the charity, if funds are tight).
- Many worthy charities “fail” in their AGM/EGM notices, so become short of potential committee members and find themselves with the everlasting same committee/trustees, this can lead to staleness of ideas and overwork for volunteers.

Mary Mackenzie (Miss)  
January 2005

WRITTEN EVIDENCE FROM NATIONAL TRUST FOR SCOTLAND

Introduction

The National Trust for Scotland is fully supportive of the Scottish Executive’s intention of modernising the law relating to Scottish Charities in order to introduce a transparent, proportionate and robust regulatory framework. The Bill brought forward will be a major step forward both in terms of
modernising Charity Law in Scotland and in reassuring the public that the charity sector is well-run and trustworthy. The Trust is pleased that many of the concerns it raised over the consultation draft of the Bill have since been addressed by the Executive. While the Trust is aware of several areas of the legislation that may continue to give cause for concern, particularly in relation to potential discrepancies between Scottish and English legislation, most of these issues have been more than adequately aired in written evidence submitted to the committee by other organisations and individuals. Thus the following evidence concentrates on two issues relating to charity trustees. A summary of information about the Trust’s constitution, governance and management is included to illustrate these two issues.

Definition of Charity Trustees

The Trust is concerned that the Bill as introduced does not in some cases identify exactly who the charity trustees of an organisation are and suggests that there might be benefit in tightening up the definition of charity trustees within the Bill.

The charity trustees of various types of charity are defined under Section 103 of the Bill. As a body corporate established by enactment the Trust’s charity trustees should be defined by s103(a)(ii)162. While the definition appears to accommodate the fairly complex governance structure of the Trust, it does not give complete certainty as to which positions within the governance would be considered the charity trustees; such uncertainty may well also exist for other organisations. This decision appears to depend on the interpretation of the words ‘managed’ and ‘manage’ which do not seem to be further defined in the Bill. It is also not immediately clear from the Bill which organisation or authority would determine who charity trustees were in cases of uncertainty, although this issue might well cause difficulties for OSCR. In view of the duties and responsibilities that the Bill gives to charity trustees it seems vital that all charities are able to identify their charity trustees with certainty. In the case of the Trust it would seem sensible that the members of the relatively small Board, who have functional responsibility for the operational management of the organisation, were deemed to be the charity trustees. However, without clarity as to what ‘manage’ means as used in s103 it seems conceivable that other tiers of governance might be argued to fall within the definition in addition to the members of the Board. This situation leaves a potentially large number of volunteers uncertain of their legal duties and responsibilities. This could be addressed by the terms ‘manage’ and ‘managed’ as used in s103(a)(ii) being more clearly defined in the Bill.

Remuneration of Charity Trustees

The Trust believes that in the case of relatively large and complex charities there are great benefits in a minority of an organisation’s charity trustees being senior members of staff, and therefore it welcomes the manner in which the Bill currently deals with the issue of remuneration.

The Bill does not preclude a minority of a charity’s trustees being members of that organisation’s staff and the Trust believes there are benefits in terms of effective management in this position being maintained. The Trust fully supports the need for the majority of the trustees to be volunteers. Following a recent review of the Trust’s governance undertaken by Lord Mackay of Clashfern it was decided that the Trust’s Board should include a minority of executive members: the chief executive and 3 senior directors. Notwithstanding the preceding comments about the definition of charity trustees, it seems likely that all the members of the Trust’s Board would be considered to be charity trustees. In a large organisation such as the Trust the inclusion of executive members amongst the charity trustees helps to ensure unity of purpose and equality in decision-making amongst those running the organisation, and thus promotes shared responsibility. Running large organisations is an onerous task and full-time staff can, perhaps obviously, devote more time to it than volunteers. This aids the charity trustees’ ability to reach collective and full understanding of purposes and projects. The executive members’ equal status as charity trustees in decision-making in turn gives them a higher degree of accountability and responsibility in carrying out the intentions and directions of the trustees. The Trust therefore supports the current position in the Bill being maintained.

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162Charities and Trustee Investment (Scotland) Bill, Section 103: “charity trustees” – (a) in relation to a charity which is a body corporate (other than a SCIO) means- …… (ii) where the charity is managed by its members, its members (or where a committee or group manage the charity, the members of that committee or group)
Communities Committee, 1st Report, 2005 (Session 2) - ANNEX E

Summary information about the National Trust for Scotland including constitution, governance and management

The Trust is one of Scotland's largest charities, with some 275,000 members and 510 permanent and 1000 seasonal staff. The Trust's work is supported by a team of over 2,500 volunteers. The Trust's average annual turnover in the period 1999-2004 was £34 million. The Trust cares, on behalf of the nation, for a great diversity of properties, including mountains, coastlines, islands, woodlands, battlefields and historic sites, gardens, castles, mansions and cottages. Its core purposes include access and education as well as conservation. Those properties where numbers are recorded welcome around 1.5 million visitors each year, and hundreds of thousands more visit its countryside properties unrecorded.

The Trust was established in 1931 as an independent charity with powers to hold land, buildings and chattels for the benefit of the nation. Its aims were first defined in The National Trust for Scotland Order Confirmation Acts of 1935 and 1938. Under the terms of the 1935 Act the Trust is a body corporate and is ultimately governed by a large Council, which includes both elected Members and representative Members from other national bodies. The Council acts as the guarantor of the integrity of the Trust's operations and provides a forum for debate of major issues of principle which affect the Trust's interests. However, the main functional responsibility for the active operational management of the Trust within the principles established by Council rests with a small Board of both non-executive (in the majority) and executive directors. The detailed implementation of the strategies and policies agreed by the Board is the responsibility of the Senior Management Team made up entirely of senior staff.

John Mayhew
Head of Policy and Planning
The National Trust for Scotland
24 January 2005

WRITTEN EVIDENCE FROM NATIONAL UNION OF STUDENTS SCOTLAND

NUS Scotland is a federation of local student organisations in Scotland, comprising over 60 local campus student organisations that are affiliated to the National Union of Students of the United Kingdom (NUS). NUS Scotland is an autonomous, but integral, part of the National Union of Students. The students' associations in membership of NUS Scotland account for 85% of students in higher education in Scotland and over 90% of students in further education in Scotland.

Students' associations affiliated to NUS retain autonomy over all policy areas, and may choose to make individual students' association submissions based on local policy. NUS Scotland operates a democratic forum for policy and debate on national issues affecting students and NUS Scotland's role is to reflect the collective position.

Introduction

NUS Scotland broadly welcomes the proposals expressed within this Bill to reform charity law, which has for too long appeared to fail those charities, donors and the public, who rely on its security. The ancient principles upon which the law is currently based simply do not reflect a modern world where giving takes place on a mass scale and for so many diverse purposes; the outdated regulations do not possess sufficient rigour to ensure charities are not at risk of fraud and mismanagement. The sector as a whole does not benefit from the current lack of both clarity and consistency, and any attempt to improve the legislative framework is to be encouraged and supported.

We are concerned, however, with the potential impact that specific parts of this legislation may have on Scottish Students' Associations, which exist within every further and higher educational institution in Scotland. Many Students' Associations have until now been considered integral to their parent institutions, without the consequential need to register. Under the new legislation, it is likely that it will become desirable – or even essential – for every Students' Association to register with OSCR. Students' Associations that are already registered will automatically be affected by the Bill. It is this shift in the nature of their regulation, when combined with some operating practices unique to Students' Associations, which give rise to the most potential difficulties.
We will outline within this evidence those areas where Students’ Associations will undergo changes, and may face problems, under this new Bill should it become law in this form. We hope that the Committee will have regard to the particular needs of Students’ Associations in its treatment of the legislation.

General points

The Committee is asked to consider some general points about Students’ Associations in the context of the more detailed discussion below:

- Many Students’ Associations are presently established as component parts of their parent institutions in the context of charity law. This situation is likely to change under the new legislation, requiring Students’ Associations to register with the OSCR, and carry out the various obligations that this incurs.
- Other Students’ Associations are already registered, and the provisions of the Bill will affect them automatically.
- Students’ Associations are required to conform not just to charity law, but also to the Education Act 1994, which introduces separate obligations in terms of purpose and constitution.
- It is likely that the shift in regulatory framework (from parent institutions to OSCR), and the need to comply with other Students’ Association specific legislation, will be the primary sources of difficulty for Students’ Associations to conform to the new legislative framework.
- Students’ Associations also have various constitutional and operational peculiarities that may cause specific difficulties in relation to this Bill, such as explicitly existing for the benefit of its members, and payment to trustees.

The charity test: charitable purposes

Typical purposes of Students’ Associations (as defined in their constitutions) include:
- To advance the education of its members and students of the college as a whole.
- To represent the interests of its members and act as a channel of communication in dealing with the college and other bodies.
- To promote and protect the welfare of its members.
- To promote, encourage and co-ordinate student clubs, societies, sports and social activities.

These purposes seem to be consistent with those stated in the Bill. In particular:
- Advancement of education;
- Advancement of health;
- Advancement of civic responsibility and community development;
- Advancement of the arts, heritage culture and science (especially the arts and culture);
- Advancement of amateur sport; and
- Any other purpose that may reasonably regarded as analogous to any of the preceding purposes.

We therefore have no difficulty with the newly defined charitable purposes, but we seek clarification that certain aspects of Students’ Association work would continue to be viewed as analogous to the advancement of education, such as:
- The provision of licensed social facilities solely for students at an institution
- Campaigning and lobbying on matters of interest to students
- The funding of student clubs that raise money for other charities (i.e. RAG societies)
- The funding of students’ political clubs and societies

These functions have long been interpreted as vital to supporting the educational community of institutions, and we hope and expect that this Bill would not affect them.

(Section 7)
The charity test: public benefit

The public benefit test proposed within the Bill has two aspects:

- The balance between benefit to the members of the charity or disbenefit to the public, versus the benefit to the public
- The extent to which restrictions on the general public from benefiting from the charity may be unduly restrictive

In mind of this, we seek clarification that Students’ Associations would not be liable to fail the public benefit test since that in law they exist solely to benefit their members (and students at the same institution who are not members) under the provisions of the Education Act 1994. In practice, of course, Students’ Associations bring about many incidental benefits to the public and to other charities through their participation in public policy debates, and activities they organise such as sport, RAG and community outreach projects. We hope that the test would be applied pragmatically.

(Section 8)

Students’ Associations, their parent institutions and OSCR

The Bill seeks to ensure charities are not controlled by third parties. In the case of Students’ Associations, however, parent institutions will rightly insist on a certain level of control – including the power to make certain directions to the Students’ Association – upon which grant payments to the Students’ Association are contingent. This is especially the case in further education institutions, where the institution typically retains full control of the finance and resources of the Students’ Association, not least because many of its officers are likely to be under the age of eighteen. It is of concern to us how this funding relationship would continue to operate under the new legislation, and the matter needs to be clarified.

(Section 7)

Under the new legislation, Students’ Associations would acquire a duty to submit particular changes to its constitution to OSCR for agreement. Given that the current arrangement is for constitutional amendments to be submitted to the institution’s governing body for approval, and that this Education Act duty will not change, there will need to be careful examination of how constitutional amendments are to process under the new arrangements.

(Section 16)

Again, there is the potential for conflict between OSCR and parent institutions in terms of regulatory function at a more practical level. OSCR will have the power to suspend trustees, agents and employees of charities, or to restrict their transactions. This may bring OSCR into conflict with parent institutions that may consider those funds to remain in trust of the institution at some level. Indeed, it is the governing body of the parent institution that remains ultimately accountable for the probity of those funds to the funding council(s), Ministers and Parliament. Many parent institutions are the legal employer of the staff of the Students’ Association, and might also claim employment rights over its trustees. The regulatory result is extremely unclear, and is in need of clarification.

(Section 31)

Clearly, there will be further miscellaneous duties acquired by Students’ Associations in terms of filing accounts with OSCR, and in the provision of other information to the regulator and to third parties on request. These duties are in common with those acquired by other charities, and do not present special difficulties for Students’ Associations.

(Various Sections)

Scottish Charitable Incorporated Organisations

NUS Scotland welcomes the creation of a new legal form for incorporated charities (the SCIO). Subject to further investigation, this may prove to be an excellent opportunity for Students’ Associations who wish to become incorporated but have decided that presently available legal forms are not appropriate (at the present time, all Students’ Associations in Scotland are unincorporated).

(Chapter 7)

Charity trustees

Within the Bill, there is no general change to the statutory duties of trustees, and NUS Scotland welcomes and supports this position.
Students’ Associations typically pay an honorarium to several of their trustees. These trustees, known as ‘Sabbatical Officers’ due to the original concept of taking a year out to serve within the Students’ Association, are elected by all members in a secret ballot, under the terms of the Education Act 1994. Authority for this is normally given within a Students’ Association’s constitution, but is also implied in that Act. There are many Students’ Associations, predominately in the further education sector, that do not currently possess the constitutional power to make payment to their officers, but might want to do so in the future. We seek assurance that nothing in this Bill would complicate the tried and tested provision for paid elected officers to lead, and be responsible and accountable for, Students’ Associations, a position we consider to be a democratic imperative.

Conclusion

It is clear that considerable effort has been made in this legislation towards restoring public confidence in charities, and that this will be of huge benefit to the voluntary sector. Students’ Associations consider themselves as being firmly inside this sector, and have purposes that they view as charitable which are pursued within the spirit of existing law. We do not seek to change this position, or hope for an outcome where Students’ Associations are exempt from the spirit of this legislation. As charitable bodies in receipt of public funds, it is right and proper that Students’ Associations should be subject to the highest standards of scrutiny.

We feel, however, that we must qualify our endorsement of this Bill. There are many areas where, as we have outlined, there is potential for Students’ Associations to come into conflict with the law by virtue of their very reason for being, or the way in which they have traditionally been organised. There is potential for misunderstanding and a real lack of clarity around the regulation of Students’ Associations, a situation that could not be seen as positive progress, and one that we hope the Executive will be as keen to avoid as Students’ Associations are. We urge the Executive to make specific exemptions, or at least offer specific solutions, to ensure that the problems we have outlined to not arise. It is vital that Students’ Associations and the principles by which they operate should be secured for the benefit of students across Scotland.

Submitted by and on behalf of the Scottish Executive Committee

Graeme Wise
Public Affairs Officer
National Union of Students Scotland
24 January 2005

WRITTEN EVIDENCE FROM NEVILLE P JUDD

My submissions:-

I would like to see formed a Scottish Charity Commission/Regulator.

This office, I believe, should determine Charitable Status (not the Inland Revenue).

This office should also inspect/vet all yearly balance sheets and constitutions of all Registered Charities in Scotland, big or small.

This office should keep a public Register of Charities.

Encourage and monitor compliance with charity legislation and notify all charities of any changes in legislation.

Charities should be put into two groups:-

Group 1
Large professional charities, who employ five or more staff.
I think these groups yearly accounts should be on view in public. Maybe in the public library, as these bodies don’t seem to like showing their accounts to the public and we don’t know coming into or out of their funds, as we are talking big money and could be big fraud. As we the public are asked to give, but denied information about their running.

Group 2
This group is the lifeline for all small villages and small islands in Scotland and should be given more help and support, as most of them are running on a shoestring and they do a grand job of work in the Community. These small groups whose volunteers do a grand job in the Community and are not registered should be encouraged to register as this would make sure their book keeping and running of their group was satisfactory.

This office should investigate misconduct and take remedial or protective action if necessary and in doing so they should stamp out fraud at all levels.

ps I’ve been a volunteer for some 45 years in England and on Eday, Orkney. In that time I have had to put right more than one set of accounts for small groups and I’ve also had to help them rewrite their constitutions, this is two areas that need to be looked at.

Thanking you

Neville P Judd
20 January 2005

WRITTEN EVIDENCE FROM PLAY SCOTLAND

The Charity Test: Charitable Purposes

The list of 13 charitable purposes does not include play and recreation as a charitable purpose in itself. As it stands, a charity solely or mainly devoted to advancing or providing play or recreational opportunities and facilities would have to word its objects to satisfy another purpose (education, health, community benefit, care). Although play does benefit all these purposes, the UN Convention Article 31 is a clear message that play should be a focus of attention and recognition for itself, and should not rely on objectives for another purpose.

Play Scotland recommends that play and recreation be added to the list of charitable purposes.

A Definition of Play and its importance

"Play is freely chosen, personally directed, intrinsically motivated behaviour that actively engages the child." (National Playing Field Association, Best Play: What play provision should do for children, 2000)

Play is essential for children’s social, physical, intellectual, creative and emotional development. Play is the way children “express their impulse to explore, experiment and understand.” (DCMS, Getting Serious About Play: A review of children’s play, 2004)

The United Nations Convention on the Rights of the Child


Article 31 of the Convention states:
“State parties recognise the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”

Play Scotland

Play Scotland is the lead body for play in Scotland. Play Scotland’s vision is to make the child’s right to play a reality in Scotland for the 1 million Scottish children. The organisation advocates for the best
play opportunities wherever children play – at home, in the streets, at school and out of school care. It is a membership organisation and represents people working in and interested in play.

Judy Savin
Director
Play Scotland
January 2005

WRITTEN EVIDENCE FROM PUBLIC FUNDRAISING REGULATORY ASSOCIATION (SCOTLAND)

Objectives of the Bill

The Bill itself shares many of the objectives of PFRA (Scotland) and, as the current charity-led self regulatory body for the face to face and door to door fundraising industry, PFRA (Scotland) welcomes the legislation as a force for good both in terms of the protection of reputable charities and the protection of the Scottish public whose financial support is crucial to the long term viability of charities in Scotland.

PFRA (Scotland) wish to ensure that any new legislation in Scotland protects the future income streams of Scottish charities and enables them to continue to advance their work. Scottish charities are particularly vulnerable to fluctuations in donated income as they are, on average, more localised and smaller than their counterparts in England and Wales. To this end, whilst any Scottish legislation cannot be incompatible with existing or future legislation covering England and Wales, there must be flexibility within that legislation to respond properly to particularly Scottish scenarios.

Self Regulation & OSCR

PFRA (Scotland) believe that self regulation of the face to face and door to door fundraising industry in Scotland will continue to be stringent and effective, and view OSCR as a valuable new partner in ensuring the highest possible standards in order to protect Scottish charities and the Scottish giving public.

Fundraising – Licensing, Site Allocation and Evaluation

PFRA (Scotland) acknowledge that Local Authorities must be accountable to their constituent population, and that retaining the power of licensing public benevolent collections enables them to fulfil this function. Local Authorities should not, however, have the power to rule on the potential profitability or suitability of a collection a charity wishes to conduct in their area, as the draft legislation currently allows for.

At present, the day-to-day mechanics of site evaluation and allocation is carried out by PFRA (Scotland) as the self-regulator. Legislation delegating this function away from the self regulator and transferring it to Local Authority control would lead to an arbitrary system of licensing over 32 Local Authorities and would, unfairly penalise fundraisers and the charities they work for and jeopardise future income streams

PFRA (Scotland) believe that face- to-face and door-to- door fundraising in Scotland must be allowed to take place in an environment that enables all registered charities who wish to fundraise in this manner to have equal access to sites across Scotland, regardless of the charity’s function or purpose. Sites must be evaluated and allocated against a standard set of criteria, carried out by or developed in conjunction with PFRA (Scotland) as the self-regulator for the industry. OSCR should have the power both to compel local authorities to follow a standard set of guidelines when carrying out their licensing function, and to investigate and correct unfair practice should it occur

Consequences of the Bill’s Enactment

PFRA (Scotland) believe that, as the Bill currently stands, there is a potential to damage charitable income streams through misunderstanding of the mechanics of face-to-face and door-to-door fundraising.
This method of fundraising uses comprehensive staff training before it takes place and a rigorous system of investigation and penalties for those who abuse it. A clear complaints system is already operated by the self-regulator, yet it is often the case that local authorities or other bodies who object to such fundraising practices and call for their curtailment have not made previous use of this system or contacted the self-regulator to investigate the potential for alternative arrangements.

Face-to-face and door-to-door fundraising remains one of the most cost-effective ways for charities to secure long term giving to their cause. Insufficient understanding of the process, or a knee-jerk reaction to street collection, puts this income in jeopardy by leaving it open to legislation that enables Local Authorities to satisfy a local political imperative before protecting Scottish good causes.

PFRA (Scotland) believe that a solution to this risk lies in an assured commitment to partnership working between PFRA (Scotland) as the industry self-regulator, OSCR and Local Authorities, with OSCR holding powers to enable it to compel all parties to put Scottish charities first in the licensing process.

In practical terms, the day to day implications of a system that devolved the entire process of licensing, evaluation and allocation of fundraising sites would be to massively increase the workload and costs of Local Authorities. PFRA (Scotland) have presented models that enable the industry to bear a greater share of those financial and time costs and would encourage all parties involved in this legislation to consider them in future regulatory stages.

Morag Fleming
Public Fundraising Regulatory Association (Scotland)
24 January 2005

WRITTEN EVIDENCE FROM ROYAL COLLEGE OF NURSING SCOTLAND

The Royal College of Nursing (RCN) is the UK's largest professional association and union for nurses, with over 370,000 members (35,500 in Scotland). Most RCN members work in the NHS, with around a quarter working in the independent sector. The RCN works locally, nationally and internationally to promote standards of care and the interests of patients and nurses, and of nursing as a profession. The RCN is a major contributor to the development of nursing practice, standards of care and health policy.

RCN response

RCN Scotland is broadly supportive of both the general principles and content of this Bill. We recognise that we will be one of the organisations that would be covered by the provisions of the Bill and that we would need to register with the proposed Office of the Scottish Charity Regulator. We have no further comments to make on the detail of the Bill at this stage, but will continue to monitor its progress through Parliament.

Pat Dawson
Head of Policy & Communications
RCN Scotland
24 January 2005

WRITTEN EVIDENCE FROM ROYAL NATIONAL LIFEBOAT INSITUTION

I understand that you are still able to accept submissions on the Charities Bill.

We have been able to persuade the Home Office to amend the proposed heads of charity in the English Charities bill to include a purpose which specifically covers the purpose of the Royal National Lifeboat Institution, namely:

'the advancement of health or the saving of lives'.

We would suggest, therefore, that it might be sensible for the Scottish Bill to be similarly amended, so that there is commonality between the jurisdictions.

Ian Ventham
WRITTEN EVIDENCE FROM ROYAL SOCIETY FOR THE PROTECTION OF BIRDS (RSPB) SCOTLAND

Summary

RSPB Scotland welcomes the Executive’s proposals to strengthen the regulatory framework for charities operating in Scotland, and supports the need for these measures in order to reassure the public regarding the activities of the charity sector as a whole. We support the need for the Office of the Scottish Charity Regulator (OSCR) to be independent of ministers, and note that ministers would retain significant powers to direct OSCR in its activities and to introduce secondary legislation with very few limitations on the scope of those powers. We would like to see provisions in the Bill which require OSCR to act reasonably and proportionately, and to co-operate effectively with other regulators, in order to minimise the burden on charities which are already effectively regulated, and so the amount of scarce charitable resources diverted away from the good cause for which they are primarily intended. We urge Members to take all possible steps to ensure this outcome, while introducing a regime which ensures that charities operating in Scotland are effectively governed and managed.

Impact on UK charities operating in Scotland

The RSPB works throughout the UK and has a substantial autonomy, presence and operations in Scotland. The support of our members throughout the UK is vital to enable us to carry out our work for birds and biodiversity in Scotland and we urge legislators in Scotland to avoid introducing measures which inadvertently force UK charities such as the RSPB to divert scarce charitable funds away from charitable works in Scotland.

While the Consultation Document published earlier this year expressed clear intentions that the regulatory approach should be reasonable and proportionate, this is not established on the face of the Bill. Indeed, OSCR appears to have an unfettered discretion to act: clause 1(3) states that: ‘OSCR may do anything (in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions’. We would therefore like to see a duty imposed on OSCR in clause 1 (along the lines of the requirement in clause 1(5) regarding equal opportunities) to act ‘reasonably and proportionately’.

Cooperation between regulators

To ensure that charities are effectively regulated in Scotland, whilst minimising the burdens of dual regulation on charities subject to more than one regime, regulators will need to work together. We do not believe that the current provisions regarding co-operation between OSCR and other regulators are sufficient to ensure this: ‘OSCR must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators’ (clause 20).

Whilst we appreciate that OSCR cannot force other regulators to co-operate, we believe the Bill could give effect to the belief expressed in the Consultation Document that ‘in practice…charities should not be unduly burdened by the requirement to register in two places and comply with two processes’. This could be achieved by establishing a principle of mutual recognition or reciprocity between regulators, so that information provided to one is prima facie deemed to meet the needs of another, unless there is good reason to demand additional reporting. This would apply to charities similar arrangements to those made for government bodies in the Scotland Act – which identifies cross-border bodies and makes provision to ease the regulatory impacts in both jurisdictions. In addition, the Bill could specify that OSCR should harmonise account-filing deadlines with the Charities Commission for England and Wales in order to minimise the burden on UK charities regulated north and south of the border.

It would not assist the credibility of the charity sector in Scotland, or of OSCR itself, if charities were seen to increase significantly the amount of charitable funds spent complying with the requirements of registration without any commensurate benefit in terms of improved governance.
Charitable purposes and ‘public benefit’

We welcome the proposed definition of charitable purposes, and strongly support the efforts being made to minimise anomalies between the definitions in Scotland and the rest of the UK in order to reduce uncertainty.

As for public benefit, we welcome the attempt to establish some basic principles in the Bill, in the interests of greater certainty. However, the drafting of clause 8 is impenetrable and more likely to confuse than clarify.

Fundraising activity

Scots are well recognised as significant contributors to charitable causes of all kinds, both locally, at Scottish, UK and international levels. We welcome the steps taken to increase the confidence of the public in the charity sector as a whole and the approach taken in the Bill to improving the regulation of benevolent fundraising in Scotland. We will support any voluntary regime.

Should the current approach fail, the Bill provides for ministers to introduce further regulations on fundraising (clause 82), and these would be the subject of further consultation. It would be a great shame if such regulations were in any way to reduce the ability of UK charities to raise funds in Scotland for good causes because the costs of tailoring fundraising materials to meet different regulatory requirements make UK-wide funding approaches (e.g. appeal mailings) prohibitively expensive and burdensome. We suggest that this possibility could be avoided if the Bill made clear that, when developing any regulations, ministers will have regard to requirements imposed by charity regulators elsewhere in the UK, in order to minimise the barriers to UK-wide fundraising initiatives.

Duties of charity trustees

We welcome the emphasis placed on the independence of charities and believe it is critical to the credibility of the charity sector as a whole in Scotland. We believe this is another area where the sector would benefit from greater clarity as to how the provisions will operate in practice, where charities are subject to more than one regulatory regime. For example, a reciprocal arrangement between regulators (as suggested above) would ensure that charities are not subjected to unco-ordinated and simultaneous investigation by more than one regulator. If an investigation were carried out by one regulator (e.g. OSCR), this would not preclude another (e.g. the Charity Commission for England and Wales) from investigating further any matter on which it was not satisfied, but such co-ordination would significantly reduce the burden on the charity concerned.

For further information please contact:

Julia Harrison
Advocacy Officer
RSPB Scotland
24 January 2005

WRITTEN EVIDENCE FROM THE SALVATION ARMY

Introduction

The Salvation Army is an integral part of the Christian Church although distinctive in government and practice.

Its constitution is established in the Salvation Army Act 1980 (as amended) in which its objects are shown as ‘the advancement of the Christian religion.....and in pursuance thereto, the advancement of education, the relief of poverty, and other charitable objects beneficial to society or the community of mankind as a whole’.

The services of The Salvation Army are freely on offer to all regardless of gender, race or sexual orientation.

The Salvation Army appreciates the opportunity to respond to the Charities and Trustee Investments (Scotland) Bill.
General Response

The Salvation Army recognises the work undertaken by voluntary, charitable and faith based organisations and acknowledges the public benefit and public good that results to the peoples of Scotland.

As previously indicated, The Salvation Army is broadly supportive of the reforms contained in the Bill which will assist in maintaining public confidence in Charitable Work.

As a Charity, which is currently regulated by the Charity Commission, we have previously indicated our concerns that the provisions of the Bill might involve us in an unduly onerous additional administrative burden and the incurring of additional expense in meeting the requirements of dual registration and dual regulation.

We understand that Charities such as ourselves will not be expected to provide separate Scottish accounts or reports to OSCR and we understand that there is an intention that the information to be provided to the Scottish Regulator should be no more than the consolidated information which is at present provided to the Charity Commission.

We appreciate that it has been stated and it is generally understood that there is no intention to impose significant additional administrative burdens. However, we believe that the requirements for registration for charities such as ourselves should be no more stringent than that at present required by the Charity Commission. We are of the view that it would be proper and appropriate to enshrine this in the primary legislation making it clear what the requirements are for those who are currently regulated outwith Scotland but operate within Scotland. With cooperation between the regulators and the use of modern technology it should be possible to facilitate the provision of this information from the primary regulator to the secondary one automatically. We suggest below that reciprocal legislation might be appropriate.

The question of dual regulation causes us some concern. As a charity even although we are regulated from England we are subject to the requirements of Scots Law. Any breach of the requirements of Scots Law would bring about regulatory sanction from our present regulator. We believe that in the normal course of events regulation from one source is sufficient and that this whole area requires clarification in the Bill.

Co-operation between the regulatory authorities as expressed in the Bill should ensure that any problems relating to charities would be shared between regulators which would allow the primary regulator to take such action as it deemed appropriate if prompted by the secondary regulator.

We cannot see the point in, for example, requiring a charity to seek two separate sets of consents and permissions from two separate regulatory bodies. We certainly have no problem with such matters being notified to the secondary regulatory authority. This could be done by the Charity but again allowing for the co-operation between regulators and the use of modern technology it seems to us that it would ease the administrative burden were there to be some form of arrangement whereby applications to and consents from and other matters are automatically notified by one regulator to the other. Legislation could possibly be introduced on either side of the Border to secure such cooperation.

We have had the opportunity of reading the evidence presented by Oxfam to the Committee and broadly speaking we are very supportive of the points which they have made to the Committee. We believe that there should be far greater emphasis in the Bill on clarifying the position relating to the requirements for charities such as ourselves.

Our overall concern is to avoid unnecessary expense and duplication at the expense of our charity work.

Designated National Collectors

At the present moment we have been granted Exempt Promoter Status and we would respectfully suggest that transitional arrangements should be put in place to provide for those charities currently accorded this status to be automatically transferred to the status of Designated National Collectors albeit that subsequently they would be subject to the criteria to be specified for the purposes of retaining that status.
Designated Religious Bodies

On the whole question of regulation, might we draw the Committee’s attention to the statement in the explanatory notes at paragraph 71 regarding Designated Religious Charities being exempt from certain changes to their constitutions as set out in Section 16. This does not seem to us to tie in with the actual terms of Section 64 and Section 16 of the Bill. Perhaps this requires clarification.

Conclusion

The Salvation Army is broadly supportive of the Charities and Trustee Investment (Scotland) Bill which will be of benefit to the running of charities and engender confidence and continued support of the public in Scotland. However, The Salvation Army is concerned that the requirements of dual registration and regulation are clarified for charities such as ourselves to avoid unnecessary duplication of resources and expense.

Alan Dixon, Major
Assistant to the Scotland Secretary
The Salvation Army
24 January 2005

WRITTEN EVIDENCE FROM SCOTTISH COUNCIL OF JEWISH COMMUNITIES

The Scottish Council of Jewish Communities generally welcomes the intention of the Charities and Trustee Investment (Scotland) Bill. However we would urge that the draft Bill should be amended to provide clarification and reassurance on the following points.

The public benefit test

i) Our principal concerns relate to the public benefit test. We share the concern of other faith communities as to whether public benefit might in future come to be defined in solely material terms, thus excluding groups that only provide spiritual and moral benefit from charitable status. The definition proposed in the consultation paper specifically stated that: ‘benefit need not be restricted to material benefit’ (p10) and we are disappointed that this has not been carried forward into the Bill.

ii) We are particularly concerned that the Bill decouples ‘the advancement of religion’ from ‘public benefit’ and strongly urge that the current presumption should remain in place. This would also remove the confusion which presently exists as to whether every congregation or community would have to prove public benefit on an individual basis, or whether it would be for a religion as a whole to prove public benefit, after which each congregation would be automatically recognised as meeting the requirement.

iii) It is our view that the members of many religious and ethnic minorities derive significant benefit from the provision of social activities (for example clubs for youth or the elderly, counseling and other welfare services) which cater to their religious and cultural needs from within their own community. In addition there is arguably a benefit to the entire public when private charity, whether financial or through voluntary service, provides what would otherwise be a charge on the public purse.

We are, therefore, very concerned at the view expressed recently by an MSP in the Public Petitions Committee that: ‘We believe that when charities gather money in Scotland or Britain that money should be available to everyone’ and ‘I am also very disturbed .... that [this] charity benefits only people from the Jewish religion and with a Jewish background. That is not charitable in any way.’ (Official Report 27th October 2004) A great many charities serve particular interest or community groups, and it is our view that the Bill should clarify the meaning of ‘public’ in the term ‘public benefit’ to confirm that sections of the public constitute the public. We suggest that the Scottish public do not expect charities raising money to alleviate heart disease to fund research into multiple sclerosis, nor to provide services for those in perfect health. Neither do they expect charities whose remit is to support elderly and infirm Muslims to fund Jewish youth groups. We would welcome a clear statement recognising that different charities operate for the benefit of different groups in society, and that this fulfils the Bill’s requirement of ‘public’ benefit.
iv) We are familiar with the term ‘disbenefit’ in a business context, but fail to understand its application in the context of the Bill (section 2aii). We do not regard it as helpful and recommend that its use should be reconsidered so as to ensure clarity.

Charities operating in both England and Scotland

i) Our concerns about the situation of charities that operate in both Scotland and England have not been fully alleviated despite the Bill’s attempt at clarification. The reference to charities ‘carry[ing] out activities in any office, shop or similar premises in Scotland’ (section 14bii) is very broad and likely to leave many charities in confusion. We are aware that many cross-border charities hold meetings and consultations in such premises without using them for conducting fundraising activities, and there is no indication as to whether this would require them to register with OSCR in addition to the Charity Commission.

ii) We note and are concerned by the differences between the English and Scottish Bills with regard to religion. It is our view that radically different definitions of public benefit north and south of the border would lead to an inequitable and confusing situation, where, for example, an organisation might be defined as charitable in England but not in Scotland. This would give rise to numerous problems for a charity based in one jurisdiction and operating in the other. It is our view that the inclusion in the Bill of a broad definition of ‘religion’ (as the Joint Westminster Committee has recommended for the English Bill) would be helpful in this respect, as would a provision permitting reference to precedent and common law with regard to determining public benefit.

Charitable purposes

We would also welcome the introduction of an additional charitable purpose for ‘the promotion of religious harmony, racial harmony and equality and diversity’ similar to that recommended by the Joint Westminster Committee for the English Bill as we are concerned that this may not be covered under any of the existing ‘heads’.

Summary

In conclusion, the Jewish Community generally welcomes the intention of the Charities and Trustee Investment (Scotland) Bill to ‘ensure a robust, proportionate and transparent regulatory framework’ (Policy Memorandum) but does not feel confident that the Bill in its current form will be able to achieve this. We hope that these matters will be addressed during the Bill’s passage to enable ‘charities to operate effectively in a modern society’ (ibid).

Note: The Scottish Council of Jewish Communities is the representative body of all the Jewish communities in Scotland comprising Glasgow, Edinburgh, Aberdeen and Dundee as well as the more loosely linked groups of the Jewish Network of Argyll and the Highlands, and of students studying in Scottish Universities and Colleges.

In preparing this response we have consulted widely among members of the Scottish Jewish community, particularly those involved in the management of charitable organisations.

Leah Granat
Public Affairs Officer
Scottish Council of Jewish Communities
24 January 2005

WRITTEN EVIDENCE FROM SCOTTISH ARTS COUNCIL

Introduction

The Scottish Arts Council is the lead body for the funding, development and advocacy of the arts in Scotland. In 2004/05 the Scottish Arts Council has a total budget of £67 million. £47 million (70%) of this money comes from the Scottish Executive and £20 million (30%) from the National Lottery fund.

The Scottish Arts Council was established by Royal Charter and operates at arms length from the Scottish Executive. In addition, the Arts Council has statutory functions under the National Lottery Act...
The Scottish Arts Council is currently a registered charity (SCO 02835)

The Charity Test

The Royal Charter of the Scottish Arts Council states –

‘The objects for which the Council are established and incorporated are as follows:

a) To develop and improve the knowledge, understanding and practice of the arts;

b) To increase the accessibility of the arts to the public; and

c) To advise and co-operate with Departments of Our Government, local authorities, the Arts Councils for England, Wales and Northern Ireland, and other bodies and individuals on any matters concerned whether directly or indirectly with the foregoing objects.’

The Scottish Arts Council’s work therefore clearly meets the defined charitable purposes in section 7 (2).

However the Scottish Arts Council fails the charity test under section 7 firstly under section 7 (3) (a) as if the Scottish Arts Council was wound up all assets would revert to the Scottish Executive.

The Council may also fail the Test under Section 7 (3) (b) which states that an organisation will fail the charity test if – ‘Its constitution expressly permits a third party to direct or otherwise control its activities’

7a The Scottish Arts Council’s Royal Charter (appendix 1) states that members of the Council shall be appointed by Our Scottish Ministers and Our Scottish Ministers shall appoint one of the members as chairman. However it is the Council, rather than Scottish Ministers, who have the power to carry out the Council’s Primary functions of making grants.

The Scottish Arts Council would welcome further investigation by the committee to clarify this aspect of the charity test.

The Scottish Arts Council believe that it is the actions of trustees and their freedom to act independently rather than how they are appointed that should be most important in determining charitable status.

Consequences of the Bill’s Enactment – Loss of charitable status

Financial impact

The loss of charitable status will lead to a significant impact on the Scottish Arts Council administration costs. Current benefits of charitable status of rates relief, and discounts on software and other purchases will be lost.

The Scottish Arts Council would expect any additional costs incurred as a result of a change in status to be borne by the Scottish Executive.

Charitable donations

The Scottish Arts Council from time to time receives charitable donations and legacies and although income from this channel is small compared to overall income it is an avenue which the Scottish Arts Council are actively looking to encourage and one which would be closed following the loss of charitable status.

Future projected losses

Recent years have seen the Scottish Arts Council embark on some bold, large-scale initiatives, often working in partnership with other organisations such as the National Galleries and the British Council Scotland. Examples of these initiatives are –
Scotland’s first national presentation at the internationally-renowned Venice Biennale in 2003, the world’s largest showcase for the contemporary visual arts. Scottish artists will be returning to Venice to exhibit in the 2005 Biennale.

A major programme of contemporary Scottish culture at the Smithsonian Institute Festival in Washington in 2003.

13a. Large projects such as these have been well received and celebrated. In order to sustain and widen the number of such projects and build on these recent successes the Council is increasingly looking to partnership support, trusts and sponsorship from the private sector.

13b Without charitable status this avenue of funding would be unavailable which would limit the number of international programmes the Scottish Arts Council could support in the future.

Parity with other UK Arts Councils
The break up of the Arts Council of Great Britain in 1994 lead to the establishment of the Scottish Arts Council along with the Arts Council England, Arts Council of Wales and the Arts Council of Northern Ireland. The Arts Councils for Scotland, England and Wales are currently registered charities.

The Charities Bill in Westminster will not affect the charitable status of the Arts Councils for England and Wales therefore there would be a disparity between the Scottish Arts Council and other arts councils.

There have been frequent occasions when the Scottish Arts Council has worked with other arts councils in the UK on joint initiatives, A disparity of charitable status may prevent some joint initiatives from going ahead and would disadvantage Scotland.

Implications for the National Theatre of Scotland.
The National Theatre of Scotland was established by the Scottish Executive in 2004. With the appointment of an Artistic Director in late 2004 the Scottish Arts Council expects the National Theatre to be fully established in 2005.

Unlike Scotland’s other national companies - Scottish Ballet, the Royal Scottish National Orchestra, the Scottish Chamber Orchestra and Scottish Opera - the National Theatre for Scotland is a wholly owned subsidiary of the Scottish Arts Council, an arrangement made at the specific request of the Scottish Executive pending the outcome of the Cultural Commission. The National Theatre of Scotland would therefore also lose its charitable status along with the Scottish Arts Council.

With Scotland’s established national companies attracting significant levels of charitable donations and enjoying the other benefits that charitable status brings the National Theatre of Scotland will be at a distinct disadvantage.

Maggie Page
Communications Officer - Parliamentary
Scottish Arts Council
18 January 2005

Appendix 1

Royal Charter of the Scottish Arts Council

Elizabeth the Second

by the Grace of God of the United Kingdom of Great Britain and Northern Ireland and of Our other Realms and Territories Queen, Head of the Commonwealth, Defender of the Faith:

To All To Whom These Presents Shall Come, Greeting!

Whereas We, by Royal Charter dated the seventh day of February in the sixteenth year of Our Reign, granted a new Charter replacing the Charter granted by His Majesty King George the Sixth on the ninth day of August in the tenth year of His Reign which constituted a Body Corporate by the name of...
“The Arts Council of Great Britain” with perpetual succession and with power to sue and be sued by the said name and to use a Common Seal:

And whereas the said Charters provided for the appointment of committees to be called the Scottish Arts Council and the Welsh Arts Council:

And whereas it has been represented unto Us that it is expedient to build upon the activities presently undertaken by the Arts Council of Great Britain and its said committees by their replacement with three new Bodies Corporate one of which should be an independent Scottish Arts Council:

Now therefore know ye that We, having taken the said representations into Our Royal Consideration, by virtue of Our Prerogative Royal and of Our especial grace, certain knowledge and mere motion have granted and ordained and by these Presents do for Us, Our Heirs and Successors, grant and ordain as follows:

1. (a) The persons who shall in accordance with provisions of this Our Charter be the Chairman and other members for the time being of the Scottish Arts Council are hereby constituted and from henceforth for ever shall be one Body Corporate under the name of “The Scottish Arts Council” (herein referred to as “the Council”).

(b) The Council shall have perpetual succession and a Common Seal, with power to break, alter and make anew the said Seal from time to time at their will and pleasure and by their name shall and may sue and be sued in all courts and in all manner of actions and suits, and shall have the power to enter into contracts, to acquire, hold and dispose of property of any kind, both heritable and moveable, to accept trusts and generally to do all matters and things incidental or appertaining to a Body Corporate.

(c) Without prejudice to the generality of the foregoing, the Council shall have the power to assume any rights, obligations and interests, including in land, of the Arts Council for Great Britain.

2. The objects for which the Council are established and incorporated are as follows

(a) To develop and improve the knowledge, understanding and practice of the arts;

(b) To increase the accessibility of the arts to the public; and

(c) To advise and co-operate with Departments of Our Government, local authorities, the Arts Councils for England, Wales and Northern Ireland, and other bodies and individuals on any matters concerned whether directly or indirectly with the foregoing objects.

2A. In furtherance of the objects of the Council but not otherwise, the Council shall have the following powers:

(a) to make grants upon such terms and subject to such conditions (including) the amount of a grant to be repaid on breach of any condition) and provisions for enforcement as the Council thinks fit and to take decisions relating to the enforcement of such conditions and to waive, vary or rescind the same;

(b) to delegate, subject to the consent of Scottish Ministers, all or any of its powers and duties to any person or body appointed by it, both within and outwith the Council as the council considers to be appropriate, or to committees or panels constituted in accordance with this Our Charter, and issue such rules of operation as it may deem to be appropriate;

(c) to indemnify all members of the Council and its properly constituted committees or panels who have acted honestly, reasonably, in good faith and without negligence, so that they will not have to meet out of their own personal resources and personal civil liability which is incurred in execution or purported execution of their duties;

(d) with the agreement of Our Scottish Ministers to undertake, execute and perform any trusts or incorporate any registered company or any other legal body to carry out its objects and activities;
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(e) to make to the Chairman of the Council such payment for his services as it from time to time, in its discretion, determines providing that such payment is met from funds specifically provided for that purpose by Our Scottish Ministers; and

(f) to do all such other things necessary or expedient for the purpose of attaining the objects of the Council and carrying out any statutory responsibilities of the Council.

3. All monies and property howsoever received by the Council, including and monies voted by Parliament, shall be applied solely towards the promotion of the objects of the Council, and no portion thereof shall be paid or transferred directly or indirectly to the members of the Council or any committee or panel of the Council, provided that nothing human shall prevent any payment in good faith by the Council:

(a) of reasonable out of pocket expenses to any member of the Council or its properly constituted committees, panels or other similar groups;

(b) of proper payments to any member of the Council or its properly constituted committees, panels or similar groups in exercise of the power contained in Article 2A(c) of this Our Charter;

(c) of proper payments to the Chairman of the Council on exercise of the power contained in Article 2A (e) of this Our Charter;

(d) of proper payments to any partnership or company in which a member of the Council, properly constituted committee, panel or other similar group has an interest provided that:-
   (i) such interest has been declared;
   (ii) the member concerned took no part in the decision to make such payment; and
   (iii) the payment does not relate to the activities of the member as a member of the Council, committee, panel or other similar group as the case may be.

4. (a) The Council shall consist of no more than sixteen members.

(b) The members of the Council shall be appointed by Our Scottish Ministers and Our Scottish Ministers shall appoint one of the members as Chairman. The terms of the appointment of each member shall be determined by Our Scottish Ministers.

(c) In appointing any member Our Scottish Ministers shall have regard to the desirability of the person having knowledge or experience of the arts, management, local government, industrial relations or administration or any other subject, knowledge or experience which would in their opinion be of use to the Council in exercising its functions.

(d) The Vice-Chairman shall be appointed by the Council, with the approval of Our Scottish Ministers, from amongst the members of the Council and the terms of that appointment shall, subject to the provisions of paragraph (5), be determined by the Council.

(e) Every member shall hold and vacate office in accordance with the terms of his appointment but

(i) A member shall be appointed for such a term, not exceeding three years, as shall be determined by Our Scottish Ministers, and shall be eligible for one subsequent re-appointment thereafter; and

(ii) A member shall cease to be a member (i) on termination of his membership by Our Scottish Ministers, or (ii) on submission of a written resignation of membership to Our Scottish Ministers.

(f) If Our Scottish Ministers are satisfied that any member of the Council

(i) Has had his estate sequestrated, is apparently insolvent, has been adjudged bankrupt, has made an arrangement with his creditors, or has granted a trust deed for his creditors or has been subjected to any similar legal process in any jurisdiction.
(ii) Has been convicted of an offence of a dishonest character

(iii) Is unable to perform his duties by reason of physical or mental illness, or

(iv) Is otherwise unable or unfit to discharge the functions of a member of the Council, or is unsuitable to continue as a member

Our Scottish Ministers shall have the power to remove that member from office as a member of the Council.

5. (a) The Council may act notwithstanding a vacancy among the members and the validity of any proceedings of the council shall not be affected by any defect in the appointment of a member.

(b) The quorum for meetings of the Council shall be a majority of members in office at the date of the meeting.

6. Subject to provisions of this Our Charter, the Council may regulate its own procedure.

7. (a) The Council may appoint a person or committees and panels to advise it in the exercise of such of its functions as may be determined by the Council.

(b) The Council may appoint to any such committee or panel members who are not members of the Council and may at any time revoke the Appointment of any members of such committee or panel.

8. The Council may regulate the procedure of any committee or panel or other similar group appointed by them in pursuance of article 7 of this Our Charter.

9. Any officer of the Department of Our Scottish Ministers who is appointed by Our Secretary of State to be an observer to the Council, or to any committee or panel of the Council, shall be entitled to attend any meeting of the Council or, as the case may be, of any committee or panel or other similar group to which he is so appointed.

10. (a) The Council shall, with the approval of Our Scottish Ministers, appoint a Director who shall be the principle executive officer of the Council and may appoint such other officers and take into employment its such other persons as the Council may determine in accordance with council policy.

(b) The Council may

(i) Pay to its Director and to its other officers and to other persons employed by it such remuneration as the Council may, with the approval of Our Secretary of State and the Lords Commissioners of Our Treasury, from time to time determine; and

(ii) With the approval of Our Scottish Ministers and the Lords Commissioners of Our Treasury pay to or in respect of any officer or other person employed by it such pensions (including gratuities) or provide and maintain for them such pension schemes (whether contributory or not), as the Council may determine; and

11. The Council shall keep proper accounts and other records, and shall prepare for each financial year statements of account in such form as Our Scottish Ministers with the approval of the Lords Commissioners of Our Treasury may direct and submit those statements of account to Our Secretary of state at such time as Our Scottish Ministers shall direct.

12. Our Scottish Ministers shall send the accounts to the Auditor General for Scotland for auditing pursuant to the provisions of the Public Finance and Accountability (Scotland) Act 2000 as the same may be amended from time to time.

13. The Council shall as soon as possible after the end of each financial year make to Our Secretary of State a report on the exercise and performance by it of its functions during that year.

14. The application of the Seal of Council shall be authenticated by the signatures of the Chairman or of some other member of the Council authorised generally or especially by the Council to act for that purpose, and one of such officers of the Council as may be so authorised by the Council so to act.
15. The Council may by resolution in that behalf pass ed at a meeting of the Council by a majority of not less than three-quarters of the members present and voting (being an absolute majority of the whole number of members of the Council) and confirmed at a further meeting of the Council held not less than one month or more than four months afterwards by a like majority, add to or amend or revoke any of the provisions of this Our Charter, and such addition, amendment or revocation, when allowed by Us, Our Heirs or Successors in Council, shall become effectual, so that this Our Charter shall henceforward continue and operate as though it had been originally granted and made accordingly: and this provision shall apply to this Our Charter as added to or amended in manner aforesaid.

IN WITNESS whereof We have ordered the Seal appointed by the Act of Union to be kept and made use of in place of the Great Seal of Scotland to be appended hereto:

WRITTEN EVIDENCE FROM SHETLAND CHARITABLE TRUST

I note from the website of the Scottish Parliament that the Communities Committee is seeking written evidence on the general principles of the Charities and Trustee Investment (Scotland) Bill and I understand that the Committee will shortly be discussing the topic covered in this letter

By way of background, Shetland Charitable Trust was established in 1974, and revised in 1997, to manage the donation to Shetland from the oil industry as a result of the building of Sullom Voe Oil Terminal. This donation was intended to compensate the people of Shetland for the disturbance caused by the construction and operation of the terminal. Shetland Charitable Trust has assets in the region of £200m. This supports a variety of services and projects to the value of about £13m each year to enhance the quality of life and provide public benefit for people living in Shetland. Over the years, Shetland Charitable Trust has made a huge contribution to creating a modern, positive and healthy community in Shetland.

The purpose of Shetland Charitable Trust is well known by the beneficiaries within the local community. It is seen as separate from the business of Shetland Islands Council and there is a clear understanding that the fund is being operated on behalf of the people of Shetland for the overall benefit of the community.

Shetland Charitable Trust responded to the Draft Bill in July 2004, specifically on the issue of governance. At that time, Shetland Charitable Trust welcomed the emphasis in the Draft Bill to focus on the independence of action of “charity stewards” rather than the method of appointment to the position. The Trust did not accept the view that the number of government appointments should be prescribed and instead, expressed a view that this should be determined by each organisation to suit their circumstances.

Trustees of Shetland Charitable Trust have again considered this issue in light of Section 7, the Charity Test, and the Policy Memorandum now published. Section 7 (3) (b) states that a body will not meet the charity test if its constitution expressly permits a third party to direct or otherwise control its activities.

Trustees of Shetland Charitable Trust (24 in total) are appointed by virtue of other offices they hold in their capacity as either councillors of Shetland Islands Council, the Lord Lieutenant for Shetland or the Head Teacher of Anderson High School in Lerwick. The Council does not appoint Trustees – they automatically assume office on being elected as Councillors or being appointed to the named posts. Members of the local community have a clear understanding that when they are voting for a local councillor, they are also voting for that person to be a trustee of Shetland Charitable Trust.

Shetland Charitable Trust is concerned that Section 7 may have the effect of removing the Trust’s charitable status as the Trust might be deemed to be directed or controlled by a “third party”, as a result of the high degree of overlap between Council and Trust membership. Trustees would be interested to learn if that is indeed the intent of the Committee.

Trustees continue to be of the view that it is independence of action which is most important, rather than the means by which Trustees are appointed. Trustees consider that the following points support their view that the current arrangements for making appointments to Shetland Charitable Trust should be able to be retained, and be capable of being awarded charitable status on the basis of the objectives which the Trust fulfils, within the new legislative framework.
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- The beneficiaries of Shetland Charitable Trust are the inhabitants of Shetland. The current arrangements ensure that there is wide representation of Trustees from all areas of Shetland and that all beneficiaries have access to someone they know in their area. This helps with direct accountability between the beneficiaries and the trustees who look after the assets of the Trust on their behalf. This process is open and transparent and widely understood by the local community. The democratic process means that this public accountability is tested regularly through the election process.

- Shetland Charitable Trust, through its charitable status, enjoys certain Westminster and Holyrood tax reliefs. The loss of charitable status would therefore have a direct financial disbenefit to the local community, which would result in a reduction in the services which the Trust is currently able to support.

- There is a possibility that the way in which the Bill is currently drafted would result in Shetland Charitable Trust losing its charitable status in Scotland but meeting the UK charity test for the purposes of tax relief. This would result in a situation of Shetland Charitable Trust not being regulated by OSCR but still able to operate as a charity for tax purposes.

- There is in place independence of action in terms of a separate decision making structure, management arrangements and statement of purpose, compatible with Clause 65 of the Bill. Unless where confidential business is being discussed, Trust meetings are open to the press and to the public. The Summary Annual Report and Accounts are widely distributed throughout the islands.

- Given its history, the purpose of Shetland Charitable Trust is naturally complementary to that of Shetland Islands Council so it makes sense to be strategically linked to ensure common goals and purpose, as encouraged through the community planning initiative. Both have in common the interest of the Shetland community.

- Councillors who are also Trustees of Shetland Charitable Trust have access to a wide range of knowledge and information, affecting all aspects of life in Shetland, which is beneficial to the Trust in carrying out its business.

- The current arrangements ensure a wide range of skills and knowledge within the pool of Trustees.

Shetland Charitable Trust considers that any change to the current governance arrangements would reduce the direct public accountability which is currently in place. Any selection, election or nomination/appointment process would be very likely to be less open and transparent than the current system. Trustees are concerned about the potential loss of charitable status and the disbenefit that would bring to the local community in financial terms. Consequently, Shetland Charitable Trust would formally ask that Section 7 of the Draft Charities and Trustee Investment (Scotland) Bill be re-drafted to enable organisations such as Shetland Charitable Trust to continue to secure charitable status, in keeping with the objects which the Trust has fulfilled for 30 years. Trustees consider that the current arrangements provide accountability to the beneficiary population but remain compatible with the Trust being regulated by and answerable to OSCR to ensure openness and transparency and full public accountability in our business.

Shetland Charitable Trust would wish to present their case to the Communities Committee for the continuation of the current arrangements to be built into the legislative framework, at a mutually convenient date and time.

In the meantime, I should be grateful if you would make the views of Shetland Charitable Trust available to the Members of the Communities Committee through this Call for Evidence.

Hazel Sutherland
General Manager
Shetland Charitable Trust
24 January 2005
WRITTEN EVIDENCE FROM VICTIM SUPPORT SCOTLAND

Victim Support Scotland welcomes this opportunity to comment on the Charities and Trustees Investment (Scotland) Bill. This Bill demonstrates the recognition of the need to reform the law for charities in Scotland. Reform must enhance public confidence in the work of Scotland’s charities, reflecting their integrity and value within Scottish culture, whilst enabling their valuable work to grow.

Context

Victim Support Scotland is an independent voluntary organisation which provides practical and emotional support to people affected by crime. Trained staff and volunteers deliver this service throughout a network of community and court based services. In 2003-4 Victim Support Scotland provided support in over 85,000 referrals, including people bereaved by murder, victims of sexual offences and victims of violent crimes. During the same period, the Witness Service made contact with over 67,000 witnesses.

It is an essential part of our work to campaign for improved care, support and understanding of the needs and rights of victims and others affected by crime. Our work over many years representing the interests of those affected by crime has had a major influence on public opinion and successive government policy. We are committed to raise awareness and to contribute to the wider debate on victims, criminal justice and social welfare.

Definition of charity

Charity test and ‘public benefit’
The Bill proposes that to be considered charitable an organisation must satisfy a 2 stage test:
- that the organisation falls in one or more of the charitable purposes set out, and
- that the organisation provides a ‘public benefit’

Victim Support Scotland broadly supports this test, in particular the overriding notion of public benefit as a central ethic of any charitable organisation. This is a key concept in the minds of the public when considering the role, purpose and values of charities in contemporary Scotland.

It is important that the opportunity to ensure a robust definition of what may constitute a charity is grasped during the reform process. Victim Support Scotland supports provision within the Bill to provide to determine ‘public benefit’. However we are unclear about the value of application of the ‘disbenefit’ test and would support further guidance. The explanatory notes or policy memorandum may be used to guide charities on the law to be applied.

How charities should be governed

Disqualification
The Bill proposes that certain people will not be allowed to be charity trustees. These include:
- people convicted of an offence involving dishonesty
- undischarged bankrupts
- people subject to disqualification under the Company Directors Disqualification Act 1986
- people who have previously been removed as charity stewards due to mismanagement or misconduct

Given the propensity for harm both to a charity itself and also to the public’s confidence in charities as a whole that can be caused by disreputable action by charity board members, Victim Support Scotland supports proposals within the Bill to prevent certain individuals from acting as charity trustees.

Information about charities

The Bill proposes that the Scottish Charity Register be made available for public inspection. Victim Support Scotland welcomes the transparency that can be brought about by the public availability of information about charities.
Fundraising

It is proposed that professional fundraising organisations wishing to raise funds on behalf of a charity hold an agreement with that charity allowing them to do so. Victim Support Scotland strongly supports this measure which should ensure that such fundraising work is done in a manner that is agreed by the charity. Furthermore provisions within the Bill allow for action to be taken against fundraisers rather than the charity.

OSCR Investigations and Action

The Bill gives the OSCR powers to investigate complaints about charities. Directions from the OSCR will be enforceable and can cover instances where misconduct has taken place.

Such investigations can seriously impact on the confidence of the public not just of the charity in question but also of charities as a whole. Victim Support Scotland strongly supports provision within the Bill for publication of the report on request, thereby enabling confidence to be restored in any charity investigated where no wrongdoing has been demonstrated.

Overall

Victim Support Scotland broadly supports these proposals. It is important, however, that reform does not place unduly heavy administrative burdens or legal responsibilities on charities and their members.

We believe that the Bill is a proportionate response which combines the need to strengthen public confidence in the integrity of charitable organisations with a regulatory regime that is commensurate with the scale of a charity’s operation.

We hope that you find these comments constructive and useful. If you have any further queries please do not hesitate to contact me at the above address.

Barry Jackson
Policy and Research Officer
Victim Support Scotland
25 January 2005

WRITTEN EVIDENCE FROM THE WELLCOME TRUST

Introduction

The Wellcome Trust (the “Trust”) is pleased to have the opportunity to respond to the call for evidence by the Communities Committee on the draft Charities and Trustee Investment (Scotland) Bill (the “Bill”). The Trust has focused its comments on the areas which may be relevant to the Trust’s activities, namely the charity test and the requirements to register with the Office of the Scottish Charity Regulator (“OSCR”).

About the Wellcome Trust

The Wellcome Trust is an independent, biomedical research-funding charity (registered charity no. 210183) established under the will of Sir Henry Wellcome in 1936. Its mission is to foster and promote research with the aim of improving human and animal health.

The Trust, whose headquarters are in London, is a privately endowed charity and does not raise any of its funds from the public. It has a diversified asset base of £10.1 billion (as at 30 September 2003). In the financial year ended 30 September 2003, the Trust’s total charitable expenditure was over £500 million, the majority of which was to fund research in the UK. Trust funding in Scotland for the year ended 30 September 2003 was approximately £50 million.

Registration with and regulation by OSCR

The Trust very much welcomes the inclusion of Section 14 of the Bill which will allow non-Scottish charities to describe themselves as charities in Scotland without having to register with OSCR subject to the conditions of Section 14. The Trust believes that Section 14 as it stands strikes the right balance between recognising, on the one hand, that the regulation of charities is specifically devolved
to the Scottish Parliament and, on the other hand, minimising the duplication of regulation for charities with no offices, shops or similar premises in Scotland.

The Trust believes that it is essential that Section 14 remains in its current form to ensure that the legislation does not act as a deterrent to charities like the Trust from funding in Scotland and to minimise the burden of dual (or multiple) regulation on non-Scottish charities.

The Trust currently refers to itself on its stationery as a “Registered charity”. To comply with Section 14 (c) of the Bill the Trust will need to amend its stationery in due course to state that it is “A charity registered in England and Wales”. Many UK-wide charities will have to make changes to the documents on which they refer to their charitable status and, particularly for smaller charities, this could be financially onerous unless a reasonable length of time is afforded to charities to make this change. We note that Section 97(3)(a) of the Bill allows for transitional provisions in this regard and we would welcome guidance and flexibility regarding the time by which charities must comply with Section 14(c).

Definition of charity

The list of charitable purposes in the Scottish Bill continues to be subtly different from the list of charitable purposes in the Charities Bill for England and Wales that was introduced into the House of Lords on 20 December 2004. The treatment of “public benefit” is also different.

Any significant divergence in the definitions of charity could cause problems for UK-wide charities. Those charities which will be required to register with the Charity Commission and OSCR would have to comply with more than one charity law regime which would hamper their efficiency and effectiveness. There is also a danger that if a divergence in law and regulation were to develop within the UK, charities or organisations that fund charities, may be discouraged from operating or funding in those parts of the UK where the law and regulation may be less favourable than in others.

To minimise the possibility of any significant divergence, it will be essential that the definitions of charity in both Bills are as similar and compatible as possible at the stage when they are enacted into legislation. Once the legislation comes into force, it will be vital for the Charity Commission and OSCR to take a synergistic approach to the interpretation of the definitions of charity.

Dr Louise Leong
Executive Assistant to the Director
The Wellcome Trust
24 January 2005

WRITTEN EVIDENCE FROM WEST DUNBARTONSHIRE CVS

West Dunbartonshire CVS (WDCVS) is part of the Councils for Voluntary Services Scotland Network and with CVS’s across Scotland exist to understand, communicate with and represent the voluntary sector as well as providing support, promoting good practice and growing the sector.

The Board of Directors of the CVS West Dunbartonshire broadly welcomes the proposed Bill and draws to the attention of committee members two specific issues;

- OSCR and the Regulation of the Charity Sector
- Consequences of the Bill’s Enactment

OSCR and the Regulation of the Charity Sector

- Welcome a recognised charity regulatory body for Scotland. This will address not only the generally considered issue of ensuring charities operate in the best interest of its stakeholders, but will also help to correct issues of poor practice arising from a previous lack of information provided, particularly to smaller charitable organisations. There is a degree of ignorance of the full implications of formation of a registered charity e.g. provision of information on demand etc
• Maintenance of a central register of all charities is welcomed but cognisance must be taken of the confidential nature of some contact information and the possible abuse of that information in the wrong hands if publicly available. This may lead to the resignation of some charity trustees and a loss of expertise and capacity in the sector.

• Need to consider graded compliance measures to reflect that a high percentage of registered charities have relatively low turnovers. In West Dunbartonshire 75%\(^{165}\) of charities reported a turnover of less than £5,000 per annum. What will be the provision for charities who generate no or limited income within any given year but still face the cost of a financial examination of its interests?

• There are considerable issues relating to the capacity of charity trustees to deliver this level of information immediately e.g. new monitoring information requested. This must be addressed through a targeted programme of upskilling – a clear role for the network of CsVS, the recognised intermediaries for the voluntary sector. Delivery through this network would encourage wider take-up, better targeting and follow-up checking, building of working relationships helping address any future compliance issues.

• Grading of reporting must also reflect issues such as complexity of return forms, level of financial breakdown detail for low turnover charities, clarity of language (no ambiguous terms).

• Delivery of the outlined regulation will be challenging for OSCR – difficult to manage the roles of assistance and compliance simultaneously and effectively.

• Clear role to adopt CsVS as trusted partners, particularly with regard to training and upskilling of the sector. More able to work alongside the sector to promote compliance in a non-threatening and supportive manner. This would require a commitment from OSCR to upskill the CsVS network and to provide checklist and compliance materials for delivery. This will have resource implications but would be the most cost effective delivery mechanism.

**Consequences of the Bills Enactment**

West Dunbartonshire CVS is aware of the limitations of the Bill in regards to support mechanisms for dealing with the outcomes of the implementation of the said Bill. Nevertheless, in this section CVS West Dunbartonshire would wish to underline the main issues that may arise as a consequence of the Bills enactment.

• **Training**

  Ensure that the Bills enforcement takes in to consideration the effect on Trustees. Many will have yet to participate in any formal training. There is a need for OSCR to work with support networks such as the CsVS to ensure that charities are capable of returning financial submissions, complete necessary paper work, bring about organisational change etc.

• **Promoting Best Practice**

  Ensuring that training given is concise, legal, and promotes sustainability across the sector.

• **Promotion of the independence of the charity sector**

  To ensure public confidence, OSCR should promote and regulate in regards to conflict of interest. This is underlined in the findings of the McFadden Report\(^{166}\) with specific issues relating to elected member membership of charities. Consideration should be given to widening the scope of investigation into conflict of interest in general and to underlining their impact on best practice if not properly registered.

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\(^{165}\) Valuing Our Voluntary Sector: An Evaluation of Voluntary Sector Activity in West Dunbartonshire, WDCVS 2003

\(^{166}\) Charity Scotland: The Report of the Scottish Charity Law Commission May 2001
WRITTEN EVIDENCE FROM YOUTHLINK SCOTLAND

YouthLink Scotland is the national youth work organisation for Scotland. We support the development of accessible, high quality youth work services which promote the well-being and development of young people. We are a national voluntary organisation working with both statutory and voluntary bodies. We are a membership organisation and include all 32 local authorities, and around 50 voluntary organisations in our membership. YouthLink Scotland is a registered charity, and the majority of YouthLink Scotland’s voluntary sector members have charitable status, and provide a wide range of activities and services for young people through youth work.

We welcome the opportunity to submit evidence to the Communities Committee’s Stage 1 inquiry into the general principles of the Charities and Trustee Investment (Scotland) Bill (“the Bill”). YouthLink Scotland’s evidence takes into account the Scottish Executive’s recent consultation report on the Bill, and raises a number of general issues which we consider are relevant to the modernisation of charity law in Scotland.

General

YouthLink Scotland welcomes the Bill, which we believe will make a significant contribution to developing a modern, proportionate regulatory framework for charities and fundraising in Scotland. Maintaining public confidence in the work of Scotland’s charities is vital, given charities’ reliance on public support for donations and volunteer staff. We believe that the Bill will establish a regulatory framework which will both strengthen public confidence in charities, and enable charities to maximise their potential.

There is, however, concern across the voluntary sector about the level of compliance costs which the sector will have to incur to meet its duties and responsibilities under the Bill. These costs are likely to include expenditure on training, and on the production of information material. Charities will also have to reprint stationary and publicity materials to confirm that they have charitable status, which could have significant costs implications particularly for the smaller charities. Against this background, YouthLink Scotland takes the view that the Scottish Executive should consult further with the voluntary sector to identify the type, and level, of such costs, and to identify what action the Scottish Executive would be willing to take to ensure that compliance costs for charities are affordable.

Role of a charity regulator (s.1- s.6)

YouthLink Scotland believes that the OSCR must ensure a sufficient level of information is made available to the voluntary sector about its work. Furthermore, charities should be given clear advice and guidance on how they must comply with their duties and responsibilities under the legislation. In this respect, YouthLink Scotland welcomes the Scottish Executive’s statement that the OSCR “will work alongside sector support providers to ensure that charities have access to the support they need to understand and comply with the new arrangements in this Bill”.

YouthLink Scotland also welcomes the statement that the OSCR will work within a framework of accountability. We believe this is essential if the OSCR is to retain the confidence both of the general public, and of the voluntary sector as a whole.

Definition of Charity (s.7- s.8)

The majority of YouthLink Scotland’s voluntary sector members have charitable status, and provide a wide range of activities and services for young people through youth work. YouthLink Scotland notes that the Bill introduces a new charity test which bodies and organisations must meet if they are to
attain charitable status in law. Under the Bill they will be able to do so only if their purposes consist of one or more of the charitable purposes outlined in the Bill, and they provide, or intend to provide, ‘public benefit’ in Scotland or elsewhere.

YouthLink Scotland believes that, given youth work specifically focuses on work with young people, Section 7(2) of the Bill should be amended to include the following new charitable purpose:

- The provision of informal education opportunities through youth work to promote the development of young people

YouthLink Scotland takes the view that the above amendment is necessary to reflect the important contribution which the youth work sector makes to support the development of young people within our society. This amendment would also complement the launch and development of the Scottish Executive’s national youth work strategy, which is expected to focus on a number of issues including the significant role of youth work within the lives of many young people in Scotland. In addition, amending the Bill in these terms would recognise the significant number of voluntary organisations within the youth work sector, and their provision of a wide range of youth work services and activities.

We also consider that such an amendment could help to promote sustainable and long term funding for many youth work projects. In this respect, it is worth considering the example of YouthLink Scotland’s member organisations, many of which are volunteer led. The latter provide generic services for, and offer a broad curriculum of activities to, young people, rather than short-term project work. This includes organisations like Youth Scotland, the main uniformed organisations such as the Scout Association, Girlguiding Scotland, the Boys’ Brigade and the Girls’ Brigade Scotland, and other organisations including the YMCA and the YWCA. The experience of our members is that organisations offering generic youth work services often find it hard to gain recognition for the invaluable work they undertake with a large number of young people across our society. This, in turn, exacerbates the difficulties they face in securing long term funding for such services. Providing a specific charitable purpose of supporting the development of young people through youth work would help organisations providing generic youth work services to maximise their funding opportunities from the public and private sectors. YouthLink Scotland, and our member organisations, believe that the Communities Committee should give further consideration to these issues as part of its Stage 1 scrutiny of the Bill.

YouthLink Scotland also takes the view that, in order to maximise the effectiveness of the regulatory framework for charities in Scotland, the Scottish Executive should continue to work closely with the UK Government to ensure that the definition of charity in Scotland is closely aligned with the definition to be applied in England and Wales. This would include the list of charitable purposes, and any definition of public benefit.

**Making Charity Reorganisation Easier (s.40 – s.41)**

YouthLink Scotland welcomes the proposals to make it easier for charities to reorganise, and to modernise their structures.

**Scottish Charitable Incorporated Organisations (s.49 – s.63)**

YouthLink Scotland also welcomes the introduction of Scottish Charitable Incorporated Organisations (“SCIOs”) as a new legal form for charities in Scotland. We note that the Scottish Executive has developed model constitutions for the SCIO, and will be consulting on these models in the near future. We also note from the consultation report that the Scottish Executive will be drafting regulations covering various aspects of the proposed SCIOs. YouthLink Scotland, and our member organisations, would like to be involved in any future consultations on the model constitutions for SCIOs, and on the draft regulations.

**Disqualification (s.68 & s.69)**

YouthLink Scotland welcomes the provisions relating to disqualification, and specifying the type of people who will be disqualified from acting as charity trustees. YouthLink Scotland takes the view that such provisions will help to strengthen public confidence in charities in Scotland. As part of this process, we believe that the OSCR must have adequate powers to investigate complaints, to monitor compliance with the law and to be able to deal effectively with any wrong doing by charities and their
trustees. This is critical if public trust is to be maintained in the work of charities. YouthLink Scotland notes the Scottish Executive’s expectation, in the consultation report, that if a charity trustee “is likely to be working with children or vulnerable people the charity would carry out these checks as a matter of course”. We believe that this should be clearly outlined in any information and guidance produced by the OSCR for charities, and for charity trustees.

**Regulating Charity Fundraising (s.78 – s.91)**

YouthLink Scotland also welcomes the Scottish Executive’s attempts to lay down significant foundations for the statutory regulation of charity fundraising through the Bill. We welcome also the recommendation that these foundations will be further developed by self-regulation within the charity sector. YouthLink Scotland and our member organisations would welcome further clarification through the Communities Committee’s Stage 1 consideration of the Bill of the timescales and procedures which will be involved in developing the model of self-regulation. As part of this process, YouthLink Scotland believes that further thought should be given to the development of stringent national guidelines to underpin and reinforce the system of self-regulation. These should outline the parameters of fundraising and of fund raising activities, as well as providing guidance on issues such as, for example, each charity’s responsibilities to its donors in respect of their donations.

**General Fundraising Powers (s.80 – s.82)**

YouthLink Scotland welcomes the provisions in the Bill designed to curb the activities of bogus fundraisers. Taking action against those claiming to be involved in fundraising for charities but whom, in reality, are fraudulently taking advantage of the public’s goodwill and generosity is an important safeguard against fraud. Such measures will help to strengthen the general public’s trust in charities, and in their fund raising activities.

We also support the provisions in Sections 80 to 82 of the Bill designed to regulate the activities of professional fundraisers, and of commercial participators. We note that these provisions include requirements that professional fundraisers working on an independent basis will have to provide information to potential donors about the amount of funds they will receive, while commercial participators will be required to confirm how much of the money they raise will go to the charity or cause. These provisions will help to tackle fraud, and to strengthen the general public’s trust in charities.

**Public Benevolent Collections (s83- s91)**

YouthLink Scotland welcomes the Scottish Executive’s statement that the OSCR will have a role in working with local authorities and police forces in Scotland to provide advice on the law, and to support these agencies, to agree a consistent practice in their processes for dealing with PBCs.

**Transitional arrangements for existing charities (s.97)**

YouthLink Scotland notes it is proposed that transitional arrangements will be introduced through regulations to ensure that existing charities have sufficient time to meet their duties and responsibilities under the Bill. YouthLink Scotland strongly believes that the Scottish Executive should consult the voluntary sector about these regulations before they come into force.

We further note it is proposed that all existing Scottish charities will be transferred onto the new Scottish Charity Register, and will continue to receive UK tax relief and other benefits. We also note from the Scottish Executive’s consultation report that the OSCR will then systematically review the register to ensure that each charity meets the new definition, and is complying with the regulatory system established by the Bill. It would be helpful if the Communities Committee could clarify the proposed timescale for the launch and completion of such a review.

YouthLink Scotland
January 2005
Charities and Trustees Investment (Scotland) Bill: The Committee took evidence on the Bill’s Financial Memorandum from—

Anne Swarbrick, specialist in charity law and Associate of Anderson Strathern, Solicitors.

The Committee asked Anne Swarbrick to provide further information on various issues. It also agreed that it would invite the Scottish Council for Voluntary Organisations to give oral evidence to the Committee on 18 January and that written evidence should be sought from the Scottish Council for Independent Schools, the Institute of Chartered Accountants of Scotland and the Scottish Federation of Housing Associations.
Scottish Parliament
Finance Committee
Tuesday 21 December 2004

[THE CONVENER opened the meeting at 10:10]

Charities and Trustee Investment (Scotland) Bill:
Financial Memorandum

The Convener (Des McNulty): I welcome the press and public to the 34th meeting of the Finance Committee in 2004. I remind people to turn off their pagers and mobile phones.

The first item on the agenda is scrutiny of the financial memorandum to the Charities and Trustee Investment (Scotland) Bill, which was introduced to Parliament on 15 November 2004.

I draw to members’ attention the letter that I received late last night from the Minister for Communities. It provides an update on the Office of the Scottish Charity Regulator’s budget, which has been increased since the financial memorandum was published.

Members have previously suggested that we appoint an adviser to aid our consideration of financial memorandums. As it is a relatively time-consuming process, we have decided to pilot a new system today and have invited along an expert witness who will comment on the financial memorandum. We can get feedback from members later about how well the approach works, but it will certainly provide us with an interesting insight.

With that in mind, I welcome Anne Swarbrick, who is a specialist in charity law and an associate of Anderson Strathern solicitors. I invite her to make an opening statement. I will then allow a period for questions from members.

Anne Swarbrick (Anderson Strathern): I hope that members all have my submission on the financial implications of the bill. My opening statement will very much follow the format of the submission.

I will make six main points about the financial implications of the bill. To a certain extent, the first point is dealt with by the letter that we have seen this morning from the Minister for Communities, which indicates that OSCR’s budget will be increased. The point that I make in the first part of my submission is that OSCR must be properly funded to do what is a very large and onerous task.

The second point, which is in many ways the most difficult one, is about the Scottish charity register and the Scottish charity test. Paragraph 122 of the explanatory notes indicates that the Scottish charity test should have a neutral effect on the number of charities in Scotland and the make-up of the sector. I do not accept that. I think that the proposed new definition is much narrower in scope than both the current definition and the proposed new English definition, and that that might have quite a profound effect on the number of charities in Scotland. We have heard an awful lot about the independent schools sector, but I am not talking about the independent schools sector when I make those remarks; the point is of much wider application throughout the sector. I am happy to come back to the matter and discuss it further if the committee would find that helpful.

The narrower definition has various knock-on effects. The first is that there will be significant costs to charities in trying to defend their charitable status in the light of the proposed new definition. There might also be significant costs to beneficiaries of charities. If a charity loses its charitable status and closes its doors, where will those people go for the services that they currently receive from the charity? There might be costs to local authorities in picking up the services that are no longer being provided. One point on independent schools is that the explanatory notes do not seem to make clear that there could be costs to local authorities for educating pupils who might require education as a result of possible closures of independent schools.

Section 3 of my submission relates to the reorganisation of charities. The point about educational endowments is slightly esoteric in some ways, but it is of great importance to universities, for instance, which derive quite a lot of their funding from such endowments. The proposals in the bill exchange one restriction on the reorganisation of educational endowments for a new restriction. My submission suggests that all the restrictions should be lifted. They are unnecessary and simply hinder the efficient reorganisation of such funds. We all know that education is a fast-changing sector. There is no need or reason to make it more difficult for educational establishments to marshal their funds.

The second point on reorganisation concerns trusts. The explanatory notes make it clear that public trusts that are not charities will be unable to use sections 40 and 41, which are about the reorganisation of charities. Such trusts will continue to reorganise themselves under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. However, one problem with the 1990 act is...
that it prohibits trusts from transferring their assets to incorporated charities. Sections 10 and 11 of that act were designed to encourage the transfer of funds from outmoded and outdated trusts into something that is a bit more relevant to today's circumstances. The fact that those trusts can transfer only to another trust and not to an incorporated charity does not assist transfers. Small amendments to sections 10 and 11 would greatly improve the use of such funds.

Section 4 of my submission is about charity trustees. Section 65 of the bill proposes additional duties for charity trustees and imposes criminal provisions. Those measures are much too demanding and are likely only to deter people from volunteering to be charity trustees. Charities already have difficulties in identifying people who are willing to take on the tasks, which can be onerous. Some existing charity trustees might well resign as a result of the provisions. One or two people have already asked me whether their considering resigning would be worth while. The provisions will lead to additional costs for charities in recruiting and training new trustees.

Section 5 of my submission concerns appeals and the Scottish charity appeals panel. The explanatory notes say that charities that wish to use the panel will have no costs. That might be correct as far as it goes, but it is not the whole story. The panel cannot award expenses to a charity that takes an appeal to the panel and succeeds. If a charity wants to take legal advice about an appeal, it must bear the cost itself—the alternative is that the charity goes to the tribunal unprepared and unrepresented. Such a charity would be taking on OSCR, which will undoubtedly have legal advice available to it. That would lead to inequalities between OSCR and appellants to the tribunal.

Therefore, I suggest that the Scottish charity appeals panel should have the power to award expenses to successful appellants. It should probably also have a limited power to award expenses to OSCR, but only when its view is that an appeal amounts to an abuse of process. That is the position that the Joint Committee on the Draft Charities Bill at Westminster reached on appeals and the arguments apply equally in Scotland.

The range of people who can appeal to the Scottish charity appeals panel is narrow. The policy memorandum envisages that anybody else who wants to question a decision of OSCR will have to use judicial review. That extremely costly process could be avoided by widening the list of potential appellants to the Scottish charity appeals panel and allowing anyone who is affected by one of OSCR's decisions to have it reviewed by the tribunal.

In the sixth section of my submission, which focuses on trustee investment powers, I suggest how we might improve an already improved regime. I believe that the provisions miss an important aspect. Part IV of the Trustee Act 2000 gave trustees in England and Wales the power to delegate certain functions, including investment of assets, to agents or nominees. That power should also be given to Scottish trustees to increase the possibility of improving investment returns for those trusts.

I hope that that summary of my paper has been helpful.

The Convener: Thank you. Your comments have been very valuable. Before we move to questions, I should point out that the committee is concerned more with the bill's financial implications than with any purely policy issues. Some of the points that you raised relate to policy issues.

Aside from Anne Swarbrick's evidence, members have received a range of submissions from other organisations. I will kick off our questions by asking whether you have any views on concerns expressed by a number of agencies, including the National Galleries of Scotland, about the implications of the proposed regime for their fundraising arrangements. After all, if they are unable to fundraise as much as they have been able to, that might impact on other budgets.

Anne Swarbrick: The other submissions make a number of very valid points. First, the National Galleries of Scotland's submission refers to the extension to the National Gallery of Scotland building on Princes Street, which was at least partly funded by substantial grants from charitable grant-giving trusts. By and large, those trusts can give grants only to charities. If the National Galleries of Scotland had not been a charity, it would not have been able to receive that significant tranche of funding, which is set out in the submission.

Secondly, the proposed regime will have significant tax implications. Although I do not pretend to be a tax lawyer, I will give the committee my understanding of those implications. The National Galleries of Scotland receives many paintings as part of inheritance tax provisions. Losing its charity status would have a knock-on effect on those bequests, as there would be difficulty in obtaining tax relief on them. I am afraid that is as technical as I am prepared to get on the subject. I understand that there is a difficulty in that respect, and the committee might require to receive more detailed advice on it than I can provide.

The Convener: Without going into any details, do you think that similar issues arise for similar organisations under the English legislation?
Anne Swarbrick: That has not happened, because the definition in that legislation is couched in significantly different terms. In principle, it allows all existing charities to retain their charitable status, although they are required to satisfy a public benefit test. As a result, the English sister organisations of the National Galleries of Scotland would retain their charitable status and, because all galleries are open to the public anyway, would certainly be able to satisfy the public benefit test. The question will not arise down there.

The issue of independence that is raised in the Scottish bill is not raised in the same manner in the English legislation, and so does not give rise to the difficulties that we think that aspect might create up here.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): I am interested in your comments about OSCR’s budget. Despite the fact that it has been significantly increased to about £4 million, you maintain that that is still not enough, because its remit is narrower than that of its counterpart in England. Have you been able to identify a more appropriate overall figure?

Anne Swarbrick: I am not quite saying that. In the paper, I said that OSCR’s role is very wide. That role is not just to register and monitor charities, but to carry out investigations. OSCR must be properly funded to deal with all those issues. I am not in a position to say what the proper funding would be. I left OSCR earlier this year and things will have moved on immeasurably since then. I am heartened by the fact that there is additional funding for OSCR, which probably deals with my point. OSCR has a huge remit and a big task to take on. If it is not properly funded to carry out that task, it will not be able to do so properly. That is in no one’s interests.

Mr Brocklebank: You referred to how the charitable status of independent schools might be affected. Could you develop that point and explain what your fears are?

Anne Swarbrick: It depends a little on how the public benefit test develops in Scotland. I understand that the Home Office bill is to be published today, which might cast some light on how the issue is being viewed in England. At present, it is difficult to predict what effect the proposals might have on independent schools, which receive substantial rates and tax relief. The loss of either of those two types of relief might have a significant effect. However, to an extent that will depend on the nature of individual schools. Depending on how the public benefit test is couched, many independent schools might be able to satisfy it.

Mr Frank McAveety (Glasgow Shettleston) (Lab): I am in the curious position of almost wanting to come to the rescue of the Duke of Sutherland’s art collection. At the same time, I am attracted by the idea that many independent schools might move into the local authority sector. I am confused about the potential outcome of this piece of legislation.

We have received submissions not just from the National Galleries of Scotland but from the Royal Commission on the Ancient and Historical Monuments of Scotland and other cultural organisations that fall into a grey area as regards the definition of a charity. Based on your experience, what do you think are the solutions to that issue? How could the committee explore those solutions with the Executive? Will you also comment generally on the definition of public benefit in the English legislation? It would be productive for us to explore those issues.

Anne Swarbrick: I have not yet read the English bill, which is to be published today but has not yet appeared. I cannot be definite about what the bill will do in respect of public benefit. It has been trailed that the Home Office might adopt the stance that Scotland has taken and set criteria for public benefit. Those criteria are not exclusive, but provide an indication of the sort of things that must be taken into account when deciding whether a charity provides public benefit. I do not know whether the Home Office will take that approach, but we will find out. Once I have had a chance to examine the bill, I could submit evidence on it to the committee in writing, if members would find that helpful.

I have forgotten your other question.

Mr McAveety: What kind of policy approach could be adopted that might allow charities to continue fundraising? There is no doubt that the National Gallery connection could not have been built if there had not been a flexible arrangement that allowed endowments to be developed. There is a real peril that the bill will eliminate that arrangement.

Anne Swarbrick: There is. The way in which to approach this matter is to examine the actions of trustees once they are appointed. The question is, how do trustees act? Do they allow themselves to be influenced by third parties once they have been appointed? There will always be influences on appointments. In a small charity that is run by a committee, someone might say that they know a person who would make a good member of the committee, for example. To an extent, such influences operate in every charity in the land. The question is: do the people who are appointed act properly? That is a regulatory issue; it is for OSCR to examine how the charity is run after someone has been appointed. I suppose that a half-way house might be to require that fewer than 50 per cent—or whatever the number—of the trustees of
non-departmental public bodies must be political appointments, but that would not obviate the need to examine what people do when they are in post and how they do it. It seems to me that that is how we must approach the matter.

10:30

Jim Mather (Highlands and Islands) (SNP): I have been looking at the numbers. If we do a simple sum and divide the £4 million by 28,000 charities, it appears that the notional annual subscription in 2005-06 would be £142 per charity, compared with the current rate of £46 per charity. That would be a considerable uplift, even without considering the cost of expenses and wider access to the appeals process. Is such an uplift reasonable, given the different profile of the activity that OSCR will undertake?

Anne Swarbrick: To be frank, that is a difficult question to answer. I am sure that OSCR would have similar difficulties in speculating about the future. Part of the problem is that we do not have much knowledge about the charitable sector in Scotland. We think that there might be about 28,000 charities, but we are not even sure about that. There are a lot of uncertainties, but many things will become clearer during the next five years or so. In the meantime, there will be at least as many inquiries into charities as there have been in the past. Indeed, there will probably be more inquiries, because certainly in the initial few years after the bill is passed OSCR will uncover practices that might otherwise have continued for several more years. That is part of the bill’s purpose, of course. More action might have to be taken against charities to enforce the new legislation.

Jim Mather: I am intrigued by the rapid inflation in OSCR’s budget. Would we have a better chance of controlling that if we were to match the English definition of charitable status and retain charitable status for all existing charities?

Anne Swarbrick: If the definition in the Scottish bill is retained, there will be many appeals to the tribunal, which could get very out of hand. Many charities will find themselves in serious difficulties because of the definition. Your suggestion might help to prevent that.

The Convener: According to the briefing from the Scottish Parliament information centre, 67 per cent of charities—two thirds—have an income of less than £25,000. If every charity must pay a £2,000 subscription, a substantial element of charities’ income will be spent on registration. As Jim Mather pointed out, that would represent a significant uplift for many charities.

Anne Swarbrick: I understood that there would be no charge for registering with OSCR—the situation might have moved on and I might have missed something.

The Convener: Could a threshold be established? What would be an appropriate threshold for subscriptions?

Anne Swarbrick: I understood that there would be no charge for registering with OSCR.

Jim Mather: Charities might be liable for administrative costs.

The Convener: The Scottish Council for Voluntary Organisations certainly thinks that charities would have to pay £2,000, which would be unmanageable for many charities.

Anne Swarbrick: I think that you are talking about the potential cost of complying with OSCR’s requests for information. Is that the context?

The Convener: It might well be, but the committee briefing refers to a £2,000 “charge set for registration”.

Anne Swarbrick: I do not think that OSCR will charge that sum; I think that that refers to the cost to the charity—

Jim Mather: Paragraph 130 of the financial memorandum says:

“While OSCR will not charge for registration there may be some minimal administrative costs to charities ... for most it should be minimal but for others it could be up to £2000.”

The figure refers to charities’ internal administrative costs.

The Convener: From paragraph 130, we do not know how the charges will operate and what criteria will be set. How will the scaling be set? Will the charge be a percentage of turnover?

Anne Swarbrick: Any additional costs are significant for some small charities, but it is impossible to set up the sort of regime that we are talking about for OSCR without requiring charities to input to it; otherwise, the regime would be completely unrealistic. The new system will undoubtedly entail some costs for charities—you cannot make an omelette without breaking eggs.

The question is more for the Scottish Council for Voluntary Organisations and the sector than for me. The existence of a register and a central information point will probably provide a long-term benefit for all charities. Given the present state of knowledge, we should not set up a register without making it comprehensive, at least initially. Perhaps in five or 10 years, we could consider whether some charities could fall under a regime that has a lighter touch or might even be deregistered entirely, although charities might not want that. We are taking the initial steps in the right way. There will be costs, but they are unavoidable.
John Swinburne (Central Scotland) (SSCUP): I am not sure whether this is a political or a financial question, but will the bill improve the situation in Scotland, or is it a method of paying lip service to a problem that exists in the minds of the public? Many charities have a bad reputation, although many others do tremendous work. What percentage of donations should go to the good cause? Is 50 per cent an acceptable or unacceptable figure? People perceive that the percentage of donations that goes to the good cause can be extremely low, which is one reason for the bill. Do you have a ballpark figure for that?

Anne Swarbrick: The short answer is no, because charities vary enormously. For instance, it is difficult to say that, for all charities, administrative costs must be no more than 20 per cent of their income. Some charities have high administrative costs due to the nature of their work. To give what is in some ways a bad example, although it is graphic, the work of the Samaritans involves using the telephone a lot, which means that the telephone bills must be astronomical. It would be unreasonable for that charity to be required to have the same level of overheads, including telephone bills, as a charity that does different work. We cannot give an across-the-board figure. Even the Charity Commission, which has been dealing with the issue since about 1960, will not nail its colours to the mast. The matter depends on the charity in question and the nature of its work.

John Swinburne: That was a good political answer.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Even if there is not a registration cost, there is an inevitable cost in putting information together and providing annual reports for the registration to be valid, which I think is what you were getting at. If I give money to a charity, I expect such information to be in the public domain and I do not think that there is a problem with that.

From your legal perspective, can you say whether there is anything to prevent NDPBs from remaining under ministerial control and being accountable to Parliament, while setting up charitable operations that are totally separate from Government to receive paintings or endowments? The remit for their role within the public sector in advancing the arts and culture and so on can be set by ministers, but their charitable arm, with regard to receiving donations or gifts, can be a completely separate operation from what is in effect their public service remit. Would that be fair to say?

Anne Swarbrick: That would need a bit of thinking about. It is certainly not the way in which it has hitherto been organised, and there may be some difficulties with it. For instance, in the case of the National Galleries of Scotland one question that strikes me immediately is what would happen to the buildings. Would the charity have control over them or would some political control be needed? I do not know the answer to that. Difficult issues would be involved, particularly in relation to the funding and the building of the extension. Also, if the paintings have been left to the nation, there may be tax difficulties in them then being given to another body. I do not know. What you are referring to is complicated and would need to be thought about carefully. I would not reject it out of hand, but it might be awkward to achieve.

Alasdair Morgan (South of Scotland) (SNP): We have been discussing the costs of all this, but do we have any idea what the cash benefits would be? It seems to me that the benefits are either that we stop illegitimate charities, which are in effect swindling the public, or that we make some of those that are working work more efficiently so that they spend less on administration. I do not know whether there are any other benefits that can be quantified in cash terms, but do we have any estimate of the annual cost of the things that are happening at the moment? Does it approach the costs of the regulation that we are putting in place to stop them?

Anne Swarbrick: I do not have the figures at my fingertips, but no doubt OSCR’s current budget could be ascertained. Until about this time last year, when OSCR was established, the Scottish Charities Office was undertaking inquiries into charities. I think that the budget of the SCO was in the region of £400,000—it was very small.

Alasdair Morgan: But what are the costs to the public of what may be being swindled from them—not swindled directly, but taken from them by maladministration and not spent effectively? Do we have a clue as to what those figures might be?

Anne Swarbrick: We do not, but it is rather like asking a senior police officer how much money is lost in credit card fraud every year. I do not think that he would be able to answer that question either. It is in the realms of speculation.

Alasdair Morgan: It is a question that is worth asking, because if we are going to spend more than £4 million solving a problem, we should maybe have an idea of what the cost of the problem is.

Anne Swarbrick: I can see that. Various other models were considered before the OSCR model was decided upon, some of which would have been a cheaper solution, and at least one of which would arguably have been a more expensive solution. I suppose that it is possible that things could be organised differently.
Jeremy Purvis: Part of our evidence—I think that it was from the SCVO—dealt with the cost of training in compliance with the requirement to provide accounts information and so on. The bill simply indicates that an annual report should be provided, but it leaves it up to OSCR to determine what should be within that; it could be half a page of A4 or it could be a substantial document. Are you aware of the typical requirements and costs of registration systems south of the border or elsewhere? Certainly, the SCVO says that it is unclear about the financial memorandum’s costing for training requirements.

10:45

Anne Swarbrick: I have two points to make on that. First, I am sure that that the Charity Commission has figures on the cost to charities of preparing their annual reports, but I cannot tell you what they are off the top of my head. However, I am sure that officials would be able to obtain that information. Secondly, there is a lot of leeway on the length of annual reports. OSCR has been doing a monitoring project, of which you are probably aware, that uses a relatively lengthy questionnaire. Whether it should always be as lengthy is another matter. I would expect it to get shorter, but OSCR would have a better idea of that than I would.

Mr Brocklebank: I was interested in the point that you raised in your opening statement about charities that might lose their status. What would happen to the vulnerable people who depend on such charities? Obviously, it is difficult to speculate about how such people might be affected, but who would have to pick up the tab for them? Have you thought that through?

Anne Swarbrick: Presumably, local authorities and social services in some form or another would be involved. Another charity might also help. However, if one charity that provides particular services experienced difficulties with the new definition, it is likely that all charities that provide such services would have the same difficulties.

Mr Brocklebank: You said earlier that the galleries that receive paintings and other works of art on loan might, in turn, lend them on. It occurs to me that the Scottish Parliament plans to get into that line of business and take works of art on loan. I gather that the galleries are groaning with unshown works of art, some of which are likely to come to the Parliament. The Parliament will presumably pick up the tab for insuring them, but I assume that there will be a benefit in kind to the Parliament and that that will have tax implications.

Anne Swarbrick: I would think not, because the paintings will be on loan and will be available for the public to come to the Parliament to view them. That will probably be regarded as an extension of the galleries’ obligations to put the paintings on show. I would expect that paintings on loan to the Parliament from the National Gallery would remain firmly in the gallery’s ownership.

The Convener: As a supporter of the clean walls strategy for the Parliament, I would prefer to get rid of some of the works of art rather than get more in.

Jim Mather: I am keen to explore two points, which are not completely related, but which I think are of some merit. First, have we lost sight of maximising the possible positive effect of increasing public confidence in charities, and hence increasing markedly the amount of money that is donated to them?

Anne Swarbrick: There are arguments for different ways of registering. At least part of the consultation that has been going on for what seems like for ever but is actually about three and a half years has been examining other possible models. One could argue that what OSCR is doing is sufficient but that it is not sufficiently public and that the register is needed in order to create transparency and public confidence. I suppose that one could stop at various points along the route and assess how much requires to be done and at what cost.

Jim Mather: The other thing that interests me is the possibility that, rather than put the burden so heavily on OSCR's shoulders, there might be a mechanism whereby we could respect the nature of a charity audit and create a specialist requirement for the auditing profession to be somewhat more rigorous and perhaps focus on specific areas when carrying out a charity audit. In other words, perhaps we should delegate the audit out there and get it done at the coalface.

Anne Swarbrick: That might be one way of looking at it.

Jim Mather: It strikes me that we could place a heavier emphasis on creating a healthier balance between compliance and cost control. I am thinking in particular of cost control and the public purse.

The Convener: That is an issue that we could take up with Executive officials when they come before us next week.

Anne Swarbrick: I would have difficulty in saying much more on the issue.

Dr Elaine Murray (Dumfries) (Lab): I want to return to the issue of the national cultural institutions. The SPICe briefing suggests that the problem is not the fact that the charity trustees are appointed by Government, given that they are obliged to act in the best interests of the charity, but the fact that the charity would be directed by
ministers. As I understand it, the problem relates to the ministerial guidance and direction.

Anne Swarbrick: Yes. There is at least a theoretical possibility of trustees being controlled by ministers. Two issues are involved: the question of who appoints trustees—and for what reason and with what remit—and the question of what control may be exerted over trustees once they are appointed. I think that a path can be found, if a bit more thought is put into the requirement on trustees for independence of action once appointed.

Dr Murray: In that case, if the NDPB, or any cultural institution, was independent of Government, even though its trustees, or some of them, could have been appointed by ministers, is there still an issue about an artwork that is donated in lieu of taxation? Surely the work would be given not to Government but to someone independent of Government. Will that issue still arise?

Anne Swarbrick: It might. As I said, I am not a tax lawyer. I am sorry, but the detail of the question is therefore outwith my area of expertise.

The Convener: If I may, I will pose a more fundamental question. If I get the gist of Malcolm Chisholm’s letter right, we are looking at a trebling of OSCR’s budget. If you wanted to put an additional £2.5 million into the charitable sector, would you put the money into supporting the Office of the Scottish Charity Regulator? I will leave that question hanging from the wall for a minute.

I am trying to get at the gap between the perceived problem, which is the improprieties that happened in a very small number of Scottish charities, and the solution, which is to put in place the enormous edifice—well, a £4 million edifice—of OSCR. That figure covers its direct costs, in addition to which we have to consider the knock-on costs and implications for charities. However, we cannot assess those costs on the basis of the financial memorandum. In your view, is the balance an appropriate one? Does the bill give value for money? What bang are we getting for our buck?

Anne Swarbrick: As I said, the argument on the subject raged quite a few years ago when the whole question of charity law reform began to be discussed. At the time, my view was that the remit of the Scottish Charities Office should be beefed up a bit more and that the SCO should be given more personnel. I also thought that the way to go was to have a much better register than the Scottish charity index that we have at the moment. That view has been rather overtaken by events. It was not the view that was adopted at the time and we now have the proposal for OSCR that is included in the bill.

Although the solution may not be quite as expensive as that of the Charity Commission, it is expensive nonetheless. I can well understand why you are asking the question.

The Convener: I declare an interest. I was a member of the Kemp commission in 1997, which recommended significant changes to charity legislation in Scotland. However, I do not quite follow how those changes came to be consolidated into this large regulatory mechanism. That is not what witnesses at the time suggested should be done. Certain changes to legislation were required, but not the scale of regulatory structure that is now proposed. As someone who has been in the business for a long time and has perhaps been in more day-to-day contact with it than I have, can you shed any light on how we got here?

Anne Swarbrick: It was a very tortuous route. I am not sure that I know where the OSCR model arose. It is difficult to remember all the twists and turns. However, the model is of relatively recent origin and was not under discussion at the time of the Kemp commission. It would be possible to look back and work out how we got to this point, if that were thought to be useful.

Jeremy Purvis: In paragraph 2.2 of your paper, you indicate that a number of charities will fall foul of the new, more limited definition of a charity. You compare that with what I understand to be the current definition under the 1990 act and refer to “other purposes beneficial to the community”. What is the difference between that and “the advancement of civic responsibility or community development”, to which the bill refers?

Anne Swarbrick: The two are significantly different from each other. Community development is an area of charitable endeavour that has been developed and covers activities such as volunteering. The overall public benefit test can be divided into many little pockets, one of which is the community development pocket. The language can be quite technical. We will have to accept that it is the way things are. In the new definition, we are trying to cope with 400 years of common law. Community benefit presses a particular button and relates to issues such as volunteering.

Jeremy Purvis: Is it possible for that to be made more explicit? Many existing charities that say that their purpose is beneficial to the community would also argue that it is beneficial to development of the community in which they operate and to civic responsibility. Presumably, it is for OSCR to decide whether that is the case. You indicate that it is likely that a considerable
number of those charities would fall foul of the new definition and would need to lodge an appeal to ensure that there was an investigation. How explicit will the distinction between
“other purposes beneficial to the community”
and
“the advancement of civic responsibility or community development”
become? I would have difficulty making that distinction.

Anne Swarbrick: The difficulty is in determining the basis on which OSCR will decide whether a charity satisfies the public benefit test. That is where the effect of 400 years of common law becomes apparent. At the moment, the bill tries to sweep the issue to one side and to say, “We are not having that.” However, that is a completely impractical approach. Even if the previous legislation is repealed, it will still be examined in practice, as guidance. The existing definition will be retained in England, so it will still be highly relevant there.

Jeremy Purvis: Are you saying that the wider definition that refers to “other purposes beneficial to the community” will be kept in England?

Anne Swarbrick: Yes. England will keep all the little pockets around public benefit that we are sweeping away entirely. I will give you an accessible example. Paragraphs (j) and (k) of section 7(2) of the bill mention disability specifically. Paragraph (j) refers to “provision of accommodation” for the disabled and paragraph (k) refers to “provision of care” for the disabled. In England, there is only one term, which is “relief of disability”. That term is wide and includes, for example, guide dogs for the blind and disability rights advice. It seems to me that neither of those is covered by “provision of accommodation” or “provision of care”. Such issues around the definition cause me great concern. We have two paragraphs that cover disability, but they are narrower than the English provision on the subject.

Alasdair Morgan: Are you saying that under the tests the Guide Dogs for the Blind Association might not be able to register?

Anne Swarbrick: If it wanted to set up a Scottish guide dogs for the blind association, it would struggle on the basis of the definition in the bill.

Jeremy Purvis: It would be fine if it made sure that it looked after the dogs, under the advancement of animal welfare.

Anne Swarbrick: The situation is even more ridiculous than that. The association could train handlers to handle the dogs, but it could not train the dogs.

11:00

Jeremy Purvis: As the lead committee considers the bill, there will inevitably be many such issues. In my area there is a housing association that was set up to house people with mental health problems, and there could be a question mark over that. Every MSP will have their own issues and that committee will go into details.

However, what we are interested in is the likely proportion of charities—although we do not even know how many there are in the first place—that will encounter the problem that you indicated and might seek to appeal. We are interested in the resources that OSCR will require. Is it fair to say that the tripling of the budget is a sensible precautionary measure, given the potential for appeals, and that there should be a review of OSCR’s budget or a sunset clause as the system settles down? We do not want a huge backlog of appeals at the beginning because charities need to continue to do their valuable work. You said that the system might take five years to settle down, but could we say that we will then reduce OSCR’s scope and size?

Anne Swarbrick: I think that you and I probably know that that will be a difficult thing to achieve once the system has been set up.

Jeremy Purvis: That is on the record.

Jim Mather: On guide dogs, I notice that one of the charitable purposes in the test is “the provision of care to the aged” and “people with a disability”. Would the Guide Dogs for the Blind Association not qualify under that?

Anne Swarbrick: I do not think so, because its work is not about care. It is about training a dog to do a job.

Jim Mather: So we could have an anomaly whereby that wonderful charity is vigorous and strong in the rest of the UK but totally absent here—

Anne Swarbrick: Absolutely.

Jim Mather:—with all the cost implications that would ensue.

Alasdair Morgan: No. Charities would find it beneficial to register south of the border, but they would continue to operate here.

Jim Mather: They could distribute money here, but I do not think that they could operate here.
Anne Swarbrick: That might be the result. The Guide Dogs for the Blind Association will be required to register with OSCR if it undertakes significant activities in Scotland. I do not know where it will be left if it does not qualify as a Scottish charity.

Alasdair Morgan: There are obviously some UK charities—

Anne Swarbrick: The Guide Dogs for the Blind Association is an English charity, but one of the provisions in the bill requires charities that are registered elsewhere to register with OSCR as well if they conduct significant activities in Scotland.

Alasdair Morgan: I presume that they will have to pass the tests in the Scottish legislation.

Anne Swarbrick: Presumably so. There is a looming difficulty with that.

The Convener: You have helped us to identify a number of questions to ask the Executive witnesses when they come before us on 18 January. I thank you for coming along today, and I indicate to everyone that we hope to sign off our report on 1 February. Anne, you offered to help us by telling us how we got here from the Kemp commission. Could you give us a short note on that?

Anne Swarbrick: I can do that, yes.

The Convener: That would be helpful. Thank you for all your assistance.

We move into private session for our next item, on the budget seminar.

11:04

Meeting continued in private until 11.33.
Charities and Trustees Investment (Scotland) Bill: The Committee took evidence on the Bill’s Financial Memorandum from—

Lucy McTernan, Director of Corporate Affairs, and Paul White, Director of Networks, Scottish Council of Voluntary Organisations; then

Richard Arnott, Head, and Quentin Fisher, Deputy Head, Bill Team, Scottish Executive Development Department and Jane Ryder, Chief Executive, Office of the Scottish Charities Regulator.

Des McNulty MSP declared an interest as a Director of The Wise Group and the Tron Theatre Company.

Scottish Executive officials agreed to provide further information on various issues.

The Committee discussed areas of concern in relation to the Financial Memorandum for inclusion in its report to the Communities Committee. The Committee also agreed that the Clerk would highlight these concerns to the Clerk of the Communities Committee in advance of its evidence taking session on the general principles of the Bill on Wednesday 19 January 2005.
Scottish Parliament
Finance Committee
Tuesday 18 January 2005

[THE CONVENER opened the meeting at 10:00]

Charities and Trustee Investment (Scotland) Bill:
Financial Memorandum

The Convener (Des McNulty): I open the second meeting of the Finance Committee in 2005. I welcome the press and public and remind members to switch off all pagers and mobile phones. We have apologies from Jim Mather and Elaine Murray, who are delayed by the weather. I suspect that Wendy Alexander might be in the same position. I hope that they will be able to join us soon.

Before we start, I inform members that our assistant clerk, Emma Berry, is moving to a job in the Presiding Officer’s office and that this is her last committee meeting. I thank Emma for all her hard work. She is the person who has made sure that we get all our papers in total and on time so we owe her a considerable debt of gratitude.

The first item on our agenda is to continue our scrutiny of the financial memorandum to the Charities and Trustee Investment (Scotland) Bill. Members will recall from our meeting on 21 December that we agreed to invite the Scottish Council of Voluntary Organisations to give us oral evidence on the bill in addition to the oral evidence that we took from Anne Swarbrick on that date. I welcome Lucy McTernan, director of corporate affairs, and Paul White, director of networks, from the SCVO.

Lucy McTernan (Scottish Council for Voluntary Organisations): We are pleased to contribute to the Finance Committee’s review of the financial implications of the Charities and Trustee Investment (Scotland) Bill and I thank the committee for the opportunity to speak to members this morning.

We know from your earlier discussions that you have a particular concern about the costs that are associated with the proposed reforms for charities and we share that concern. However, our focus is not so much on the one-off direct cost for charities, which the Executive has summarised as being up to £2,000, as on the immediate and on-going costs of the training and support that charity trustees in Scotland will need to entrench the new systems and to make the most of the opportunity to improve governance in the sector substantially.

We reinforce the message in our earlier written evidence that we hope very much that OSCR, the new regulator, will develop a light-touch approach to the regulation of Scottish charities, minimising bureaucracy for itself and the charitable sector and allowing the maximum time and resources of charities to be devoted to charitable endeavours rather than diverted to deal with red tape.

We believe that that is possible, provided that OSCR works in close co-operation with the sector to create systems that build on current good practice in record keeping and accounting. The sector stands ready to co-operate with OSCR.

We are encouraged that OSCR has scaled back—at least in the short term—its initial plans for detailed and extensive questions in its annual returns process, which would have required charities to set up new information collection systems and to recalculate their annual accounts in ways not currently required by regulation. However, we remain concerned about the possibility of bureaucracy developing in OSCR, which in turn would increase red tape in the sector. That is where the costs for individual charities could well escalate over time.

We are not at all clear how the recent increase in OSCR’s budget has been justified, but we must be clear that the resources that are required by the regulator are just one side of the resources that are required to make the regulatory system function effectively in practice.

In that context, I draw attention to the role of the sector’s infrastructure, which provides advice and support to individual charities—namely the network of councils for voluntary service. The established CVS network should be viewed as a key resource in the delivery of the required governance programme. The CVS network covers every local authority in Scotland and provides services in urban, rural and island environments. The network uses briefings, events, newsletters and websites to communicate with voluntary organisations locally, keeping them up to date with new legislation and policy developments and offering opportunities for local groups to share best practice.
The network, which recently agreed a new core activities framework to provide a clearer customer-focused approach to CVS work, is in touch with 26,000 voluntary organisations throughout Scotland and is therefore well placed to provide advice and promote good practice on the changes in charity law.

The SCVO and the CVS network stand ready to roll out in partnership with OSCR a new programme of information and training to charity trustees to enable them to gear up for the new law and the wider challenge of improving governance in the sector. However, the figure of £150,000 that was given by the Executive is a clear underestimate of the resources that will be required by the sector to implement the new legislation, although we appreciate that it is a difficult task to estimate accurately the cost of training of the type that is referred to in paragraph 139 of the financial memorandum. We have been given to understand that the figure of £150,000 was based on experience of other training delivered to the sector at national level in Scotland and we understand that it translates to 3,000 attendees at training courses at £50 per attendee.

Although the approach that has been taken might be helpful, we would advocate basing estimated cost on the current information about the sector that the sector itself has compiled. “The UK Voluntary Sector Almanac 2002” states that “in general charities have on average eight trustees” but that “an estimated 40% fulfil that role for more than one organisation”.

Currently, the index of Scottish charities—the Scottish charities register as will be—which is held by OSCR, holds details of about 18,000 live charities, but we believe the real number to be closer to 28,000. That suggests that there are somewhere between 86,000 and 135,000 individual trustees in Scotland. Using the Executive’s cost of £50 per person for training would give a figure of between £4 million and £7 million. Although there is an absence of reliable statistics on the number of trustees in Scotland, we believe, based on our experience of the Scottish voluntary sector, that it is unlikely that there are as many individual charity trustees as that. Our working estimate is 50,000 for all practical purposes. We also believe that training would not necessarily have to cost £50 per head.

We would recommend a budget of £500,000 in the first year of implementation with a need for a tapering budget year on year thereafter to carry out training to entrench new practice and to provide for new trustees taking up their responsibilities in the years to come. We would be happy to discuss with OSCR and the Executive how that could best be delivered and to work to establish a definitive cost.

The Convener: Thank you. In opening our questions, I put to one side the question of the cost to charities, on which you ended your statement, and return to the other comments that you made about light-touch regulation. As you know, I was a member of the Kemp commission in the mid-1990s. The work that we did then, on which Jean McFadden built in her review of charity law, envisaged a much less ornate system of regulation than what the Executive proposes. You seem to echo that in saying that you would prefer a light touch to be taken. Are we in danger of dealing with what is a real but nonetheless limited problem of charities that operate in unacceptable ways by introducing an inappropriate and unduly onerous system for regulation of the overwhelming majority of charities that work effectively?

Lucy McTernan: Our view is that the regulator that the bill proposes has all the right elements and is the right recipe for the regulator that we want. Critically, those elements include a new register that is transparent and publicly accessible.

We are concerned that the regulator could become too bureaucratic and start requiring of charities much greater levels of information than are required to fulfil the objectives of public accountability and encouraging public confidence in charities. We do not want to go from the absence of any regulation to so much regulation that growth and development of voluntary organisations and charities in Scotland is hampered to the point that it is detrimental to the health of our communities rather than a positive benefit. That is why the SCVO and charities in Scotland have been campaigning for this reform for some 10 years.

The Convener: You commented on the increase in OSCR’s budget. Do you believe that there is an imbalance there and that the expansion of the budget is not justified by what you see as OSCR’s appropriate functions? Might the increase be an indication of an orientation towards too much bureaucracy?

Lucy McTernan: The SCVO and the rest of the voluntary sector have lacked a detailed understanding of OSCR’s plans for itself. We have the supplementary evidence that has been provided this morning and a consultant’s report about the resources that OSCR requires. I do not know about committee members, but I find that less than helpful for understanding what OSCR proposes to do. All that has been published is the corporate plan for OSCR 1, which is the interim regulator until the bill is enacted.

We would find it helpful to understand how OSCR proposes to operate in its OSCR 2 phase,
following enactment, and to understand more clearly what it needs those resources for. That might make the sector more comfortable about the scale that a figure of as much as £4 million a year indicates.

The Convener: If OSCR is to fulfil all the regulatory functions—with which you say you do not disagree—it will require an appropriate budget and appropriate staffing for that. Have you formed a judgment about whether the budget is correct and can be justified by the functions? Does uncertainty remain?

Lucy McTernan: As I just said, without a detailed understanding of what OSCR plans to do to respond to the bill’s requirements, it is difficult for anybody external to take a view on whether the figure that it has reached is appropriate. Our sense is that the figure is on the high side. We had always expected the scale of OSCR’s operation to be streamlined and OSCR to work with the grain of how the voluntary sector and charities operate in Scotland rather than be a Big Brother-style regulator. The sector must deal with much inappropriately, misused or misappropriated and prevent charitable funds from being used inappropriately, misused or misappropriated and given your perception of whatever problem the bill is intended to address, how much money would it be worth spending on the measures?

Lucy McTernan: There are clear lessons to learn. Disclosure Scotland imposes just one of the regulatory burdens that voluntary organisations face. Combined with other burdens, that is causing organisations many problems with concentrating their resources on what they are supposed to do, which is working with people and supporting communities, rather than filling in forms.

Alasdair Morgan (South of Scotland) (SNP): Given that the purpose of such regulation is to prevent charitable funds from being used inappropriately, misused or misappropriated and given your perception of whatever problem the bill is intended to address, how much money would it be worth spending on the measures?

Lucy McTernan: It is worth spending the right amount of money in the right ways. Our concern is that the money is being focused on establishing an institution—a regulator—rather than on giving proper consideration to the resources that are required to help individual charity trustees. Many of us in the room may be trustees. People throughout communities in Scotland take on that very responsible job. Such individuals should benefit from the resources that are available through the reform to obtain the advice, training and support that they need to do their job better.

Alasdair Morgan: The point that I am trying to get at is that the bill is intended to fix a perceived or potential problem. The resources that are put into that must be proportional to the perceived size of the potential or real problem. I am trying to get a feel for that.

Lucy McTernan: The problem is viewed differently from different perspectives. The immediate cause of the bill’s introduction was perceived to be one big scandal, but the sector has campaigned for charity law reform for 10 years. Reform is about not just the big scandals that break but the support and framework that trustees and charities need in order to flourish and do more. That is a big problem that nobody has ever quantified in cash terms. It would not necessarily be helpful to do so.

We do not want the sector or the reform to be short-changed. Nobody argues that we should reform on the cheap. We just want to ensure that the scale and focus of spending are appropriate.

Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD): Did you say that you were not clear about the reasons for the costs and for their projected rise?

Lucy McTernan: The only information that we have is the information that is in front of the committee, which is from a consultant’s report.

Jeremy Purvis: Table 1.1 in OSCR’s evidence to us seems straightforward about how costs reach £2.1 million. After a new regulator has been established, its use is inevitable. As with any ombudsman or anything else, when citizens realise that they have an opportunity to use an independent or regulator voice, they will take it. It is fairly straightforward to build in increased capacity in the next two or three years to allow OSCR to settle. What in the costs in table 1.1 and the projected increase in workload is unreasonable and does not follow the streamlined model? The costs in the table do not necessarily imply a huge organisation.

Lucy McTernan: I understand that those figures do not represent the final expenditure on OSCR and that the budget has increased—in fact, it has almost doubled. We have not seen the information to justify almost doubling expenditure.

I return to what I said: nobody argues for OSCR to be under-resourced. We would like to know OSCR’s plans and what it needs those resources for, because those functions might be delivered better in different ways. I am thinking particularly
of the role of providing guidance and advice. As I said in our opening statement, support to individual trustees and charities is better delivered to the sector by the sector rather than by a brand new institution that is created to do that. Ways exist to make that more effective and cost effective if we work in partnership with the regulator or between the sector and the regulator. We would like the Executive to consider that.

Jeremy Purvis: You will have seen the evidence from the Scottish Federation of Housing Associations, which does not say that its members will incur major cost. The federation is right to say that its member organisations’ income comes from tenants’ rents. All of us have housing associations in our areas and want none of their income to be depleted. The SFHA did not highlight a serious concern about the cost on its organisations. Is it not the case that what the bill will require of charities is what they should be doing already? Few charities do not have continuing training or awareness raising, anyway.

I am making two points. First, evidence that the committee has received has not said that considerable costs will arise. Secondly, do you know the current expenditure of organisations on training and development?

Lucy McTernan: We need to be clear about the distinction between the two questions to which the people who gave evidence responded. One aspect is the notional figure of £2,000 as a direct cost to charities. We understand that that is to cover matters such as reprinting stationery to comply with new regulation. Of course such costs will exist, but they are not the important costs. Stationery must be reprinted in due course in any case. Charities entirely expect to absorb such direct costs, which are what the SFHA referred to.

We are talking about the broader issue of training and support for a level of understanding of a significantly different legislative and technical regime, which would involve a significant cost that is more parallel to what the Executive referred to when it used the figure of £150,000. Of course charities and trustees undertake regular training or should be building up to those costs, but the regime is new, significant and different and requires a resource that is identified to implement it. That requirement could taper off over several years so that it becomes part and parcel of any organisation’s routine.

Jeremy Purvis: Do you know what the current expenditure is on training and development for trustees and charity workers? Is that information captured?

Lucy McTernan: It is not captured in its entirety. We should be clear that the training that is provided for organisations is specific to the nature of their business. The councils for voluntary services and SCVO deliver the only training that is supplied routinely to charity trustees.

Jeremy Purvis: What does that cost?

Paul White (Scottish Council for Voluntary Organisations): I can help on the councils for voluntary services. The Executive currently supports the CVS network with £2.5 million per annum. The overall income of the network, which includes contributions from local government, lottery funding and trusts, amounted to about £14 million in 2003-04.

To set the issue in context, our experience is that the motivating factor of trustees of groups that are concerned with arts and culture, children’s services, services for older people or sport is either to make a difference in that field of activity or to make a difference to the general well-being of the community in which they live. Although we welcome the regulation that will be introduced through the bill, for which, as Lucy McTernan said, we have campaigned for about 10 years, we are concerned about how trustees in communities throughout the country will face up to the challenges that the new regulation will pose and be able to continue in their roles with confidence that they deliver efficient, effective and accountable charitable services. They must be confident that they can meet OSCR’s requirements.

The issue that we have tried to highlight is that the infrastructure already exists to support the voluntary sector in Scotland and that local organisations are aware of that and are familiar with it. We want to ensure that resources are used efficiently and that support goes where it is most needed: into the network that already supports Scotland’s voluntary sector. To some extent, that would take care of the debate about having a regulator that also provides guidance and advice services.

John Swinburne (Central Scotland) (SSCUP): Do you agree that charitable organisations are caught between a rock and a hard place? On the one hand, they try to deliver public accountability for the moneys that they receive and a comprehensive programme of good governance, while on the other hand, the public perception of charities means that people are slightly reluctant to put a pound coin in a can because they do not know what percentage of it will go to the worthy cause to which they are donating. I have read screeds of submissions from various organisations, but no one has yet quantified the ideal figure or percentage in the pound, or a figure below which we can say that a charity is not doing its job. Would that be a good way of measuring charitable organisations’ efficiency and delivery of charitable work?
Lucy McTernan: You are absolutely right that charities are caught between a rock and a hard place in trying to achieve public accountability and do their job right. Of course they want to invest time and resources in being open to the public so that their supporters and the people whom they serve understand what they do, but they also want to maximise the resources that go to the services that they provide. However, the idea of an ideal figure or percentage, above which an organisation would be seen to be working efficiently or effectively, is not helpful. Given that the percentages of money that organisations need to spend on direct delivery of services and on central services vary radically from organisation to organisation and from year to year depending on the effectiveness of their fundraising, it is simply not possible to come up with an ideal figure.

The solution is not to have a simplistic figure, but to have public accountability and openness in the books, which is exactly what we are trying to achieve through a public register that is managed by the new regulator. That will mean that information is readily available to any member of the public who wishes to inquire about how an organisation raises and spends its money.

John Swinburne: Will the bill impinge on the amount of charitable work that bodies are able to do as a result of the costs of accountancy and investigation into whether the moneys that are received are spent properly?

Lucy McTernan: Our point is that the bill and the proposed reforms will not necessarily mean that charities will be hampered or have to divert resources away from the front line. However, OSCR’s operation in practice, the implementation of annual returns systems and the collection of information from charities may have such an effect. We want to ensure that the balance is absolutely right and that the new regulator works in sympathy with, or with the grain of, the way in which charities operate rather than providing a new set of issues for them to deal with.

John Swinburne: No one has ever answered my question about the ideal amount or percentage in the pound that should go to the cause for which it is intended. What would be the minimum amount below which we could not countenance an organisation being called a charity? Would that be 2p, 10p or 20p in the pound?

The Convener: Lucy McTernan has already answered that question.

John Swinburne: Not to my satisfaction.

The Convener: No, but she has responded.

I welcome Elaine Murray, Jim Mather and Wendy Alexander, who have struggled through the weather to get here.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): The SCVO presentation seems to contain a paradox, in as much as while you broadly welcome OSCR’s regulatory function, at another level you are saying that you want a lighter touch. You want a lighter touch, but you also seek more money to make the system work. Do you accept that that is a bit of a paradox?

Lucy McTernan: I do not accept that it is a paradox. Our point is that the devil will be in the detail. The SCVO and the wider voluntary sector support the bill because it has the elements of a new regulatory regime that we require. However, that regime can be delivered in a number of ways and we are trying to discourage the regulator from becoming over-enthusiastic about its needs and in the information requirements that it makes of charities. We want to keep the implementation at the right pitch so that the balance is correct over time. Charities must be actively encouraged and be able to make the most of the new regulatory system rather than find that it inhibits them.

Mr Brocklebank: Correct me if I am wrong, but if I understand your figures, you believe that the estimate of £150,000 for training seminars is insufficient and that the minimum that will be required in the first year is £500,000. Is that correct?

Lucy McTernan: That is our suggested figure. The Executive’s figure in the financial memorandum seems to be based on the suggestion that 3,000 individuals in Scotland should receive training, but that is not even close to one trustee per charity that operates. The amount is simply insufficient. We need a focus on the number of people who are in that position of great responsibility in the charitable sector, because they will have to adjust to and learn about a new set of regulations and issues in the years to come.

Mr Brocklebank: As you are aware, about 67 per cent of charities in Scotland have an annual income of less than £25,000. In those circumstances, is the £2,000 one-off administration charge acceptable for such charities, which make up almost 70 per cent of Scottish charities?

Lucy McTernan: I am aware of the figures on charities’ incomes—they are produced by the SCVO. The figure of £2,000 in the financial memorandum is the Executive’s estimate of what it would cost to reprint stationery and so on; it is not a proposed fee to be paid to OSCR. Undoubtedly, adjusting to the new system will create an administrative cost for charities but, as I said, that cost would exist over time anyway. As long as the system can be implemented with common sense, charities are prepared to absorb the costs.
Mr Brocklebank: Do you mean even the charities that have an income of less than £25,000 a year?

Lucy McTernan: It is unlikely that those small organisations will incur anything like £2,000 in direct costs of that kind.

The Convener: I want to pick up on Ted Brocklebank’s point about the large number of small charities. Do we need the same system of regulation for all charitable organisations or should we use a very light touch with small charities that have limited budgets and reserve more developed systems of regulation for larger charities? Might that be a more appropriate system than the one that is proposed in the bill?

10:30

Lucy McTernan: Absolutely. That is how the discussion around OSCR’s initial plans for monitoring has gone. We are delighted that OSCR has chosen to issue only a very basic annual return form to organisations that have a small income. We hope that that approach will continue over the piece because it is unhelpful to small organisations to be compared with those that are many times their size. It is a matter of providing different information and of horses for courses. However, the SCVO considers it important for the purposes of transparency and public accountability that every charity that operates in Scotland—at least in the first years of the new regime—should be on the register, unlike in England, where some small organisations do not have to register.

The Convener: If the process of regulation for smaller charities is a matter of filling in a form and providing basic information about what the charity does, will we need training for every charitable trustee in Scotland? Do we need to estimate cost on the basis of providing such training?

Lucy McTernan: Filling in the form is about providing information, but the bill will change trustees’ responsibilities, and the SCVO thinks that it is fundamental that all people in Scotland who operate with those responsibilities understand them. The bill’s implementation will also provide a tremendous opportunity to broaden training from strict compliance with the letter of the law to addressing the underlying issues of good governance and good practice in the voluntary sector. The two matters could be combined, which would enable us to broaden the discussion out from what the bill says to include the range of governance issues that could do with being refreshed across the sector, such as how trustees work with their communities, how they respond to the needs of their users and how they spend their money efficiently. That is the broader context in which we would like training on compliance with the bill to be placed.

The Convener: I should declare an interest. I am a director of two charitable organisations: the Wise Group and the Tron Theatre Company in Glasgow. I have had other roles in and with charitable organisations. In such a role, the issues of greatest concern are one’s fiscal responsibilities as a director of a company; they are not really to do with the regulation of a charity. The argument that you are making is not narrowly about the implications of the charity regulation system that is being introduced, but about the position of the directors of charities as directors.

Lucy McTernan: That is very much the point; our argument is about governance overall. The current legislation says that trustees are in management and control. That of course refers to money, organisations’ wider resources and assets, staff—if there are any—and volunteers, and, critically, the users of organisations’ services. Trustees have responsibilities in all those areas. We are talking about giving trustees a deep understanding of their responsibilities in a way that is not scary—we do not want to frighten people away from such responsibilities—rather than just telling them what forms they need to fill in and what information they have to collect over the year.

The Convener: Will you comment on the supplementary evidence that we received from Anne Swarbrick, which I think you have seen? In paragraphs 2.1 to 2.7 of her evidence, Anne Swarbrick mentions issues in respect of differences between the proposed Scottish approach and the proposed Westminster approach. She says that the existence of different regimes and tests in Scotland might be a problem for charities that operate across the two jurisdictions. I would be interested to hear your comments on that.

Lucy McTernan: There are two different regimes at the moment, so the reform will not change that. If anything, it will bring the two regimes closer together. We are pleased that a public benefit test will be introduced in England and Wales; the idea was pioneered in Scotland as a more modern approach to the understanding of charity that allows the public to understand what charity means and makes the legal definition of charity reflect more closely how people understand it in general terms. We are pleased that the English and Welsh bill has the same basis; that will bring the two definitional frameworks closer together. There will, of course, continue to be changes, but we do not anticipate that they will be anywhere near as large as some people have suggested.

Jeremy Purvis: I return to training. I do not think that I got an answer to my question about whether you know how much money is spent on training at
the moment. I think that Mr White mentioned the funding that you get through various sources from the public sector. Does that total £14 million or is it £14 million plus the £2.5 million from the Scottish Executive?

Paul White: The amount totals £14 million. To answer your question, we do not know exactly how much is spent on training. The council for voluntary service network’s new core functions cover six different areas, two of which are providing support services and promoting good practice in the sector. Unfortunately, I do not have a breakdown at the moment of how much of the CVSs’ overall income is spent directly on training.

Jeremy Purvis: I would have thought that such a breakdown would be helpful. Lucy McTernan commented on the third section of your submission, which is headed “Ensuring good governance” and with which I agree entirely. It is interesting that you do not have a base figure for your activities in supporting organisations. If you did, the committee could be more confident that your estimate of, for example, £500,000 for training is more accurate than the Scottish Executive’s estimate of £150,000. You are saying that the Executive cannot base its figure on anything because of a lack of evidence, but it could be asked of you where the evidence of your experience is if you do not capture it yourselves.

Lucy McTernan: Our calculations are based on our understanding of the number of charities and trustees in Scotland and our experience of providing basic information and guidance materials through to delivering proper training courses. We would look to roll out a programme that would provide a basic set of information to all trustees in Scotland. We already publish a pamphlet called “In Management and Control”, which provides the basic information that any person needs when he or she takes on the responsibility of a trustee. We hope that such information—refreshed in the new context, obviously—would go out to all trustees and would be supplemented by making training courses available in each local council of voluntary services area at least annually.

Jeremy Purvis: It is the case that you are not capturing all that information at the moment, is it not? Within your own work, information on training and education is not captured.

Lucy McTernan: It is difficult to put it like that. We have done research throughout the sector to identify what training budgets voluntary organisations have, but beyond the infrastructure bodies—the SCVO and the CVSs—that provide support specifically on governance and charity law, most training budgets are devoted to training on professional practice, such as child care regulations or new information on employment law. We can provide the sector’s expenditure on training in general. The figures that Paul White provided on the resources that go through the CVS network are the nearest that you will get to the resources that are invested in supporting charities to be charities. We are saying that that work needs to continue and that it needs to be supplemented, at least for the first few years of the new regime, to take account of the new requirements on trustees and to take the opportunity for a step change in governance of the sector.

Jeremy Purvis: In the third section of your submission, you say that you have identified “the need for adequate training in all aspects of governance”.

How much can the new requirements be absorbed into current continuing work and how much will be extra? You have said that you believe that there should be more training.

I was slightly confused about what you said on the need for a light touch. You argue for a light touch but you do not think that it is necessarily coming, although you mentioned that the basic requirement for an annual return form is a light touch. However, in the third section of your submission, you say that the bill provides an opportunity to go beyond what is in it and to work on good governance for the sector. Is it fair to say that the light touch should be in the regulation—the requirement on the charities for an annual return—whereas the work of OSCR and others on good governance, continuing education and trustee awareness needs to go beyond a light touch?

Lucy McTernan: That is probably fair. Our point is that the investment needs to be made in good governance and on-going training rather than in creation of new information-collection systems.

Jeremy Purvis: Would such investment be over and above the £14 million?

Lucy McTernan: We estimate that the annual cost, which would taper off over a number of years, would be £500,000 for development of supplementary new materials and training in light of the new legislation. Our proposal would be both effective and cost-effective as it would not involve starting afresh with a brand new system of training and resources.

Jeremy Purvis: Sure. However, is it fair to say that the cost of that would come on top of the £14 million?

Lucy McTernan: Yes. That would allow us to respond to the new legislation.

Mr Frank McAveety (Glasgow Shettleston) (Lab): I want to clarify the response that was given
to the earlier question on Anne Swarbrick’s submission. Anne Swarbrick claims that the differences in approach to case law between the Scottish bill and the proposed English legislation might have a significant impact on charities. Do you share that view or do you totally disagree with it?

Lucy McTernan: There will be an impact on organisations that operate cross-border, because they will be required to comply with the charitable definitions both north and south of the border. However, relatively few organisations in that category will be affected. We disagree with Anne Swarbrick that the problem is as big as she and others have made out. I think that, in practice, the threats to existing charities are not as they have been portrayed; the vast majority of existing charities will move on to the new register and will fit into the new system quite smoothly. There will be issues only for organisations at the edges that are unable to demonstrate from the word go that they provide a public benefit.

Mr McAveety: What is Anne Swarbrick worried about that you are less anxious about?

Lucy McTernan: I am afraid that I do not understand the depth of concern that she expressed in her evidence.

Ms Wendy Alexander (Paisley North) (Lab): The committee finds itself in a bit of a dilemma when the experts disagree. The most worrying aspect of Anne Swarbrick’s written evidence is paragraph 2.6, which states:

“The cumulative affect of all this is that both parts of the Scottish definition are much more restrictive than both its English equivalent and also the present UK wide definition and so the charitable status of many Scottish Charities may be endangered. … These charities will be working in many areas of charitable endeavour.”

In fairness, the SCVO has made it clear that it does not share that position, but can you give the committee any guidance on how we, as non-experts, might achieve some clarity on the issue? There is an obvious risk that if we pass legislation that does not mean what we think it means we might find ourselves in a genuine dilemma. Have you embarked on any endeavours that might provide us with helpful advice on how we might get to the bottom of that issue?

Lucy McTernan: The committee must focus on cost, but I think that few costs will fall on the charitable sector because of the new definition of charity, which will be based on the concept of public benefit. Some organisations that currently enjoy charitable status will have difficulty in proving their public benefit; those organisations will be affected. However, the number of such organisations over time will become far fewer than people have suggested. The reason why I do not understand Anne Swarbrick’s evidence to the committee is that I am not sure that it can be demonstrated—excluding organisations that operate on both sides of the border—that charities in Scotland will incur additional costs compared to charities in England.

Jim Mather (Highlands and Islands) (SNP): I will return to training. I am intrigued that the SCVO thinks that the new training requirements might be in the region of £500,000. Would that involve the SCVO retiring, or replacing, elements of existing training?

Paul White: No—an expanded and extended programme of training in good governance should be delivered to Scotland’s voluntary sector. Such training could be delivered in part by the SCVO, which would be at the centre because of our track record, but more important is that support could be delivered to grass-roots organisations through the national CVS network.

10:45

In our experience, when voluntary sector organisations face a difficulty or dilemma, they turn to their local source of support, which is provided by the CVS network in every local authority area in the country. There is a council for voluntary service on everybody’s doorstep. Edinburgh has Scotland’s oldest CVS, which dates back to the 19th century, although it is fair to say that most are of much more recent origin. The councils are well-established players at local level and are a source of guidance and support, especially for smaller voluntary organisations.

Additional new training would ensure that the bill’s requirements were entrenched among trustees in the voluntary sector but, if I may pick up on the convener’s comments, wider issues such as financial management could also be covered as part of that overall programme.

Jim Mather: I understand that. However, commercial training organisations have an ongoing programme whereby new courses come on stream and old courses die or atrophy. Could the challenge of the new training not be funded within that £14 million budget?

Paul White: That is a fair question, but we should be clear about the £14 million that the CVS network attracts. Each organisation in the network is independent. In addition to the funding that they receive from the Executive, the organisations make every effort to raise income from a range of other sources. Much of that income, such as lottery money, is project based and requires specific activities to be undertaken in return. Therefore, much of the money is already ring fenced.
Given the nature of the charity law review, its impact on Scotland’s voluntary sector and its importance to both the voluntary sector and to our communities as a whole, we believe that we need to kick off an ambitious and high-profile programme of training to ensure that people do not fall through the net. We need to ensure that trustees have access to the information, guidance and support that they require so that they can continue with confidence in the important role that they play. As a sector, we need to put our shoulder to the wheel, but we need the resource to ensure that the bill has the impact that we all want.

Jim Mather: If the £500,000 was made available, what would that mean in practical terms? What additional resources would be acquired?

Paul White: There would be two elements. The SCVO would look to develop an in-depth governance programme that would set the tone at national level for what the sector requires. At local level, we would look to the network of councils for voluntary service to deliver conferences and good-practice events in communities throughout Scotland. More important, once those had taken place, the councils for voluntary service would then be in a position to provide on-going advice and guidance for trustees who find themselves with dilemmas or who are uncertain about the new regulations. That is pretty much where we are coming from.

The Convener: There is a sense in which the SCVO has a vested interest in the proposal. To paraphrase Mandy Rice-Davies: you would say that, wouldn’t you? It strikes me that some organisations, such as housing associations, would not approach the SCVO for such training because they have governance programmes of their own. Some of the bigger charities, such as Wise Group or Barnardo’s, are probably capable of delivering such training for themselves. The real issue, I suppose, is which subset of the voluntary sector will require such training from the CVS network. Should such training on governance be provided in addition to, and build on, current provision as you suggested, or should it be provided in the context of a reappraisal of the services that are currently funded and delivered? In a sense, the question is about rebalancing versus additionality.

Paul White: On which organisations a governance programme should ideally target, you are absolutely right to point out that the bigger players in the sector will be able to keep their own houses in order. We are confident that they will be able to do so. As we discussed earlier, many voluntary organisations are small or small to medium in their scope. We are particularly keen to target our efforts on those organisations.

On how we use the resources that are currently employed, you are absolutely right that one reason why we can deliver a training programme at a lower cost than the several million pounds that might be suggested by the cost of £50 per trustee—which is referred to in Lucy McTeman’s submission—is that there is an existing infrastructure in place to support the voluntary sector. Our view is that we can use existing resources to deliver a governance programme, but we need to ensure that we get the profile and information out at a level and impact that is sufficient to ensure that the legislative changes are embedded in Scotland’s voluntary sector. That is not something that we can do half-heartedly. We must put the resource in so that we can deliver the change that we and the general public require.

The Convener: That has been a useful exchange. Next, we shall take evidence from Executive officials, so some of the issues that you have raised will no doubt be raised with them. Thank you very much for coming along.

10:50
Meeting suspended.

10:53
On resuming—

The Convener: I reconvene the meeting. We shall now conclude our formal scrutiny of the bill by taking evidence from Scottish Executive Officials and Executive agency officials. I welcome Richard Arnott, head of the bill team, Quentin Fisher, deputy head of the bill team, and Jane Ryder, chief executive of the Office of the Scottish Charities Regulator. I would like to offer the officials the opportunity to make a brief opening statement, and then we shall proceed to questions.

Richard Arnott (Scottish Executive Development Department): We are grateful for the opportunity to talk to the committee about the financial implications of the bill. You have introduced us, so I will not do so again.

It may be worth emphasising that the overall financial implications of the bill are not expected to be very great for any charity that is already well run and compliant with the many existing legal requirements. Those requirements include adequate governance arrangements, accountability, control by charity trustees, maintenance of accounting records, preparation of accounts and so on.

However, implementation of the bill may lead to implications for any charity that is not currently compliant with those requirements. That chimes with the main objective of the bill, which is to
establish a robust, proportionate and transparent regulatory framework that satisfies public interest in effective regulation of charities in Scotland. The regime is intended to protect the public interest in charities. If it brings to bear pressure on charities to comply with a regulatory regime, and hence brings public confidence that all charities will use charitable funds for the correct purposes, the value of the bill will be significant. It will help to protect the estimated £240 million a year that is donated to Scottish charities by the public. Compared with that, the cost of implementing the bill, which I guess could be said to be a maximum of £10 million a year, is relatively small.

I would also like to emphasise a couple of key issues that we note have already been discussed by the committee. The committee asked Anne Swarbrick to provide a background note on the origins of the proposed regulatory regime; she has submitted an extra note for this meeting, on which I would like to comment. On the summary of events leading up to development of the bill, it is also important to remember Jim Wallace’s announcement on 16 December 2002 of the Executive’s response to the McFadden review. In summary, Mr Wallace announced that the Executive accepted the main principles of the McFadden recommendations but that, as legislation was not available at that time, it was instead planning to establish OSCR as an Executive agency, because that could be done without legislation.

Finally, it is worth noting that since the financial memorandum for the bill was published, further information on OSCR’s estimates for increased resources to implement the bill have become available. As OSCR noted in its written evidence to the committee, and as was confirmed by the Minister for Communities in his letter, it is now estimated that OSCR’s budget needs to be increased to £3.6 million per annum from 2006-07 to take account of the extra work that will probably stem from implementation of the bill. I know that the committee has discussed that this morning, but I want to emphasise that the figure has changed since the memorandum was published.

We shall do our best to answer your questions.

The Convener: I would like clarification on one matter. In The Scotsman, the Scottish Council of Independent Schools was quoted as stating that the independent schools sector pays out

“£7.5 million a year to help less well-off children attend private schools, but only receives £2.5 million annually in rates relief.”

What is your view of those figures?

Richard Arnott: As we said in the financial memorandum, there is no direct implication in the bill that schools will lose their charitable status. However, because that has been the subject of much discussion, we thought that it would be useful to include figures that are available. To get those figures, we had discussions with the Scottish Council of Independent Schools. The estimate of the value of charitable status to the independent schools in Scotland that we included in the financial memorandum is between £3 million and £6 million, which is a combination of estimates that various people made, including the SCIS and the SCVO. Since then, we have managed to obtain a little bit more information that might be helpful.

We originally estimated that the non-domestic rates benefit that schools received was about £2.5 million a year, but we have been able to investigate that further with local authorities; we now understand that that non-domestic rates rebate amounts to £4 million. There are obviously other benefits for independent schools, such as gift aid and corporation tax exemption. Benefits will vary enormously from school to school, and I am afraid that we do not have accurate information on them. We can only accept the SCIS’s estimates. I understand that the SCIS is undertaking further research with schools to try to improve that estimate, but we do not have an overall value.

The Convener: It will be useful to get as much clarity as possible on those issues.

11:00

Alasdair Morgan: Can Richard Arnott give us an update on the situation with regard to non-departmental public bodies, from which we have received a fair number of submissions? You said that you are considering whether they should either cease to be charities or cease to be non-departmental public bodies.

Richard Arnott: The position has not really changed on that.

Alasdair Morgan: There has not been a decision, has there? That is the point. You said that you are going to decide whether they should either cease to be charities or cease to be non-departmental public bodies.

Richard Arnott: No, the Executive’s position has not changed on that. It has been announced that, as part of the regular review that is undertaken, each charitable NDPB will be considered and a decision will be made on whether it is appropriate for it to continue as an NDPB or whether it would be more appropriate for it to continue as a charity. The Executive has accepted that there is a conflict between the requirements of public bodies policy—which, because of public bodies’ accountability to ministers, requires that ministers should be able to
control them through powers of direction, which they usually have—and the fact that, in general, charities should be independent bodies. The reviews have not all been completed yet, and only once that has been done will the Executive consider whether additional funding will be required.

The Convener: I ask you to make this absolutely clear: are you talking about the quinquennial reviews?

Richard Arnott: Yes, but I understand that they are not called that any more.

Alasdair Morgan: I accept the argument, but our job is to estimate the costs of the bill, and all the evidence that we have received suggests that, if the decision is taken not to make NDPBs charities but to have them retain their status as non-departmental public bodies, the potential costs will be enormous—far greater than anything that has been expressed in the financial memorandum. Even the evidence that we have received today from the Royal Botanic Garden Edinburgh, which is based in lots of other places apart from Edinburgh, suggests that the issue is not just tax relief but the effect of donors not giving donations because they would no longer get tax relief on them. First, I suspect that the Executive’s sums totally underestimate the potential loss. Secondly, even if the sums are correct, there is no chance on earth of the Executive making up for bodies’ loss of funds. Is that a fair comment?

Quentin Fisher (Scottish Executive Development Department): The figures that are used in the financial memorandum were derived from the bodies themselves and their sponsor divisions within the Executive a couple of years back. The figures were checked again last year with the sponsor divisions.

Alasdair Morgan: But were those figures simply for tax relief?

Quentin Fisher: Those were the figures for the value of rates. The question that we asked was a broad one and, I confess, the bodies came back with incomplete figures, as it were. Some could not tell us—in fact, most of them declined to tell us—the value of charitable status in terms of donations, which is the issue that you raised. We accept the fact that there would be a potential loss of donations were such a body to lose its charitable status; however, as you can well imagine, it is difficult to put a figure on that. Donations depend on legacies, for example, and are not regular income or turnover. For that reason, such bodies have always been a bit reticent about putting a figure on them.

In their more recent evidence, they have put figures on them, and we have no reason to question them. However, we do not say that the figures that we provide in the financial memorandum relate to lost donations; we are specific and say that they relate to tax relief and rates relief. I note with interest that, in the submission from the Royal Botanic Garden Edinburgh, which has been received today, the figure that is given for rates relief is lower than the figure that we were initially working on.

Alasdair Morgan: What is the Executive’s view on the matter? Do you view it with equanimity? It strikes me that it would be impossible to proceed on the basis of those bodies losing their charitable status. The financial loss to a number of bodies would be enormous and would not be made up, which would have significant repercussions throughout large parts of Scotland.

Richard Arnott: The other thing that ministers will have to consider—obviously it is not for officials to consider—is whether it is more important for the bodies to remain charities or for them to remain NDPBs.

Alasdair Morgan: Surely it goes further than that and is about whether it is more important that bodies continue to do the job that they are doing and are not totally hamstrung in carrying out that function. The committee must decide that now, in considering the financial memorandum, rather than speculate about a decision that ministers will take at some stage in the future.

Jane Ryder (Office of the Scottish Charities Regulator): This is about the financial implications of applying the principle—the charity test—consistently. The difficulty for NDPBs, and possibly for other organisations that are at the direction of third parties, is not the public benefit test but the requirement for independence of constitution. Although that is not a wholly new requirement—we have had many discussions about it with the Charity Commission—it is not terribly well understood or well articulated at present. One of the themes that came through in the consultation and that is coming through in the debate is the principle that charities should be independent.

The Convener: Yes. There are some issues there.

Ms Alexander: That was a helpful intervention. We are trying to assess the financial consequences of the policy position in Scotland. As the bill stands, the clear policy position in Scotland—with the public benefit test that we are using and the independence criterion that has been mentioned—is that quangos will no longer have charitable status. Is that correct? That is the policy position that is set out in the bill.

I return to Alasdair Morgan’s point and seek further clarification. It is rather puzzling that the financial memorandum deals only with the loss of
rates income and grant-in-aid funding and does not deal with the impact of the bill on charitable giving. That is not an issue for the charitable organisations; it is an issue for the Executive. We are simply observing that it is a matter of regret that that issue is not dealt with in the financial memorandum.

I ask the witnesses to clarify something else. The submission that we have received from the Royal Botanic Garden Edinburgh states:

“Under proposed charities legislation for England and Wales, the national cultural institutions will retain charitable status and will be regulated by the Department of Culture, Media and Sport or DEFA.”

In England, the policy position is that it is possible for a body to be both a quango and a charity, and to pass both the public benefit test and the independence test. If we were discussing the financial memorandum to an English bill, we would not be interested in the loss in charitable giving; the issue would not arise, because such bodies would retain their charitable status. However, in Scotland, we have chosen to have a public benefit test and an independence test that do not allow quangos to meet the threshold, although they can meet the threshold in England. Surely, in those circumstances, it is all the more important that we have a financial estimate of the costs that will be associated with the more restrictive definition that will exist in Scotland. Why does such an estimate not appear for the bill?

The Convener: There might also be an indication of how those costs might be met separately, if they cannot be met through the existing system.

Ms Alexander: Indeed. We have made a policy decision that is different from the decision that has been made in England, but there are no figures in the financial memorandum for the costs that are associated with that decision.

Richard Arnott: As Quentin Fisher mentioned, we attempted to find out the value to NDPBs of their being charitable bodies. They were not able to provide us with a value for the donations that might stop. That is unfortunate. They seem to be thinking harder about it now and they are providing some estimates; however, when we made our estimates, they were not able to provide them.

I emphasise two further differences between the position in England and the position in Scotland. First, under current English charity legislation, there are 100,000 exempt charities, and that is to be continued in the proposed English legislation. When we were designing the regulatory system in Scotland, one of our main aims was to encourage public confidence in the charity brand—I suppose that is the best way in which to describe it. We felt that the fact that a large number of charities would be exempt from regulation and from the new, independent regulator that we are setting up would not necessarily encourage public confidence in charities, so we have decided not to have the concept of an exempt charity.

The other difference rather strays outside charities legislation. I think that the Executive has gone further in public bodies policy in wishing to ensure NDPBs’ accountability to ministers. I do not claim to be an expert on the matter, but the same issues have not arisen in England.

Ms Alexander: I have a supplementary question. The submission from the Royal Botanic Garden Edinburgh states:

“For the reasons given above”—

which are essentially about its capacity to seek charitable income from individuals or grant-giving trusts—

“most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation.”

The organisations include organisations such as the Royal Botanic Garden Edinburgh, the National Galleries of Scotland and the National Library of Scotland.

Do you share that view? The position seems incredible to me. It is clear that you do not share that view, given that such organisations will lose their charitable status. Is that accurate?

Richard Arnott: I do not think that that relates to the bill. I have no reason to challenge what the RBGE says. If it is saying that such things are not viable—

Ms Alexander: It states:

“most capital projects involving a public/private sector partnership will simply not be viable without charitable status available to the client organisation.”

Jane Ryder: That is because of the implications of tax relief for the organisation and donors.

Ms Alexander: I accept that we are talking about speculation, but there is a rather helpful list, which includes the Royal Botanic Garden Edinburgh, the National Museums of Scotland, the National Galleries of Scotland and the National Library of Scotland. Perhaps that short list would be a helpful place to start in estimating the sums of money involved and the impact of the differential approach.

The Convener: A number of other organisations have made the same point in previous submissions.

Dr Elaine Murray (Dumfries) (Lab): I share the concerns that others have expressed about the effects on NDPBs and cultural institutions in particular. There is a possibility that, because
English law will be different from Scottish law, English cultural institutions will be at an advantage compared with Scottish cultural institutions if the bill is passed.

I want to ask about something that I put to Anne Swarbrick—she was not terribly sure about the legal position. I presume that one possibility would be for the NDPBs that are affected to become independent organisations. Currently, NDPBs can benefit from gifts of art in lieu of tax, such as inheritance tax. Probably the most famous example is Titian’s “Venus Anadyomene”, which went to the National Gallery of Scotland. If the organisation became an independent organisation to retain its charitable status, I presume that it would no longer be able to get art gifts in lieu of inheritance tax.

Jane Ryder: I should declare an interest: in my previous life, I was the director of the Scottish Museums Council, which is the organisation for the non-national museums and galleries. I will have to check this, but my recollection is that it is possible for the Government to allocate to any recipient; it does not have to allocate to the National Museums of Scotland or the National Galleries of Scotland. However, there are criteria relating to security, insurance, the importance of the collection to which the item is being allocated, I think, and so on. I would have to check that to be absolutely sure about it.

Dr Murray: You say that each NDPB will be reviewed. Previously, there was what was known as the quinquennial review, but it stopped happening every five years, which I presume is why the name was dumped.

Has the Executive any idea about how the independence route—I do not want to get my SNP colleagues too excited—could be funded or managed? Has there been any financial calculation of the cost of losing NDPBs and transferring them to the independent sector?

11:15

Quentin Fisher: The reviews and their consequences for NDPBs and their charitable status are not waiting for the bill. They were kicked off at the end of 2002. Indeed, six NDPBs have already ceased to be NDPBs so that they can retain their charitable status. Each of those is quite different in nature and they each have different financial arrangements. Each organisation has to be judged on a case-by-case basis so that decisions can be made.

As far as funding goes, the line that we take in the financial memorandum is that if there is a decision to give up charitable status as an outcome of the review, and that results in a net loss of income, the Executive will consider providing additional grant-in-aid funding to reflect that. However, the caveat is that there is also the possibility of restructuring services, which might be a possibility in some instances.

Dr Murray: From my limited experience of winding down NDPBs and institutions such as the Royal Commission on the Ancient and Historical Monuments of Scotland, I know that the position is far more complicated than initially meets the eye.

The Convener: Could Quentin Fisher let us know—not necessarily now—which six NDPBs have changed status and why they did that? Was the decision related to charitable status or were other factors at play? That information would be helpful to us.

Mr McAveety: I should plead previous on the issue, because of my ministerial role, although I was on the side of the angels then.

There is a complexity in restructuring any NDPB, whether it is being removed from Government authority, is being brought further within the control of the Executive or is affected by the principles that have come along the tramline in this charities legislation.

For a long time, I have been troubled by the lack of cumulative wisdom that has been applied to finding solutions for different policy objectives. Jane Ryder has confessed—much as I did—to her previous role on the Scottish Museums Council. Perhaps her experience could help us to find a model that allows NDPBs to retain charitable status and generate income, because there is no way in which two or three of the major developments that have taken place in the past five to 10 years would have happened without grant giving or gift donation.

There is something else that we have not mentioned today but on which I would like to hear Jane Ryder’s view. Have you had any discussions with the Cultural Commission, under James Boyle, about the potential impact of any recommendations that it might make to ministers? It might endorse the structure of existing NDPBs and the way in which they address income generation, because one element of the commission’s remit is to consider how to allow organisations greater freedom to generate income instead of their being dependent on Government grant in aid year on year. Organisations feel that that dependency does not give them a chance to be flexible.

I am concerned that cumulative wisdom is not being applied to resolving such issues. The Finance Committee has some difficult questions to address today and I would like to hear your views on them.
Jane Ryder: I have applied my mind to the problem, but I have not come up with a solution. If I had, I would be more than happy to share it with you. There is a role for discussion with the Cultural Commission and we have noted that. However, the timing—the timetable for the bill’s progress and the Cultural Commission’s intended timetable—is awry.

Mr McAveety: What are the barriers? Someone such as you who has the right experience must have some idea of the possible solutions. Have you woken up one morning and thought, “I’ve got a solution,” but found that, by noon, someone has decided that it cannot be done? I felt that I had that problem when I had my portfolio.

Jane Ryder: In discussions with others, I have had certain ideas, which the NDPBs have explored. None of the options is satisfactory because of the sums at issue. Because of my previous role, I have huge sympathy with organisations. My personal view is that it would be ironic if we were to find ourselves in a position in which the NDPBs were most at risk while other categories of organisation could at least pass the initial charity test, even if they were open to challenge in other areas. I am not sure that that was ever the policy intention of the bill.

Alasdair Morgan: I want to follow up on the last response that I got from Mr Arnott. Would it be possible for us to have copies of the letter that you wrote to the various NDPBs a few years ago and to find out what their responses were?

Richard Arnott: Yes, I am sure that we could provide that. That would probably have been dealt with through the NDPBs’ sponsor divisions in the Executive.

Alasdair Morgan: That would be helpful. Even if NDPBs responded fully on what they thought would be the result of the loss of charitable status, they will not have dealt with the issue that is mentioned in paragraph 4.3 in the submission from the Royal Botanic Garden Edinburgh—namely, the fact that such bodies’ counterpart organisations south of the border will not lose charitable status. That is a significant issue. The RBGE makes the point that because the major capital projects that those English organisations are running will continue to attract charitable donations, many donors who might previously have supported the projects of the relevant Scottish body will turn to the English organisations instead. The NDPBs would never have thought of raising that issue in their submissions. I am suggesting that even those organisations that answered your question fully would have underestimated the potential loss.

Richard Arnott: You might well be right. At that time, they would not have predicted the changes, but I am not sure that that is something that we would expect to consider as part of our examination of the bill’s financial implications.

Alasdair Morgan: There is a financial implication for those bodies.

Richard Arnott: It is not necessarily an implication of the bill; it is an implication of existing charity legislation.

Jane Ryder: It is the result of a displacement effect—in other words, it is an indirect rather than a direct financial consequence.

The Convener: The issue is crucial, so I will let in another few members. My understanding is that the Communities Committee will take evidence from a number of NDPBs this week. Our committee might like to send a representative along to that meeting.

Mr Brocklebank: I might or might not be expressing the concerns of other members, but my feeling is that the bill is a very big hammer to crack a relatively small nut. That view has only grown as I have listened to the evidence this morning.

I find it difficult to understand what is being said. The Royal Botanic Garden Edinburgh gives chapter and verse on the bill’s financial implications—it describes how giving to the RBGE will be affected, for example. It says that it had believed that the national cultural institutions would not be affected by the bill, but it is obvious that that is not the case. The RBGE claims that there has been little consultation on the matter. How does the panel respond to that?

Richard Arnott: I am surprised, because I thought that the consultation paper that the Executive issued on the draft bill in June last year made clear the potential implications and set out the Executive’s position on public bodies and the conflict with charitable status. I would need to check, but I imagine that the RBGE was one of the bodies that responded to that consultation.

Mr Brocklebank: Did you go directly to the NDPBs? Who did you approach to ask for the financial information?

Richard Arnott: When the original statement was made in 2002, I believe that the Executive went to the NDPBs’ sponsor divisions, which in turn went to the bodies themselves.

Mr Brocklebank: You believe that that was the case. Does that seem adequate? I am not sure that it does.

Richard Arnott: In 2004, we consulted the sector and ensured that each of the affected non-departmental public bodies received copies of the consultation. I am pretty sure that we got responses from all of them.
I have attended meetings with some of the steering groups that are examining the reviews of the NDPBs to ensure that they understand the implications of the legislation. The Scottish Executive has ensured that those considering the bodies’ position are aware of the implications of the bill.

I know that my colleagues in the culture division are still considering solutions. I understand that one of the methods that they are considering is the example of the museums in Sheffield. There, it has been established that ownership of the assets remains with the local council—I think that that is who owns them—and the museums look after the assets under a contract or a funding agreement, thereby maintaining their independence. I do not know whether that is a potential solution, but I know that it is being considered.

Mr Broicklebank: As things stand, we are saying that our great cultural institutions, such as the art galleries and the Royal Botanic Garden Edinburgh could be put at a very significant competitive disadvantage compared to similar bodies south of the border, such as the Royal Botanic Gardens at Kew, the British Museum, the National Gallery and the British Library. As a result of the proposals that we are discussing, all those national bodies will have a competitive advantage over the Royal Botanic Garden Edinburgh and other bodies in Scotland.

Richard Arnott: That could be the case, if ministers decide that they should continue to be NDPBs.

The Convener: The solution might create other problems, though. If the bodies were to become independent, there would presumably be an issue of control and accountability. The problems replicate themselves and the solutions might generate other problems.

Richard Arnott: Obviously, the solutions would have to be considered in their widest sense.

John Swinburne: What analysis and investigation was made to quantify the extent of the existing financial problem prior to setting up the legislation? How much money was being pilfered out of the charities compared to what it is costing to implement this legislation? Are we, as Ted Broicklebank suggests, using a sledgehammer to crack a nut?

Richard Arnott: I will introduce the answer to that question before handing over to Jane Ryder, who has figures for individual cases.

It is important to emphasise that the reason for having the bill relates to the fact that, as Lucy McTernan said earlier, the sector has been calling for a regulatory system for around 10 years. That is the main basis for the bill, but it has to be said that there was an increased impetus for the call for legislation as a result of a small number of high-profile cases.

Jane Ryder: The two catalysts for the bill were the Breast Cancer Research (Scotland) and Moonbeams Children’s Cancer Charity cases in 2003. The indicative figures that we have been able to pull out show that, over five years, the two organisations raised just under £17 million between them and used just over £2 million on direct charitable expenditure. At the point at which the Scottish Charities Office intervened against the charities, a sum of not less than £14 million was not expended. That is an extremely significant sum.

As an executive agency, OSCR can develop a proactive monitoring scheme. Lucy McTernan talked about how we are proposing to phase that in. We hope that that will enable us to identify problems on that scale at an early stage. The bill also gives us significant additional powers that would enable us to intervene at an earlier stage and to do so against subsidiary companies and agents, which were significant factors in the 2003 cases.

I would also like to echo Richard Arnott’s point. The two primary objectives of the bill are to build public confidence through an appropriate regulatory scheme and to emphasise the accountability of charities in return for the benefits of charitable status. That is something that we have been emphasising. There are valuable aspects of the bill that, both through the regulator and directly, will make charities more accountable and transparent to the wider public and the stakeholders. I would not want to lose sight of that.

11:30

Jeremy Purvis: I want to follow that by asking about the anticipated costs in future years. Table 4.3 in your submission is helpful, as it shows the anticipated cost up until 2009-10, when it is expected to be more than double the current expenditure. Can you give us some more detail on the figures? The table shows a cost of £453,000 in 2006-07 for charitable status and further costs of £245,000 and £381,000 for registration and monitoring, respectively. The cost against the heading of “Charitable status” will go up to £500,000 by 2009-10—what does that heading refer to?

Jane Ryder: That heading covers the processing of new applications for charitable status. At the moment, the Inland Revenue receives in the order of 1,300 new applications a year. The heading also covers the rolling programme of the review of charitable status, which we will institute. Section 30 requires us to
remove a charity from the register if it does not meet the charity test, which is a provision that we will introduce over time. A lot of work in the initial stages is associated with the development of the guidance for the charity test, with putting in place everything that we need to assess new applications immediately and with phasing in the programme.

The charities register has been referred to. We currently publish the Inland Revenue information on live charities, of which there are about 18,500. However, our estimate of the total number of charities that will need to appear on the register is approximately 30,000 including the live charities, a number of organisations whose activities are currently unknown, English charities that might have to register and an increasing number of new charities. Work will also have to be done to keep the register up to date because, under the bill, charities are required to notify us of certain changes of detail.

We are developing a proactive monitoring scheme, which we piloted on 300 charities in the summer. We have produced a comprehensive report that is at the printers even as we speak and which will be published in the early spring. As has been mentioned, we plan to phase in that scheme gradually over 2005. It will be light and proportionate. The two thirds of charities that have an income of less than £25,000 were only ever intended—and are intended—to fill in a simple annual return to be returned to us with their accounts for us to do the rest of the work. We are asking the remaining approximately 8,000 charities to supply more information because they have it and know that the figures are accurate and because that will relieve us of some of the processing load. By April 2006, when the bill comes into effect, both the regulator and the charities will be familiar with the anticipated requirements.

Jeremy Purvis: I understand that explanation but, with regard to charitable status and the other categories, on the basis of the number of applications that you say that the Inland Revenue receives at the moment, it seems that you would be looking at £400 per registration—that is very much a ball-park figure—with any associated queries on the back of that and perhaps monitoring and investigations. You are not building in any efficiencies. You are not saying that you will become more efficient over the first five years of your life. Do you anticipate that greater numbers will come through, which will produce efficiencies?

Jane Ryder: It is precisely that—greater numbers will come through. The figures also cover dealing with the new regime for Scottish charitable incorporated organisations and a fairly extensive consent regime. The overall figures also absorb a five-tier system of appeals, under which we will have to conduct an internal review on request, after which cases can go up to the appeals panel and then on up to the court in—hopefulvery much decreasing numbers. Nevertheless, there are considerable costs involved in that.

Jeremy Purvis: The figures for guidance show an increase as well. I am not sure whether it is an inflationary increase. It is understandable that there will be start-up costs in order to make known the new requirements, but why is there a continuing substantial cost for guidance?

Jane Ryder: There will be a continuing need for guidance as new issues arise and new charities come on stream. The point was made in earlier submissions about OSCR striking the appropriate balance in providing general guidance. I stress that it is not OSCR’s intention to offer tailored training, but it is appropriate that OSCR offer general guidance on compliance issues and on the issues of practice that come out of our monitoring and investigations, so that the sector learns from cumulative experience and individual decisions.

The bill requires us to publish the results of inquiries, so there are already some prescriptive indications about the process that we have to follow. We need some flexibility to respond to new circumstances. However, it is right that guidance, advice, training and support are on a spectrum. Some aspects will be provided by OSCR, some by the SCVO and some by other intermediaries.

We have held discussions with key umbrella organisations that advise us, such as the Institute of Chartered Accountants in Scotland. Clearly, accountants will be critical. It is not that OSCR wants to reaudit anybody’s accounts, but we want to ensure that the standard of audit practice is appropriate and that the new regulations are understood.

The Convener: One suggestion for an alternative approach was that rather than putting the burden on OSCR, the nature of charity audit could be respecified and a specialist requirement could be placed on the auditing profession. Do you have any comments on that?

Jane Ryder: There is currently a specialist requirement.

The Convener: But it could be extended.

Jane Ryder: Yes. Yesterday, I had a brief discussion with the ICAS executive director of regulation and compliance about how we might approach the issue. We have not sought any additional assurances from auditors, but we want to work with ICAS and other auditors and examiners to ensure that there is a joint understanding in guidance, and possibly examine
the introduction of specialist accreditation by ICAS, which is a matter for ICAS.

Jeremy Purvis: On the figures for investigations, given that the convener rightly said that directors of charities have to observe the rules of the Inland Revenue, are you not adding an additional investigation and performing a role that the Inland Revenue would perform anyway, especially if there is non-reporting of financial activities? That is currently investigated under Inland Revenue rules, and it, not OSCR, would investigate.

Jane Ryder: Investigations would be into compliance with a whole range of the bill’s requirements, including on issues of misconduct, and not purely with financial requirements. The Inland Revenue has a very limited investigatory function. The current function of the Inland Revenue to grant status is passing across to OSCR.

Jeremy Purvis: If you have a very light-touch reporting mechanism, which we understand will be the case, £400,000 to investigate basic annual returns seems rather a lot.

Jane Ryder: Perhaps I had not properly explained that. There is a light touch for two thirds of the charities—the small charities that will be providing us with an annual return and their accounts, which we can examine—and a more extensive questionnaire for other charities, which will give us information on fundraising ratios and dealings with trustees, for example, because governance issues are critically important, and we can then drill down to those. We do not anticipate for a moment that we will be investigating a substantial number of the proportion of the 30,000 charities, but the sum quoted is not a great amount. When channelled into investigations, pure and simple, it is little more than the Scottish Charities Office had prior to the establishment of OSCR, but we have a range of other functions and ways of assisting and facilitating charities to comply. There is a balance to be struck. The bill gives OSCR extensive powers of investigation and sanction but, as Richard Arnott has indicated, we envisage using those powers only in a very small number of cases. The balance of our activity following investigation will be to facilitate the charities to comply, not to take extreme intervention powers.

Jeremy Purvis: Given that that is the case, I would like to look at the headings in table 1.1. Forgive me if I am comparing apples with pears, but does table 1.1 not show the existing figures? I am looking at the reason why we are extrapolating up to more than double that by 2009-10. According to table 4.3, investigation is probably the most considerable part of the work after the registering of new charities. What would be the equivalent under the existing figures, given that you have just said that it is continuing existing practice? Does that come under the £295,000 for operating costs, or are the headings not comparable?

Jane Ryder: I am sorry, but I—

Jeremy Purvis: Table 1.1.

Richard Arnott: Table 1.1 is the existing—

Jane Ryder: I beg your pardon.

Jeremy Purvis: You have said that the investigative role is extending what is currently the practice. Where in table 1.1 is the current budget that you originally set down for investigations?

Jane Ryder: I think that it is incorporated within salaries, training and recruitment, and specialist legal and agency support. That is—

Jeremy Purvis: Do you have that table in the same format as table 4.3?

Jane Ryder: No, we do not. Sorry. That table—

Jeremy Purvis: Are you able to do that?

Jane Ryder: With some considerable difficulty, I think, because—

Jeremy Purvis: Why?

Jane Ryder: Only because table 1.1 reflects the situation in December 2003, when OSCR was set up as an executive agency. The European Foundation for Quality Management modelling has been done by us in the course of 2004 on the basis of our first six to nine months’ experience.

Jeremy Purvis: Right, okay. If meeting that request is impossible, or if it is possible but only with considerable expense, you must nevertheless have given a case to the minister for an increased budget. Did the minister not say—

Jane Ryder: We presented it not so much as a case for the increased budget but as a full analysis of what we need in light of the legislation, which allowed us so say what the difference was, rather than starting with a baseline and working upwards.

Dr Murray: On a slightly different issue, Anne Swarbrick raised the concern that when charities appeal to the appeals panel, they will not be able to recoup the cost of the appeal for such things as legal advice, even if they are successful. They will therefore have to stand those costs from the public donations that are given for the purposes of the charity. Do you want to comment on that? Could any consideration be given to helping a successful charity to meet the costs of an appeal?

11:45

Richard Arnott: The best way to answer that may be to explain our thinking. We have been
aiming to set up an independent regulator that effectively acts in the public interest. For a charity or a body to apply to OSCR and be registered, it must meet the costs of applying. The idea of having an appeals panel was to provide some independent check or quick and simple second opinion on OSCR’s decisions. We would hope that the panel will be able to provide quick opinions. It is intended to offer a lower, quicker and easier test than going to court, which is what would have to happen otherwise.

We would hope that the costs will not be extensive. That is part of the reason why we did not consider it necessary to award compensation costs. We also felt that there might be an element of thinking along the lines of, “Well, I might as well appeal because I’ll get my costs if I win.” We are aware that if people are really unhappy with the panel’s decision, the appeal can be taken to the court, which can award costs if it so chooses.

Dr Murray: Can you give us a rough estimate of the costs to an organisation of an appeal?

Quentin Fisher: We did an estimate. If we take out of the budget that we have set for the appeals panel the running costs or baseline of £80,000 per annum, that would come to about £1,300 per case. That is the cost over and above staffing costs and so on.

Richard Arnott: To clarify, that is the cost of the appeal panel.

Dr Murray: Yes—not the cost to the organisation.

Richard Arnott: You were asking about what the cost would be to a charity that was appealing. In theory, the cost to the charity would be that of writing a letter saying that it wished to appeal and to ask for a second opinion.

Quentin Fisher: We recognise that, in reality, some charities will wish to take legal advice and have legal representation present. That would cost them, although there is of course no requirement for them to have that. As Richard Arnott says, representatives of the charity can simply write a letter and then turn up on the day and argue their case.

Jim Mather: I am interested in the total sums concerned. You mentioned total donations of £240 million and total costs of £10 million. Is that the annual cost?

Richard Arnott: Yes.

Jim Mather: If we take that publicly funded administrative cost of the bill—£10 million—and add that to gift aid as a percentage of total donated income, it begins to look as though the public purse is giving its support to quite a marked extent. Given the probable impact following the passing of the bill, with the loss of the NDPBs, it strikes me that we might find a higher percentage of the total income coming from the taxpayer. Have you mapped that out? Have you examined that and compared what will happen and what is happening in Scotland with what is happening in the rest of the United Kingdom and in other small European countries, to see whether that is reasonable?

Quentin Fisher: You mention the rest of the UK. To make a comparison between what we are proposing to do and set up and what is happening in England, the Charity Commission for England and Wales has existed for quite a while now and, when I last looked, £30 million was its—

Jane Ryder: And 600 staff.

Quentin Fisher: Yes—it has 600 staff, which is more than here. Granted, the Charity Commission has a bigger remit and a bigger constituency, and has to deal with more charities. That is certainly proportionate and relative to the existing regulatory structure in England and Wales.

Jim Mather: I hear the words, but I would like to see the numbers mapped out so that we can make a genuine benchmark comparison. At the moment, we are heading into the dark in a number of areas. However, working out the exact total cost would be a simple exercise. You have that figure. How much is the gift aid? You have that figure. How much are the total donations that are delivered to charities in Scotland? We can compare that with elsewhere, so that we can see whether we are paying over the odds in managing the charitable sector in Scotland. Is that not possible?

Quentin Fisher: Sorry, but I want to be clear about this. Are we talking about the cost of regulation rather than the cost of the benefit to the sector?

Jim Mather: I am talking about the totality of the matter. In essence, the public purse is paying for the cost of the administration and of the gift aid that would otherwise remain with the Treasury. As a result, would it not be reasonable for us to be given those data to benchmark what is happening in Scotland with what is happening elsewhere?

Richard Arnott: I am sorry—I have become confused. The £240 million per year that is donated to charities in Scotland is not just gift aid.

Jim Mather: I understand that.

Richard Arnott: I believe that although the figure includes some gift aid, that does not represent a very large proportion.

Jim Mather: But, again, we are dealing with anecdote. I am looking for some hard figures.
Richard Arnott: I am not sure that we are able to produce any harder figures.

The Convener: I suppose that Jim Mather's question centres on the amount that the taxpayer pays to support the charitable sector, after taking into account all the different categories of contribution including the underpinning of administrative costs, relief through gift aid or any other associated costs. I believe that he is also seeking a breakdown of proportionate issues at a UK and Scottish level and is wondering whether there are any useful comparators elsewhere in Europe.

Jane Ryder: There might also be what might be called set-off figures that show the amount that charities contribute back through national insurance and so on. Of course, some of those aspects relate to their status as businesses rather than as charities, which makes things difficult to disentangle. This is not an entirely one-way street.

Jim Mather: I am asking for a simple subset of the figures to find out whether we can clarify things.

As far as OSCR is concerned, Jeremy Purvis raised a concern that I share about the change in the reporting format. There has been a move away from elements such as rental, services, salaries, training and recruitment towards categories such as leadership and governance, and people management. Is it not possible to report openly, transparently and consistently?

Jane Ryder: Yes. I hope that in seeking to move to the European Foundation for Quality Management model we will make the reporting system more open and transparent than it would have been if we had maintained the position from which we started in December 2003 and simply provided indicative figures. In trying to make an extrapolation back to those initial figures, we must bear it in mind that the functions in 2003-04 are different to those that are set out in the EFQM model for OSCR 2. As a result, the issue is a bit like comparing apples with pears.

Jim Mather: Sure, but that approach leads to discontinuity in the transitional year and does not allow us even to compare apples with apples, never mind pears with pears.

I take it that the first four categories of the cost element—leadership and governance, people management, information management and resources—are all overhead rather than operational aspects.

Jane Ryder: That is correct. I should point out that those categories are standard for that model. Indeed, I have a 68-page resource impact assessment that sets out the matter in much greater detail, if members would like to see it.

Jim Mather: One of the major issues relates to the fact that other organisations, particularly those in business, tend to ensure that the overhead figure is stable or diminishing. Your forecast indicates that that figure will increase pretty much at the same rate as the direct cost. Why is that?

Jane Ryder: We have indicated some of our assumptions with regard to inflation on salary settlements and information technology replacement—that is probably a separate issue, but we have included it anyway. Our assumption of 3 per cent inflation on salary settlements is about half the normal assumption for Scottish Executive matters, which means that the figures include some efficiencies.

Jim Mather: But I have calculated that your overheads amount to 43 per cent of total cost, which is about twice the published rate for organisations such as Scottish Enterprise and Highlands and Islands Enterprise.

Jane Ryder: It is not entirely correct to classify all those costs as overheads. For instance, the appeals process comes under leadership and governance. I have sympathy with the sector, which talks about dual regulation. There are substantial costs for OSCR in complying with the requirement to be a non-ministerial department; it must comply not only with the legislation, but with the Executive’s requirements. Therefore, the overheads are not purely the tangible ones; some of them are operational issues.

The Convener: I offer the witnesses the opportunity to respond to Lucy McTernan’s earlier argument about training costs. It is clear that there is a substantial gap between the £150,000 to which the financial memorandum refers and the £500,000 that the SCVO indicates as a more realistic first-year cost. The SCVO argues that there should be a tapering process in subsequent years.

Quentin Fisher: The figure in the financial memorandum relates to the Scottish Executive and to the costs to the Administration, as opposed to the costs to the charities or to the sector itself. The figure of £150,000 was based on experience of a previous exercise in relation to the Protection of Children (Scotland) Act 2003, in which a section of the sector was trained to go and train others.

The Convener: Have you got any out-turn statistics for how your estimates worked through that process? That would be an interesting test.

Quentin Fisher: It would be. We did not conduct the exercise and were not directly involved in it. The exercise was conducted by the sector, but we could certainly ask about it.

We are budgeting the training cost as a cost to the Administration. We acknowledge that there will
be a cost to the sector, but we have not attached a figure to it. The SCVO has attached a figure to training, but I do not think that we have seen that figure before today; we would have to discuss that with the SCVO. However, in our thinking, we considered that the SCVO has an existing training programme. One of the members mentioned that. We envisaged that the training would somehow be accommodated within that programme.

Richard Arnott: There has been much discussion about guidance for improved governance, good practice and compliance with the regulations. In considering the financial memorandum, we wanted to stick with the training that would be required to ensure that people complied with the regulations. That is where we feel that OSCR's main role lies. It should be for OSCR, as the regulator, to provide the guidance for what is needed to comply with the regulations. I understand fully that the sector may well wish to take that guidance further and to approve the good practice operations of the voluntary sector in general, but I do not think that the cost of doing that should be attributed to the bill. However, that does not mean that I disagree that it is required.

The Convener: There is a level of truth in that that picks up on my earlier comment about the different kinds of responsibilities on charity trustees. However, it seems to me that there is an issue about your introducing a new system that, undoubtedly, will have training costs for charitable organisations that must be taken into account. You made a specific estimate of the light-touch figures versus the figures from the charities that were subjected to greater reporting requirements. Can you be a bit clearer about the criteria that are being operated to separate out the sheep and the goats and whether you have identified specific training costs for different levels of regulation?

12:00

Jane Ryder: That is an operational matter for OSCR, which we are beginning to scope out. The monitoring pilot and extensive consultation provided us with a sample from which we could identify where the greatest problems would arise and what the appropriate response to them might be. In some cases, the appropriate response will be to work with specialist advisers such as ICAS members; in others, it will be to work with the SCVO and other intermediaries.

As Richard Arnott indicated, OSCR will provide guidance to an extent but we will not provide training. As happens at the moment, OSCR staff will host our own general guidance sessions and appear at other people's presentations and seminars to provide more detail and to answer questions. A range of responses will be appropriate, depending on the issues concerned. We are beginning to develop those responses.

The Convener: Forgive me, but that is really quite imprecise. The committee has been asked to comment on a bill, but the cost of training people to meet the bill's regulatory requirements is unspecified. You have said, "We could do this and we could do that" and "We might need this and we might need that", but you have not been able to separate out what exactly will be required and what that is likely to cost. That is an issue.

Jane Ryder: I do not think that the regulator can do that. The regulator's remit, as it were, goes only so far before we get into issues about what each individual charity needs and how that can be addressed.

Richard Arnott: The answer to the convener's earlier question must be that we fill that gap by discussing with the charities and umbrella organisations such as the SCVO what is required as the bill develops.

The Convener: To an extent, our role is to specify the cost of the bill before it is implemented. You have acknowledged that substantial hidden costs are associated with the bill and that you will need to have further discussions on those costs with the various agencies that might be expected to deliver the aims of the bill.

Richard Arnott: It is more a case of our needing to have discussions with the support agencies to which we already provide significant financial support. We need to discuss with them what that support should be used for and whether some of it should be used to support the implementation of the bill.

Jeremy Purvis: Mr Arnott will be familiar with the table that follows paragraph 4.3 in OSCR's written submission. Does he agree that it is odd that OSCR's anticipated cost for providing information and guidance is way more than double the suggested cost for the 20,000 charities that are to receive that training? Should the cost to the public agencies of producing guidance be more than double what it has been estimated it will cost the charities themselves?

Richard Arnott: No. If I have understood the question correctly, the cost to which you refer is the cost to OSCR of providing information to charities and to the public. If OSCR provides the guidance, the charities should not have to pay for training as well.

Jeremy Purvis: Given that those costs will not necessarily be absorbed by the charities, should not the financial memorandum have captured the costs to the public purse of providing that training?

Richard Arnott: It should have done so only if one considers that providing information to people assists in their training.
Jeremy Purvis: You have just said that it does.

Richard Arnott: It does—sorry, I am getting myself confused. It is important that OSCR provides the sector with information on what OSCR requires and on the lessons that can be learned from OSCR’s investigations. I am not sure that there is a direct cost to the sector in absorbing that information. I think that what I am saying is that part of the sector’s training costs will be provided by OSCR providing information. I agree with you on that.

The Convener: We will stop the evidence-taking session at that point. I thank the witnesses for coming along and responding to our questions.

I suspend the meeting for a couple of minutes to allow the witnesses to leave. We will then have five minutes or so for committee members to reflect on what they have heard and to make any suggestions that they have to the clerk about how we should proceed on the issue.

12:05

Meeting suspended.

12:06

On resuming—

The Convener: I remind members that, because we are still meeting in public, it is probably not appropriate to discuss some of the detail of what our draft recommendations might be.

Ms Alexander: I suggest that we go into private session for five minutes or so. That would let members speak frankly about how much the matter is in our domain or in that of another committee. One of the difficulties seems to be in deciding how much the issue is ours and how much it is other committees’. To avoid trespassing on the work of other committees, there might be merit in spending five minutes in private on that.

The Convener: If members agree, I am happy for us to move into private session. Do members agree?

Jeremy Purvis: Not entirely. It is fairly clear that we discuss in public, on an agenda, whether we are going to discuss anything in private. It was not published on the agenda that we would be going into private session and I am not sure that that would be fair to witnesses that we have had. I am quite happy to put my comments on record. We have done that when we have previously discussed the remits of committees.

The Convener: There are two points to be made. Jeremy Purvis’s general point is correct; however, Wendy Alexander’s point is also correct.

Some of the issues that have emerged from the evidence that we have taken are policy rather than finance issues. It would perhaps be risky for us to get too heavily involved in the policy issues. My suggestion is that we seek to engage with the Communities Committee to highlight the concerns that have been expressed today and perhaps appoint a member of this committee to attend the Communities Committee meeting at which it deals with NDPB issues, so that the points that have arisen today can be raised at that meeting. That would be done separately from the consideration of our report. There is a Communities Committee meeting tomorrow at 9.30. According to the proper relationship between committees, those issues should really be dealt with by that committee, with us feeding into its considerations rather than trying to draw any preliminary conclusions here. That is my suggestion, and members seem to be in agreement with that.

Members indicated agreement.

The Convener: What we now need is a committee member to volunteer for that.

Alasdair Morgan: Jeremy Purvis and I will be catching the number 2 tram tomorrow morning. That rules us out.

Dr Murray: Some of us will be attending the Education Committee meeting tomorrow morning.

Ms Alexander: We get a wee bit jumpy when another member comes to our committee, although I am absolutely not against a member going to the Communities Committee. I was going to suggest a clerk-to-clerk letter, but in view of the time, it should be a clerk-to-clerk e-mail that makes two points. The first is that the bill designates NDPBs in Scotland as not being charities, but the financial memorandum does not touch on the impact on those bodies and the sum of money that is involved, either in grant giving to them or in individual charitable donations. Other members may have other points.

The second point that we should make is that, since the bill was first produced, it has become clear that a different approach will be taken in England. Therefore, the first point is significant not only because the bill will have an unquantified direct financial impact, but because a migration effect that is also unquantified may be created because there will be a different approach elsewhere.

Everybody is throwing up their hands and saying, “Oh God! There’s no policy solution.” England has a policy solution, but that issue is not for this committee to pursue. In England, some NDPBs that are regulated by the Department for Environment, Food and Rural Affairs keep their charitable status. We should send an e-mail that makes two points: first, that there is an
unquantified financial impact and, secondly, that the impact may be exaggerated because similar conditions will not pertain in England.

**Mr McAveety:** So we want an English solution to a Scottish problem. Can you live with that?

**Ms Alexander:** We should flag up to the Communities Committee the policy’s financial implications and pass the matter over to that committee.

**The Convener:** If we cannot send a member, Wendy Alexander is right that we should get something specific down on paper. Given the timescale, we need to do that immediately. Susan Duffy is comfortable that she can express Wendy Alexander’s points.

**Ms Alexander:** Others may have other points, but the two that I mentioned seem to be the big ones.

**The Convener:** We must ensure that the point about NDPBs is flagged up clearly to the appropriate committee. That does not mean that we cannot deal with it, but it would ensure that the issue is dealt with in the proper context.

**Dr Murray:** Unfortunately, three committee members are on the Education Committee, so it is difficult for us to go along tomorrow morning. Is the Communities Committee taking evidence only from NDPBs tomorrow? The issue is not just about NDPBs. We might want to send a member to a later meeting with Executive officials and ministers to talk about the policy decision to take a different policy stance in Scotland from that in England. It might be worth while having a member of this committee available to attend when the minister gives evidence to the Communities Committee.

**The Convener:** There are four panels of witnesses at the Communities Committee tomorrow, one of which is made up of representatives of NDPBs. As always, our report is scheduled to be with the Communities Committee before the minister gives evidence. We will produce our considered judgment so that it feeds into the Communities Committee’s scrutiny of ministers. I hope that that answers the point.

**Dr Murray:** It depends on how significant our concerns are. If they are sufficiently significant, it might be appropriate for a Finance Committee member to be at that meeting.

**The Convener:** The best bet at this stage is to highlight our concerns as Wendy Alexander suggested. We should let the lead committee take evidence and then consider the issue. It might take a fortnight before the committee considers a draft report, but we will have the opportunity to consider our conclusions and feed them into the process.

**Ms Alexander:** I have one final point. In our e-mail we could also ask the lead committee to press the minister on whether the Executive will quantify the sums of money that may be involved in the differential approach. There is a wee bit of a lapse of time before the Communities Committee takes evidence from the minister, but it would be ideal if the inquiry to the minister did not come from us, but from the lead committee.

**Alasdair Morgan:** The Communities Committee’s meeting with the minister will be after that committee gets our report anyway, so we can put the point in our report.

**Ms Alexander:** Yes, but we are trying to get a change of heart in advance, rather than afterwards.

**Alasdair Morgan:** Yes, but the meeting will be after we report.

**Ms Alexander:** All right. The question is whether it is appropriate for us at this stage to seek clarification of the unquantified costs and whether we should do that now at our own hand, based on what we have heard, whether we do it to inform our report or whether we ask the lead committee to consider the issue.

**The Convener:** The easiest thing is for us to ask for the information. If the response comes in time, it can be included in our report. Are members content with that as a route forward?

**Members indicated agreement.**

12:15

*Meeting continued in private until 12:28.*
Charities and Trustee Investment (Scotland) Bill – Stage 1: The Minister for Communities (Malcolm Chisholm) moved S2M-2352—That the Parliament agrees to the general principles of the Charities and Trustee Investment (Scotland) Bill.

Christine Grahame moved amendment S2M-2352.2 to motion S2M-2352—

Insert at end—

“and, in so doing, notes the Scottish Executive’s commitment to protect the National Collections’ charitable status but has concerns that Scotland’s colleges may fall foul of section 7(3)(b), and calls for there to be a clear statement on the face of the Bill of the purpose of a charity, namely that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status, and for the Executive to bring forward appropriate amendments at Stage 2 to this effect.”

After debate, the amendment was disagreed to ((DT) by division: For 39, Against 77, Abstentions 1).

Tommy Sheridan moved amendment S2M-2352.1 to motion S2M-2352—

Insert at end—

“but, in so doing, supports the removal of private and other fee-paying schools from the artificial cover of charitable status which saves these elite institutions thousands of pounds in various taxes every year and calls on the Scottish Executive to bring forward amendments during Stage 2 of the Bill to achieve this objective whilst maintaining the status of independent special schools.”

After debate, the amendment was disagreed to ((DT) by division: For 8, Against 77, Abstentions 32).

The motion was then agreed to (DT).

Charities and Trustee Investment (Scotland) Bill - Financial Resolution: The Deputy Minister for Communities (Johann Lamont) moved S2M-2319—That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Charities and Trustee Investment (Scotland) Bill, agrees to any increase in expenditure payable out of the Scottish Consolidated Fund in consequence of the Act.
The motion was agreed to (DT).
Charities and Trustee Investment (Scotland) Bill: Stage 1

The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S2M-2352, in the name of Malcolm Chisholm, that the general principles of the Charities and Trustee Investment (Scotland) Bill be agreed to.

14:34

The Minister for Communities (Malcolm Chisholm): I am pleased to open the stage 1 debate on the Charities and Trustee Investment (Scotland) Bill. I thank the Communities Committee for its rigorous scrutiny of the bill and welcome its endorsement of the bill in the stage 1 report. We agree with many of its recommendations.

The bill aims to provide a robust, proportionate and transparent regulatory framework that protects the public interest and helps charities to flourish. The process began with the establishment of the McFadden commission in 2000 and the setting up of the Office of the Scottish Charity Regulator in 2003 to monitor and supervise charities ahead of the legal reforms that are contained in the bill.

The charity sector had been calling for legislative reform for some time and we worked closely with the sector to develop the bill. I am very pleased with the response to the consultation exercise and I believe that the positive report from the Communities Committee illustrates that we have a better bill as a result. I look forward to continued discussion with the sector as the bill progresses and as we move towards its implementation.

The Executive is committed to encouraging a vibrant and diverse charities sector in Scotland, and the bill is a crucial part of that. The charity sector provides a great benefit to our society. It has an income of £2 billion a year, of which the public donates about £240 million. It is therefore extremely important that we create an environment in which the sector can continue to flourish. The bill is designed to do that by providing reassurance to the public that the many charities to which they give generously use their donations appropriately, but without placing an undue burden on those charities. The principle of proportionate and balanced regulation is central to the bill, and we agree with the committee that co-operation between OSCR and the Charity Commission for England and Wales will be key to the bill’s success. The inclusion of the duty on OSCR to co-operate with other regulators is designed to encourage that co-operation.

I reiterate my welcome for the committee’s report. I am particularly pleased with its support for the two-part charity test and for our approach to public benefit and I agree with many of its comments on charitable purposes. The committee’s evidence taking and consideration have moved policy thinking on and I am grateful for all its work. We will be carefully considering the wider implications of the committee’s numerous recommendations. I do not intend to discuss all the recommendations today, but I want to clarify the Executive’s position in a number of key areas.

I will start by mentioning the important issue of the independence of charities. Everyone agrees that charities ought to act independently and that trustees ought to act in the best interests of their charities. What we have not always agreed about is how to create a test of independence that is fit for purpose. One of the issues that was raised in evidence to the committee was the proposed test’s potential to remove charitable status from the five national collections non-departmental public bodies. The committee said that, although the principle of independence is fundamental to the charitable sector, the restriction on third-party direction powers should not inhibit charities from continuing to operate under the same constitutions where there are public interest reasons for a link to a third party.

We remain committed to promoting the independence of charities. That is not to say that the Government cannot set up charities or that charities cannot take on government functions, or even that charities cannot receive government funding, but it means that a charity’s purposes must remain exclusively charitable and that charity trustees should act solely in the interests of the charity. The specific exclusion of third-party control in section 7(3)(b) was added to the bill to reinforce that.

As a result of the evidence that was presented to the committee and in recognition of the unique role that is played by the five national collections NDPBs, we have already agreed to find a way to ensure that the National Library of Scotland, the National Galleries of Scotland, the National Museums of Scotland, the Royal Commission on the Ancient and Historical Monuments of Scotland and the Royal Botanic Garden Edinburgh are able to retain their charitable status.

The committee raised concerns about local authority arm’s-length charities and the appointment of their charity trustees by the local authority. As the Deputy Minister for Communities, Johann Lamont, said in evidence to the committee, charitable status will depend on charities’ purposes remaining exclusively charitable and their charity trustees being able to act solely in the interests of the charity. The fact
that the charity trustees are appointed by the local authority should in itself have little impact.

The possibility that the independence requirement may have an impact on further education colleges has been identified. We have acknowledged that the test in its current form could impact in such a way as to be too severe or unworkable and we are examining the test to consider whether amendments are necessary. However, we remain firmly committed to the principle of charity independence and of charity trustees acting solely in the interests of the charity.

The public benefit test has already been widely debated and I very much welcome the committee’s support for the approach that has been taken in the bill. Much of the discussion has centred on independent schools and a number of views have been expressed on whether such schools should or would lose their charitable status as a result of the bill. The bill does not make judgments about specific types of charity but seeks to provide a robust test against which all charities can be judged. It is a key principle that all charities should have to prove that they provide public benefit before they can access the substantial benefits of charitable status.

Tommy Sheridan (Glasgow) (SSP): Will the minister elaborate on that and say how much of an organisation’s activities have to be of public benefit? Surely we cannot just have a statement that they have to prove that they provide public benefit; the point has to be elaborated on.

Malcolm Chisholm: Every charity will have to satisfy OSCR that it can demonstrate public benefit. That applies equally to independent schools as to anyone else. I know that, as his amendment to the motion indicates, independent schools are Tommy Sheridan’s particular concern. Although the fact that a charity charges does not in itself mean that it ceases to provide public benefit, charges will not be able to be “unduly restrictive”—two key words in the public benefit test.

By providing broad criteria of what constitutes public benefit, we have created a robust test that encapsulates previous case law but which, importantly, has the flexibility to adapt to changes in the sector and in public perception of what constitutes a charity. Allowing OSCR to judge each case on its merits is the right way to ensure that a fair and reasoned approach is taken to each case.

Alasdair Morgan (South of Scotland) (SNP): Will the minister take an intervention?

Malcolm Chisholm: I will have to make progress, because I think that I am getting behind time.

The committee acknowledged that point but highlighted that it was a challenging and contentious task for OSCR. I believe that the appeals process and the duty on OSCR to consult on how it will determine charitable status will ensure a fair and open process for those important decisions.

The other part of the charity test is to do with charitable purposes. I believe that we have developed a set of purposes that reflect the Scottish charitable sector and allow for development as perceptions of charities change.

Although I am committed to creating a legislative framework that meets the needs of the Scottish charity sector and public, there are concerns that differences in what constitutes a charity in England and Wales and in Scotland could create a situation where bodies are recognised as charities in Scotland but are not recognised as charities by the Inland Revenue. However, what matters most is that we have clarity about what constitutes a charity in Scotland and what fits the public perception of what a charity should be. The committee makes that point in its report. However, I acknowledge the need for close working between OSCR, the Inland Revenue and the Charity Commission, on which I know that officials are working.

Mr John Swinney (North Tayside) (SNP): Will the minister take an intervention?

Malcolm Chisholm: I think that I really need—

The Deputy Presiding Officer: Minister, you have time. I will allow an intervention if you wish.

Malcolm Chisholm: I do not know how much time I have to get through my speech. If I get through it, I will take interventions at the end.

Another part of the bill that has excited debate is the continuation of the designation of certain religious charities, exempting them from some aspects of the regulatory controls in recognition of their internal control mechanisms. The issues have been well debated by both sides; the religious charities think that they should be exempt from OSCR controls that could impinge on the internal governance of the church and their independence from the state and others feel that there should be no exemptions from OSCR review at all. The bill strikes a balance between the two sides, providing a regulatory framework for all charities and, in the interests of transparency and accountability, it is right that all charities should be accountable to the Scottish public through OSCR for their charitable status.

The status of OSCR has also been debated during the bill consultation and one of the main principles that the bill sets out is that OSCR is to be an independent regulator. The consultation on
the draft bill confirmed the earlier strong views that decisions on charity status and regulation of charities should be free from political interference. Modern practice is that independent regulators should preferably be bodies corporate, governed by a board of members, rather than relying on individuals to hold statutory powers. I am pleased that the committee’s report agreed with the way that the Executive proposes to implement that.

OSCR is to be a public body free from ministerial direction, except in relation to the framework for its annual report that is to be lodged with the Parliament. It is intended that OSCR will be made a non-ministerial office-holder in the Scottish Administration by a Scotland Act 1998 order. We are discussing with the United Kingdom Government the feasibility of a body corporate becoming an office-holder in the Scottish Administration. There is no precedent for that but, whatever the outcome, we are committed to OSCR being an effective and independent regulator.

Mr Swinney: Will the minister clarify his comments on the judgments of the Inland Revenue? If an organisation is given charitable status by OSCR, will it automatically be given charitable status by the Inland Revenue?

Malcolm Chisholm: I cannot speak for the Inland Revenue, obviously, as that is within the provenance of the United Kingdom Government, and so cannot give the guarantee that John Swinney seeks. However, I can say that OSCR, the English charity regulator and the Inland Revenue are seeking to co-operate with one another.

I said at the start of my speech that I wanted the bill to set out a proportionate and balanced approach to charity regulation. That has been a consistent theme throughout our deliberations. The bill gives OSCR the necessary powers to prevent wrongdoing and to intervene to protect a charity’s assets when a serious breach has occurred. However, the need to minimise dual regulation has been taken into account.

Following consultation, the bill has been amended to allow charities that have no major activities in Scotland but which have members here not to register with OSCR, provided they make it clear that they are registered elsewhere. The day-to-day regulation of charitable registered social landlords has also been delegated to Communities Scotland, although OSCR will remain in control of their charitable status.

The principle of proportionate regulation is found throughout the bill and will be continued in the subordinate legislation. The accounting regulations, which will be consulted on soon, will allow smaller charities to produce simplified accounts while still giving OSCR and the public a clear picture of the charity’s activities. Penalties for failure to comply with the legislation will be applied proportionately and will take account of the circumstances of the breach.

If charities are to flourish in Scotland, it is vital that the legislation that we implement recognises the wide diversity within the sector and acknowledges the pressures on the small, one-person charity as well as those facing the large international players. I believe that the bill does that, but we are committed to working with the sector to ensure we do not inadvertently place unnecessary strains on charities.

I welcome the committee’s support for the provisions in the bill to regulate benevolent fundraising. Those provisions are key to ensuring transparency and accountability in the way in which funds are raised and to promoting public confidence in the sector, which is one of the main aims of the bill. We will continue to work with the sector as we develop the regulations on fundraising and public benevolent collections.

The bill regulates fundraising by and for all benevolent bodies—not just charities—in order to maximise public confidence in donating to good causes. The committee recognised the importance of that approach.

I am pleased that the committee supports the development of a scheme of self-regulation by the sector, with reserve powers in the bill that can be used if further statutory regulation should prove necessary. The Executive has agreed to allow the self-regulation scheme time to prove its worth. The sector has undertaken considerable work on that and we look forward to working with it as the scheme is finalised and put in place.

In the coming months, work will be done to develop the regulations and to establish training and awareness-raising programmes. The relationship that we developed with the sector during the initial consultation stage is key to that and we will continue to work to engage it in the implementation process to ensure a smooth transition to the new regime.

I look forward to working with the committee in the coming parliamentary stages. I am convinced that we can produce an act that allows the sector to grow while providing the necessary reassurance to the general public.

I move,

That the Parliament agrees to the general principles of the Charities and Trustee Investment (Scotland) Bill.

14:48

Christine Grahame (South of Scotland) (SNP): I should declare an interest, as I am the
The SNP welcomes the way in which OSCR operates and the way in which it has been set up. We also welcome the bill’s clean-slate approach to the question of what is and is not a charity. There will be no presumption that an existing charity should remain a charity. That is reflected in paragraph 25 of the Communities Committee’s report. Time has moved on and some organisations that have historically had charitable status and the concomitant tax and rates benefits might no longer be entitled to that designation. That is covered in paragraph 86. Although it is ultimately for OSCR to determine any application, we in the chamber have a duty to assist OSCR through the primary legislation.

I am interested in what the minister said about public confidence and the public perception of what is and is not a charity. That is reflected in paragraph 86, which says that the committee “believes that it is important to set criteria that bodies should meet in order to benefit from tax relief and to ensure that there is public confidence in the charitable and voluntary sector as a whole.”

I, too, thank everybody who gave evidence to the committee and my colleagues for working through the bill. The programme is constructive, but there are issues that the minister has mentioned that need to be resolved. There are, of course, the national collections—our art galleries, museums and so on—to which the minister referred, which will have difficulties in passing section 7(3)(b), which is on third-party direction. The minister also mentioned NDPBs and the appointments system. There may be issues for the SNP—there certainly are for me—to do with the appointments system, which we will examine at stage 2.

Similar difficulties arise with Scotland’s colleges, which I do not think that the minister mentioned. They would pass muster on the charity test on all counts, except the same subsection on third-party direction. I refer the minister to paragraph 134 of the report. Of course, those difficulties must be resolved. Colleges act in the public interest and do a great public service and we do not want them to lose their status and the benefits that arise. My colleague Fiona Hyslop will address those matters more fully.

I will deal with the more contentious part of the SNP’s amendment. I make it clear in passing that the SNP cannot support the Scottish Socialist Party’s amendment, although I am sympathetic to it. We cannot support it because it would remove charitable status from all fee-paying schools and all private schools, with the exception of independent special schools. The amendment is too specific. There might be schools that use alternative education methods—the Steiner schools might be one type, but there are others—and the amendment does not deal with the private health care sector.

The catch-all part of the SNP amendment would give flexibility to OSCR, which is necessary in the grey areas that will arise in practice. Our amendment, which includes the words “overriding purpose”, makes it clear that some fee-paying schools and indeed the private health care sector—it should be remembered that each organisation must independently apply to OSCR for registration—would find it difficult to meet the charity test on public benefit. I will be blunt. The Gordonstouns and Fetteses of this world—fees at Fettes College are £12,000 to £15,000 per child—represent an exclusivity that would fail the test, while Donaldson’s school for the deaf is at the other end of the spectrum. There are grey areas in between.

Murdo Fraser (Mid Scotland and Fife) (Con) rose—

Alex Fergusson (Galloway and Upper Nithsdale) (Con) rose—

Christine Grahame: I will take an intervention from whichever gentleman wants to intervene.

Murdo Fraser: The member may be aware that, according to recent figures, independent schools in Perth and Kinross are worth around £40 million to the local economy and that much of that is generated in the constituency of her colleague Roseanna Cunningham and much is generated from overseas. I thought that the SNP was the party of enterprise, so why is it attacking a part of Scotland’s economy?

Christine Grahame: The member has done his bit for his electorate. The point is that those schools do not meet the charity test. What the member says is irrelevant to the bill that we are considering. They may have other routes that they can take, but that is not one of them.

In evidence, it was made plain by representatives of the independent schools sector that perhaps one in nine of the pupils has an assisted place. My committee colleague John
Home Robertson—who attended a private school—put it in a much more interesting way when he said:

“So about nine out of 10 pupils do not receive … bursaries.”

He also said:

“...I confess that I would struggle to defend the proposition that there is a public benefit in private education.”

My colleague Scott Barrie stated:

“We can all accept that the educational aims of the independent and state sectors are the same. However, like other members of the committe, I am struggling—from some of the answers that we have received so far this morning—to establish why it is necessary for the independent sector to have charitable status to achieve those aims, when the state sector seems to be able to do so without that status.”

—[Official Report, Communities Committee, 12 January 2005; c 1568 and 1573.]

Mr John Home Robertson (East Lothian) (Lab): I am struggling to understand what the point of the SNP’s amendment is. Christine Grahame should not make the mistake of believing her own press releases. Section 7(1), which is on the charity test, requires a body to show that it provides … public benefit in Scotland or elsewhere.

It is surely good enough to have that public benefit test for the independent regulator to interpret without Christine Grahame’s amendment, which has been put forward as a political stunt.

Christine Grahame: That is an unfortunate shifting of John Home Robertson’s ground. The point of the amendment is to have in the bill a simple statement of the overriding purpose of charitable organisations. There is no such purpose in the bill as it is drafted. I wish the purpose to be inserted into the long title. I hope that I will get extra time for this, Presiding Officer.

The private sector fails in my book—and I thought that it failed in John Home Robertson’s book—to pass the “unduly restrictive” test. We need only look at the language that is used in talking about private hospitals. In his evidence to the committee, David Mobbs said:

“We do not see charging fees as being restrictive in our marketplace because people can access our services through insurance … —a large proportion of the population has insurance—or through cash plans, taking loans”.—[Official Report, Communities Committee, 12 January 2005; c 1571.]

“Marketplaces”, “loans” and “cash plans” are not the language of charities. The test should be clear and simple. This is no witch hunt against private schools or hospitals and it is not—as a Conservative member said this morning—the politics of envy; it is a call for a simple and clear statement in the bill of the modern purpose and definition of a charity.

In my last minute or so, I will touch on some minor points that I welcome on behalf of the SNP. We agree that there should be separate lists of current, active charities and those that are no longer functioning. As Donald Gorrie said, some may have assets that can be used by other charities with similar purposes. That was a positive point to make.

In a recent letter to us, the Law Society of Scotland said that it would like to see a list of charities that are foreign based. That should be made clear and accessible to the general public through an on-going electronic register in which they can feel that everything is safe and secure. That would also assist OSCR.

We welcome the fact that a Scottish organisation will not necessarily be designated a charity just because its English twin is and, in reference to John Swinney’s question, we recommend that a protocol be established between the Treasury and OSCR to tidy such matters up before the bill progresses much further.

In paragraph 27 of the summary of its report, the committee recommends that the Executive should amend the definition of ‘misconduct’ in section 103 to prevent honest people who are working as trustees in charities and who make minor and genuine errors from falling foul of the law, which is too draconian.

I have touched on a few points and expect colleagues to develop others. I commend the insertion of the purpose of a charity into the long title of the bill, so that the bill is not simply regulatory—a charity is a charity is a charity—and that people will recognise that. I trust that our amendment will receive a fair wind. The SNP otherwise fully supports this long-awaited reappraisal. Whether or not our amendment is supported, we support the thrust of the bill and the regulation of our many charities, which should now flourish in the confidence that rotten apples cannot get into the proverbial barrel and contaminate others.

I move amendment S2M-2352.2, to insert at end:

“and, in so doing, notes the Scottish Executive’s commitment to protect the National Collections’ charitable status but has concerns that Scotland’s colleges may fall foul of section 7(3)(b), and calls for there to be a clear statement on the face of the Bill of the purpose of a charity, namely that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status, and for the Executive to bring forward appropriate amendments at Stage 2 to this effect.”
Tommy Sheridan (Glasgow) (SSP): Charity law is currently outdated and unsatisfactory. The case for reform is, therefore, very strong. We should take the opportunity today—as we have on many other occasions—to applaud the day-to-day work of charitable organisations and hope that the bill will provide robust cover to expose the tiny minority of rogue organisations whose activities prevent other organisations from enjoying the clean bill of health that they deserve. We must also ensure that none of the regulations that are introduced discriminates against the smaller charities that do not have the administrative capacity of some of the bigger charities to comply with the various regulations. I am glad that the minister referred to that.

The Scottish Socialist Party strongly supports charitable institutions having the greatest possible independence, so that they can pursue their goals free from Government, Scottish Executive or local authority interference. In particular, charities should be free to express opposition to local authority or national Government policies that are in conflict with their aims or the interests of their beneficiaries. Government, Executive and local authority quangos should not be allowed to seek charitable status as long as their independence from government is questionable, and quangos should not be granted charitable status if ministers or councils are able to overrule undemocratically other directors or trustees in decision making.

However, the nub of today’s debate is the issue of public benefit. Perhaps I should declare an interest in this part of the debate because I consider myself a class warrior on the side of the working class. The class war, which Mr Blair often says is over—although he has not told us who won—is still alive and kicking. It is absolutely pathetic that if an ordinary member of the public is asked to highlight the odd one out between Amnesty International, Greenpeace or Fettes College, none would get the answer correct. Of course, two of them are fantastic organisations that work for the improvement of society and humanity; the other is a charity.

Christine Grahame should look for the updated fees at Fettes College. The annual fee is now £20,199 for a boarder at Fettes. It is garbage that those pupils, whose mums and dads can afford £20,199 per year to send their kids to a glorified child-minding agency, are going to an organisation that is considered a charity. That is absolutely pathetic.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): Will the member give way?

Tommy Sheridan: I will give way to the member in a minute.

Because the school’s charitable status is based on a historical precedent, it is a bit like comparing new Labour to a socialist party—it used to have some historical resonance but there is no resonance whatsoever today.

Mike Rumbles: I thank the member for taking an intervention. I am not clear about whether he is simply against any form of independent schooling per se. He used Fettes College as an example, but Lathallan School, which is in my constituency, is a very small school that provides public benefit for local people through bursaries and so on. Does he include Lathallan?

Tommy Sheridan: What I am looking for is absolutely clear—a presumption against fee-paying schools having charitable status. That should be the exception rather the rule.

Karen Whitefield (Airdrie and Shotts) (Lab) rose—

Alex Fergusson rose—

Tommy Sheridan: There are two members on their feet. If they let me continue just now I will give way in a moment.

Unbelievably, the Executive wants to continue to give charitable status to those glorified child-minding agencies for the children of the wealthy.

The SSP welcomes the proposal for a public benefit test to determine eligibility for charitable status. However, we do not believe that the bill sets out clear public benefit criteria. That is why I ask the minister to comment on proportionality in relation to what is public benefit.

Mike Rumbles mentions that the odd bursary is up for grabs. Are we saying that if a school of 463 has three bursaries, it should qualify as a charity because that is a public benefit? That is utter nonsense and the people of Scotland want an end to the ridiculous situation in which such elite institutions are able to hide under the cover of charitable status.

Alex Fergusson: It is no secret that I went to one of those fee-paying schools—I hope that the fact that John Home Robertson and I both did so suggests that there is not too much about such schools that is elitist. Will Mr Sheridan come clean about the fact that his policy is to get rid of those schools altogether? Would it not be better to do that by reducing demand for those schools by making sure that the state sector provides such a good education that demand disappears, rather than by making public schools more exclusive than they already are, which is what the member’s amendment would achieve?

Tommy Sheridan: It is interesting that the member finishes his intervention with the killer phrase “more exclusive than they already are”.

That is the point. They are exclusive institutions for the children of those who can afford to pay. Alex Fergusson should get a grip on reality. There are currently 1 million workers in Scotland whose wages are less than £15,000 per year. How can they afford to spend £20,000 per year to send their kids to the Fettes Colleges of this world? The majority of the respondents to the Executive's first consultation on the bill strongly opposed the continued charitable status of private schools and hospitals. The Executive has failed to take cognisance of that in today's debate.

The total fee turnover for private schools across the UK is £3.4 billion a year. Private schools are not charities but profitable private industries to which charitable status brings tax advantages, lottery funding and direct Government support. The state currently gives benefits that subsidise private schools to the tune of £1 billion a year. That is equivalent to £2,000 for every private school pupil. By the way, it is also five times what it would cost to provide every school pupil in Scotland with a free healthy school meal. The new Labour members will not support such a measure because they do not want to feed the rich kids, but they do not mind subsidising the rich kids to attend private schools.

Karen Whitefield: Does Mr Sheridan agree that the bill will give no presumption of charitable status for any organisation? For the first time, organisations will not automatically qualify for charitable status just because they provide education. Such organisations will need to convince OSCR by proving and demonstrating that they meet the criteria in the bill against which OSCR must judge whether they are charities.

Does Mr Sheridan also accept that some independent schools in Scotland are in no way elite but cater for exclusive groups such as those with learning disabilities or special needs?

The Deputy Presiding Officer: Mr Sheridan, you should think about summing up now.

Tommy Sheridan: Presiding Officer, I will do so, but I hope that you note the length of that intervention.

The member raised some important points, but my amendment is couched in terms that would not remove charitable status from independent special schools that provide the type of benefit to which she referred. However, she put her finger on the nub of the issue when she said that the bill will provide no presumption for or against private schools. I am opposed to that because I want a presumption against private schools. I want such special schools to have the same recognition that would be given to an elephant that sits in the corner of the living room. Private schools are undoubtedly a symbol of elitism and privilege that represents the establishment in this country.

Charitable status confers 80 per cent uniform business rates relief on private schools. It provides tax relief on bank deposits and on income from investments. It provides private schools with the ability to claim back tax paid by benefactors. When the question was asked in Westminster last March, the Government had to admit that £150 million a year would be generated if value added tax was imposed, as it should be, on private school fees. In 1998, four private schools between them received more sports lottery funding—£3.2 million—than all the state schools in Scotland put together.

In conclusion, those who attend private schools tend to attend Britain's top universities—the Cambridges and the Oxfords. Seven of Britain's nine most senior generals, 33 of its 39 most senior judges and 120 of the 180 officers graduating from Sandhurst attended private schools. In other words, private schools represent the elite. As a Parliament, we should say that we have no truck with elitism.

The Deputy Presiding Officer: Mr Sheridan, you must finish now.

Tommy Sheridan: If such schools are to exist, they should stand on their own two feet without public subsidy.

I move amendment S2M-2352.1, to insert at end:

“but, in so doing, supports the removal of private and other fee-paying schools from the artificial cover of charitable status which saves these elite institutions thousands of pounds in various taxes every year, and calls on the Scottish Executive to bring forward amendments during Stage 2 of the Bill to achieve this objective whilst maintaining the status of independent special schools.”

15:08

Mary Scanlon (Highlands and Islands) (Con): At stage 1, the Scottish Conservatives welcome the general principles of the Charities and Trustee Investment (Scotland) Bill, which will review and update charity law in Scotland.

We believe that the focus of the bill should be on promoting volunteering, charitable work and giving. There is no doubt that charitable organisations offer solutions that are uniquely tailored to local problems in a way that could never be replicated by Government agencies.

Like many bills that have been introduced in Parliament, many issues will be dealt with not on the face of the bill but in the subsequent guidance, which will need to be interpreted and implemented. We must therefore hope that our understanding of the spirit of the bill will be
identical to OSCR’s when it decides which organisations will retain charitable status and be regulated accordingly.

First of all, I will deal with the two amendments that have been lodged. I simply ask the SSP and the SNP to tell us the number of independent schools that they have visited. For example, have they ever visited Gordonstoun, which was set up in the 1930s by a Jew fleeing Nazi persecution? It provides more than 200 jobs in the Moray constituency and is absolutely central to that community.

Tommy Sheridan: Will the member give way?

Mary Scanlon: I want to finish this point.

Has Tommy Sheridan ever visited St Aloysius’ College in Glasgow or, in Edinburgh, Stewart’s Melville College and the Mary Erskine School, which is the largest independent school in Europe? Has he spoken to the many parents who make considerable financial sacrifices to pay for their children’s education? Many of the pupils at those independent schools are from military families; as their parents are sent on duty to different parts of the world, boarding school provides the only continuity of education that those children can get. I declare myself a class warrior for every parent who works hard and makes serious sacrifices to give their children choice, freedom and the best education, as they see fit.

As Murdo Fraser has pointed out, independent schools also provide valuable jobs for local people in rural small towns. In fact, when he and I visited Morrison’s Academy in Crieff this week, we heard of research that shows that more than 8 per cent of all employees in Crieff work in the independent school sector and that it brings millions of pounds into the local economy.

Tommy Sheridan: I thank Mary Scanlon for taking my intervention. If she had not allowed me to answer her question soon, my heart would have probably bled so much that I would not have been able to get to my feet again.

Yes, I have visited St Aloysius’ College. I have also visited George Watson’s College and Fettes College, and will talk about that later. Mary Scanlon seems to have the misconception that we want to close down those schools. In fact, we want to open them up, which will create more jobs.

Mary Scanlon: That response shows that Tommy Sheridan has a greater lack of understanding of the situation than I thought he had. I should also point out that, when Rannoch School in Perthshire closed, 57 jobs were lost in a local rural area. Many teaching staff left the area and the school was turned back into a private home.

If the SNP communities spokesman had wanted to know more about independent schools in Scotland, she might have chosen to attend at least one of the three pre-legislative briefings that Communities Committee members received, particularly the one that was held in Perth. Taking all the children in independent schools into the public sector would cost the taxpayer more than £150 million. Those who have lodged amendments to the motion should tell us where that money will come from.

Linda Fabiani (Central Scotland) (SNP): Will the member give way?

Mary Scanlon: I look forward to Linda Fabiani’s explanation.

Linda Fabiani: First of all, I should point out that I have attended meetings on behalf of the SNP and the Communities Committee and have visited many private schools. Secondly, does the member really believe that if Fettes College lost its charitable status it would close its doors?

Mary Scanlon: I chose my words carefully and referred to the SNP communities spokesman; I was not aware that Linda Fabiani was the communities spokesman. As for her question, it is not for me to decide whether Fettes College should lose charitable status. That is a decision for OSCR.

Karen Whitefield: On a point of information, the member might recall that there was no SNP representative at our meeting with the independent school sector in Perth.

Mary Scanlon: I thank the member for reminding me of that. The SNP should have chosen to attend the informal briefing, which we all found extremely helpful.

Although I do not agree with him, I understand why Tommy Sheridan lodged an amendment. After all, he is not a member of the Communities Committee. However, I do not know why Christine Grahame lodged an amendment, given that she had every opportunity to amend the stage 1 report. Her amendment shows that the SNP would restrict freedom, choice and diversity in Scotland only to promote intolerance through its ideological lack of understanding.

Fiona Hyslop (Lothians) (SNP): Will the member give way?

Mary Scanlon: No, I have taken enough interventions.

Education is a public benefit; it needs no secondary justification. It benefits the pupil, their family and society. I say to Tommy Sheridan that it is a pathway out of poverty and that parents should be able to choose to make sacrifices to pay for their children’s education. If we removed
charitable status from independent schools, fewer bursaries would be paid out and fees would have to rise, making those schools more exclusive and beyond the reach of many of the working-class families that he pretends to support.

Let us remember that the independent sector was educating Scotland’s young people before the advent of the local authority-controlled network of today. My children received assisted places to go to the High School of Dundee, which is more than 750 years old. I did not put them there because I wanted them to be elite; I put them there because the discipline and the management were better than at their local school.

We should be considering ways of expanding the sector rather than crowding it out. I say to Tommy Sheridan that all the money that goes to independent schools is reinvested back into the schools and their facilities. If he knew more about the schools, he would know that.

Others have mentioned section 7(3)(b) of the bill and the effect that it will have on certain bodies. I heard what the minister said and accept that the Executive will consider the issue. The provision would affect the Church of Scotland, where the third party would be the General Assembly. For the Catholic Church, the third party would be the Vatican. Groups such as the girl guides would also be affected.

Most of the problems that people have identified in the bill have been in sections 7 and 8—on the charity test and public benefit respectively. I agree with the committee: these matters should be left to OSCR.

Two words in section 8 that gave me considerable concern are “unduly restrictive”. As a Campbell, I could not join the MacDonald clan. Does that make the MacDonalds unduly restrictive? When the Scottish Council of Jewish Communities says that it raises money within its communities to benefit people within its communities, does that make it unduly restrictive? The committee discussed the issue a lot. The arguments came back to the question, “What does ‘public’ mean?” Can something benefit one person, or a dozen people, or does it have to benefit every single person?

Issues to do with added bureaucracy have been very well covered by the bill.

At the committee, several witnesses gave the example of a children’s charity that raised money in Scotland but spent nothing in Scotland. However, I would not like money raised in Scotland to be restricted to Scotland, in the same way as I would not like the enormous amounts that the cancer charities raise in the rest of the United Kingdom not to be spent on cancer research here—research from which we benefit enormously.

The bill will have failed if it does anything that hinders charities in carrying out their work. As the bill moves forward today, let us ensure that it does so positively; that it reduces rather than increases administrative demands on charities; that it does nothing to discourage ordinary Scots from giving their time and money for charitable purposes; and that it does not place existing charities and their volunteers in a state of undue uncertainty over their future status.

15:18

Donald Gorrie (Central Scotland) (LD): This is a very important subject and, politically, a very enjoyable one. On the whole, the members of the committee addressed the issue as individuals—using their own intelligence and deploying their own prejudices rather than indulging in a party-political dogfight. We may come to wrong conclusions but at least they are genuine conclusions.

The subject has been waiting for attention for a long time. Some of us have been working on it intermittently for 30 years or so. The bill is very welcome. However, like an onion, it has more and more layers as we get into it. A lot of careful thought about amendments will be needed from the Executive and the committee, so that we can achieve the right result. We all want to promote the charitable and voluntary sector, to regulate fundraising correctly and to ensure that nothing untoward happens. The bill must be positive and promotional. We will have to examine very carefully anything that might be negative.

Three main issues arise—charitable purposes, public benefit and independence. The minister dealt with some of those issues in his speech, in which he made a lot of good points, and Mary Scanlon also dealt with some of them effectively in her speech. I think that the list of charitable purposes could be improved by adding in such things as citizenship, promoting belief, promoting racial and religious harmony and the saving of lives.

Sport is a complex issue, and we need to consider whether we can use phrases such as “community sports clubs” or “non-commercial sport”, so that we encourage sport. We should not allow huge businesses such as professional football clubs to become charities, but we should encourage genuine sport in the community. The list of charitable purposes should also include such things as recreation and play, which are left out at the moment. There is also a question about all sorts of groups that need assistance. The bill mentions accommodation and care, but it does not
mention support, and I think that support and advice are important aspects. The Executive has made noises indicating that it is prepared to consider some of those issues, so that is encouraging.

On the question of public benefit, as Mary Scanlon said, there is the issue of what constitutes “public”. It must be quite clear that a public benefit is not something that has to benefit every single member of the public. I feel that a phrase such as “giving direct and indirect benefit to the community as a whole” could be introduced. A mutual aid group, a Jewish or Muslim group, a clan group, a group of former pupils of a school or a tenants association can benefit particular people, but by doing so such groups benefit the community as a whole. We have to embrace that concept, rather than insist that every group has to be open to every individual in the world so that they can benefit from it.

Margo MacDonald (Lothians) (Ind): I am playing devil’s advocate. There seems to be a parallel between the benefit that definitely accrues to children who attend a school of their parents’ choosing, even if they pay fees to do so, and who are therefore a minority in the community, and the benefit that accrues to the minority of people who might benefit from, say, a Muslim charity.

Donald Gorrie: In either case, I think that the same argument applies. The organisation concerned must demonstrate that it is not merely benefiting a small, tight bunch of people but that the work that it does for them benefits the community as a whole.

In fact, I was just about to come on to the question of schools. The position that I take, and which Liberal Democrats and, I hope, other people take, is that it should not be a blanket yes-or-no question as to whether fee-paying schools can be or must be charities. Each fee-paying school should have to demonstrate to OSCR that, in all the various ways in which it works, it provides a genuine public benefit—through its scholarships, through use of its facilities, through the training that it gives trainee teachers and through the work that it does in the community as a whole. OSCR should ensure that charities retain the spirit of being a charity and look after their volunteers. One of the duties of a big charity should be to train up its volunteers, look after them and give them worthwhile work to do. We should also concentrate on helping small organisations that have no staff and have problems filling in lots of forms. We must be as kind to them as possible.

Another debate that we should have is whether registered social landlords should be administered by Communities Scotland.

One of the good aspects of the bill is the introduction of the SCIO—whatever that stands for. The SCIO is a new style of company and its introduction means that a charity can become a company with the minimum of hassle.

Christine Grahame raised the important issue of dormant funds. Incidentally, I do not suggest to my colleagues that we support her amendment, because the second half of the amendment does not seem to cohere with the first half. I do not quite understand what she is getting at. The minister has given an assurance about colleges and so on anyway.

Fiona Hyslop: The minister referred to the non-departmental public bodies and colleges. The second half of the SNP amendment repeats the
committee’s own recommendation in paragraph 150 of its stage 1 report.

Donald Gorrie: I still think that the amendment does not contribute to the sum of human knowledge.

The important issue is that OSCR has to be proportionate and reasonable—as, I am sure, the lady who is the present incumbent of the post of chief executive of OSCR is. However, it would be helpful to put in the bill more direction that there must be the minimum of regulation necessary to deliver the objectives. We want to avoid dual regulation, with more and more people pouring over organisations’ accounts and so on.

Above all, we have to take the bill as a positive move. We will support any measure that helps the charitable sector to develop, but we want to avoid well-meaning but over-regulatory efforts, which can hinder the progress of the charitable sector. If we get the bill right it could be a great new dawn for the voluntary and charitable sector in Scotland. I greatly welcome the bill.

At this point, I must say that I find Christine Grahame’s amendment somewhat surprising and disappointing. It is surprising because it seems clear that the removal of the presumption of public benefit will have the effect that Miss Grahame seeks in her amendment. It is disappointing because Miss Grahame—

Christine Grahame: Paragraph 150 of the committee’s report makes the point that I make in my amendment. That position is supported by the SCVO, which the member has applauded—it wants a statement to that effect to be included in the bill and I agree.

Karen Whitefield: I am in no doubt about what is in the committee’s report. Like Christine Grahame, I laboured over it. My point is that she signed up to the report. The point in parliamentary proceedings at which we need amendments is stage 2. Today is not the day for amendments, so I am somewhat surprised that Miss Grahame has lodged an amendment to the motion and has not waited until stage 2.

Last but by no means least in my list of thanks are all the organisations and individuals who submitted evidence—both written and oral—at stage 1. As well as taking evidence in the Parliament, the committee travelled to Glasgow, Perth and Aberdeen to listen to the views and concerns of voluntary and charitable organisations that will be affected by the bill. We also met representatives of independent schools. I regret that so much of the debate has concentrated on the independent schools sector, because the bill’s purpose is to provide a transparent framework for the proper regulation of charities in Scotland. For the first time, independent schools will have to play on a level playing field with every other charitable organisation. Their ability to show that they provide true community benefit will be assessed and questioned by OSCR.

The brief history of the bill that is set out in the report demonstrates that the Executive undertook a thorough process of consultation and revision during the drafting process. That process led to the introduction of a bill that has been widely welcomed. We all know about the damage that the fraudulent actions of a small number of rogue charities have done to the charitable sector. I believe that the bill’s provisions will help to drive up standards in charities and to restore public confidence.

The removal of the presumption of public benefit is central to that process. All charities will have to pass the public benefit test. The committee acknowledged that the development of that test is a difficult and contentious task for OSCR. It is important that OSCR is seen to be acting reasonably and that it ensures that the process of determining public benefit is transparent.
The committee welcomes the clean-slate approach that the bill takes to the introduction of the charity test. That is important both to ensure public confidence in the sector and to establish the criteria relating to benefit from tax relief. The committee has clearly stated its support for the establishment of OSCR as a body corporate and for the setting up of a discrete Scottish charity register.

The committee took strong and compelling evidence from Jane Ryder from OSCR, who felt that we should not follow England and Wales in setting specific objectives for the regulator. She pointed out that objectives would change over time. The committee was convinced that, to ensure that the legislation remains flexible and responsive, the bill should not include specific objectives for OSCR. However, we concluded that the bill should make reference to the need to promote a flourishing charitable and voluntary sector in Scotland. OSCR also expressed its concern about the fact that the bill does not explicitly mention the regulator’s current role of providing information and advice to Scottish ministers. The committee agreed that that was a valuable function for OSCR and that reference should be made to it in the bill.

It is important that we strike the right balance between the need for strong regulation and monitoring that builds public confidence and the need to ensure that we do not overburden and stifle charities to the extent that there is a negative impact on their operation. That is why it is vital that there is effective joint working between all the relevant agencies, both in Scotland and in England and Wales. That will ensure that the funding bodies that work at United Kingdom level are not overburdened by regulation.

I also welcome the Executive’s commitment to lodge stage 2 amendments so that the five national collections institutions can retain their charitable status.

I am happy to support the general principles of the Charities and Trustee Investment (Scotland) Bill. I am pleased that the process of committee engagement with all sections of Scottish society has resulted in a report that makes positive suggestions for amendments. I look forward to the detailed examination of the bill at stage 2.

15:35

Fiona Hyslop (Lothians) (SNP): I welcome the committee report. I confess that I have always thought of Oscar more of as a dog or an award. I suppose that our job is to ensure that our OSCR is gold plated and not easily tarnished.

The bill was a long time in coming. I pay tribute in particular to the McFadden commission and to MSPs Jackie Baillie and Tricia Marwick for keeping up the pressure on the Executive to introduce a bill. The stage 1 report correctly focuses on the central tenets of the bill, as well as on its potential weaknesses, and it does so in a constructive manner.

In supporting the Scottish National Party amendment, I draw the attention of John Home Robertson and Mary Scanlon to paragraph 150 of the committee report to which they signed up. That paragraph says:

“The Committee recognises the importance of ensuring that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status.”

In the report, the committee also

“suggests that the Executive should consider placing greater emphasis on the need to meet the public benefit test on the face of the Bill.”

I am not a member of the committee, but I am struck by the fact that public benefit has been the main focus of the debate so far. It is quite proper for the SNP to lodge an amendment at this stage. I say to Karen Whitefield that, had today’s debate not been the proper time to lodge an amendment, the Presiding Officer would not have accepted amendments for debate and vote in the chamber this afternoon.

Mary Scanlon: Will the member take an intervention?

Fiona Hyslop: No. I want to move on.

In the past, I have said that it would be unforgivable if the private schools agenda were to delay the provision of much-needed support to charities. There are far more important areas of Scottish life than the public schools, although that was not understood in the case that they presented. Those schools would pass the education test and the independence test, although the minister might want to reflect on the provisions in the School Education (Ministerial Powers and Independent Schools) (Scotland) Act 2004, which could cause problems. However, some private schools might find difficulty in meeting the public benefit test, so it is right and proper that each school should have to state their case. The main focus of the bill should be the £250 million of charitable donations.

Three qualities are central to a successful charities bill: consistency, clarity and confidence. We need to have consistency of treatment by the regulator, clarity of interpretation by those who operate charities and confidence on the part of the public that they are supporting bona fide charities.

I will concentrate on consistency of treatment by the regulator. I appreciate the comments that the minister, the SCVO and others have made about
the importance of independence. However, it is on that issue that the principle falls foul of the practice. The public will find it bizarre if a private school gets charitable status but the local further education college does not. If that happens, it will be because the independent schools are precisely that—indepe

dent—whereas the colleges are not.

The report addresses the issue of independence in paragraph 24, with its reference to section 7(3)(b) of the bill. The committee highlights the problem that colleges in particular will face. If the regulator strictly interprets the bill, colleges could lose their charitable status, which could mean that they will lose £15 million of income. Charitable status also acts as a passport that attracts other donations. Currently, corporation tax is low for colleges because their surpluses are small. However, the bill could provide a disincentive for colleges to become more successful and grow their surpluses.

The bill will have unintended consequences. That is why, on 1 March, I lodged an amendment to the Further and Higher Education (Scotland) Bill—[Interruption.] I am not sure what is creating the hum that we can hear in the chamber, but I will keep going. It sounds as though the ceiling is being lowered down on us.

Provisions in the Further and Higher Education (Scotland) Bill are specifically about direction to ensure collaboration with fundable bodies. Yes, independence has a place, but so do probity and accountability for public money. Colleges could be made independent but, frankly, given the recent history of the management of some colleges, I am not sure that the time is right for that to happen. Even if it was, the governance of colleges should be driven by the strength of the sector, not by a loophole in the Charities and Trustee Investment (Scotland) Bill. As the Presiding Officer knows, our problem is that we have two bills running concurrently. However, the Further and Higher Education (Scotland) Bill is nearing stage 3, whereas the Charities and Trustee Investment (Scotland) Bill is just completing stage 1.

One solution to the problems of tax relief and the Treasury is to have a subsidy. I note that the minister states in the policy memorandum that the Executive wants to subsidise those NDPBs that lose their charitable status because of the bill. The Scottish Qualifications Authority, the General Teaching Council for Scotland and Learning and Teaching Scotland have said that the amount of subsidy could be £6 million to £7 million. That raises a key question: what discussions have there been with ministers to recoup from the Treasury tax relief that is forgone by former charities? From the Communities Committee’s excellent report, I do not see that the Inland Revenue gave evidence, but I suggest that it should do so at stage 2.

Tommy Sheridan might like to reflect on the fact that the Inland Revenue could decide to give VAT and other tax relief to private schools, regardless of whether OSCR decides that those schools should have charitable status. If we are going to get so hung up on private schools, the minister and the Communities Committee might want to reflect on the role of the Inland Revenue.

The bill is much needed, much anticipated and much welcomed. It deserves close scrutiny at stage 2 to produce a piece of legislation that is worthy of the hundreds of thousands of Scots who selflessly give their time and energies to charities and voluntary organisations for the betterment of their fellow Scots.

15:42

Miss Annabel Goldie (West of Scotland) (Con): I should declare certain charitable activities. I am a member of the Salvation Army west Scotland advisory board, I am involved with the Prince’s Trust in Scotland and I am a trustee of a charitable trust. Also, given the reference to the church in the committee’s report, I should declare that I am also a member of and an elder in the Church of Scotland. I realise that such extramural activity is regarded as positively provocative in certain quarters, but I am unyielding.

I welcome the opportunity to modernise and reform charity law in Scotland. However, it is quite wrong to assume that no previous law existed—I shall come to that later—or that the previous law contains no important components that might continue to be relevant. Given the purpose of charitable endeavour—particularly with regard to the people whom it seeks to assist—it is important that we do not in legislation make that task more difficult, more burdensome and more expensive than at present. If we do, the losers will be the very people who are in need of help.

The extreme prospect—if the bill were to create confusion, duplicate obligations for charities operating in other parts of the United Kingdom and confront charities in Scotland with unsustainable costs—is that some charities would cease and, equally alarmingly, that others would not start. It is from that perspective that I wish to make the following points, which, in essence, are technical.

The first question that will confront any charity in Scotland, either existing or proposed, is what it is required to do if the bill becomes law. I am not clear about the answer to that. Although the bill will set up a charity regulator, a Scottish charity register and an application framework and give guidance on how applications are to be dealt with, I see no obligation requiring every charitable organisation to register. The sanction for an organisation that does not register may be that it...
will lose its status as a charity for Inland Revenue purposes, but that is not stated in the bill. Indeed, the evidence taken by the Communities Committee confirms, as far as I can understand, that a charity might satisfy the Inland Revenue test but not the test under the bill. If so, that raises two questions. First, why would a charity bother registering under the bill as long as it has Inland Revenue approval? Secondly, is it not our desire, within reason, to bring all charitable organisations within a framework of light-touch regulation and accountability? The Executive needs to put those points beyond doubt on the face of the bill.

In evidence to the committee, the chief executive of OSCR said in response to questions from my colleague Mary Scanlon about the Inland Revenue and OSCR:

“It is like three-dimensional chess. I can say only that we are doing our best in discussions to ensure that there is alignment of definition and practice.”—[Official Report, Communities Committee, 26 January 2005; c 1688.]

The purpose of the Parliament is to produce not games of three-dimensional chess, but lucid legislation that meets the objectives that it is intended to meet. The Executive must clarify those issues.

I have a specific concern about section 7, which sets out the criteria for the charity test. The danger of resorting to subject-specific definition is the high risk of omission, to which Donald Gorrie rightly alluded. Given the criteria, it seems that certain organisations will be excluded. The question has already arisen in relation to the Royal National Lifeboat Institution, but what about Hearing Dogs for Deaf People and Guide Dogs for the Blind? I assume that the fact that those charities do not specifically address the health issues of hearing and sight impairment excludes them from the charitable purpose of advancement of health, although they provide essential services to people who are affected by those conditions.

What about the animal welfare criterion? Does that relate to domesticated animals or wild animals and does it cover wild animals in captivity? I do not know, but I have serious concerns, particularly given the evidence to the Communities Committee that the bill repeals all existing charity law, in contrast to the Westminster Charities Bill, which will retain existing common law and the charitable status of existing charities. That evidence is extremely important because it also relates to the public benefit and charitable status issues. Ann Swarbrick, a solicitor with Anderson Strathern, said:

“The common law that has decided what is charitable is rather far-reaching and complex. Part of the common law defines public benefit. There are two strands. The first is public benefit tests, some of which are in section 8. The second defines types of charities, such as those for promoting the charitable sector and the relief of unemployment.

If we swept away the common law, as the Scottish bill proposes to do, we could jettison such types of charities, unless they are specifically covered by the 13 purposes in the first part of the Scottish charity test. I am afraid that the answer to whether such charities are covered is that that is, at best, uncertain. In many cases, the problem is not that they definitely would not be covered by the Scottish charity test, but that the whole thing is uncertain, which potentially leaves many charities in Scotland uncertain as to whether they are covered. That is not good enough.”—[Official Report, Communities Committee, 15 December 2004; c 1504.]

I strongly urge the Executive not to jettison the common law, which has a helpful and important role. As the Law Society of Scotland said, “pre-existing charity law and charities recognised under that law should be acknowledged and specified in the Bill.”

That is not just sound legal advice; it is overwhelming common sense.

We should take a closer look at what is happening at Westminster and ensure greater alignment with the Westminster proposals and total alignment with the Inland Revenue. That may mean that, if an organisation has charitable status under United Kingdom revenue law, that would justify its inclusion on the Scottish register. There must be far greater cohesion between what we seek to achieve through the bill and its current text.

15:48

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): As a member of the Communities Committee, I welcome the opportunity to take part in the debate on what is an important bill. One might think from the bickering that seems to be going on that the committee is not united, but that cannot be said. The differences that we had when we started our work on the bill have been largely sorted out. Organisations throughout Scotland have called for a reform of the charity law for about 10 years. I am delighted that there seems to be a broad consensus on the bill’s objectives. I am sure that members will bear that in mind when we discuss the issues on which the parties differ.

The charitable sector in Scotland provides an invaluable service and a lifeline for a variety of individuals and groups. We should place on record our debt of gratitude to it. From my work in my constituency and in the Parliament with people from deaf and deafblind groups that represent a broad range of people in the deaf community, I know that their commitment and dedication to working for the benefit of their charities is beyond question. Any legislation on the matter must ensure that we protect the ethos of charities and the good work that they carry out in Scotland, while creating a modern and workable framework for the sector. The sector must have clear regulation and responsibilities to ensure public confidence in the management of charities.
Time is not available to go into all the issues that the committee discussed when it considered the bill, so I will concentrate on the charitable status of colleges and how the test might affect them. Members will be aware that Cumbernauld College is in my constituency. I have had discussions with the college’s principal and have closely examined the representations that the Association of Scottish Colleges made in its evidence to the committee and its submission to the consultation on the bill. I have also considered the views that the National Union of Students has expressed. Those organisations fully support the principles of the bill but have concerns about how they might be affected by one test.

I am in no doubt of the public benefit that accrues to the people in Cumbernauld because of the college, just as happens in other areas in which colleges serve their communities. Colleges can give a fine example of working for the benefit of their communities. Cumbernauld College is an example of an educational institution that strives for educational excellence and plays an important role in the community.

Members will have copies of the briefing that the Association of Scottish Colleges issued for the debate. The ASC estimates that Scottish colleges save approximately £13 million a year in tax benefit from their charitable status but is convinced that that could be put at risk if the bill is passed unamended. The removal of charitable status would put a great strain on the college budgets and I seriously worry about what would have to go to make the savings.

The benefits of colleges to the communities that they serve are clear. In many cases, colleges offer much more flexibility in learning levels and in the timing and availability of classes. The nursery in my constituency, which is attached to the college, benefits from the college’s charitable status and the fundraising that it can do. Cumbernauld College benefits from VAT and other tax relief, which allows it to spend money on activities such as marketing, encouraging students to come and study in Cumbernauld and making local people aware of the opportunities that are available to them on their doorstep.

I worry that colleges will lose out financially from the loss of charitable status at a time when the old-fashioned divisions between further and higher education are, I hope, becoming a thing of the past—a good example of that is the progress that has been made on the merging of the Scottish Further Education Funding Council and the Scottish Higher Education Funding Council. I have no doubt that colleges will pass the charity test; my doubts are about whether they will pass the independence test.

For the same reasons that the committee argued so hard for the bill to make provision for the national collections, the Parliament should argue that ministers should retain Scottish colleges’ entitlement to charitable status. The minister has indicated his intention to lodge amendments to protect our national collections’ charitable status and I welcome the fact that, in his opening speech, he indicated that he would give further consideration to the status of further education colleges. I call on him to lodge amendments at stage 2 to safeguard the charitable status of our FE colleges.

On the basis of what the minister has said, I encourage the Parliament to support the general principles of the bill. I look forward to a much better regulatory framework for Scottish charities.

15:54

Patrick Harvie (Glasgow) (Green): I draw members’ attention to the declaration in my register of interests that I am a director of GALA Scotland, a charity that organises an arts festival in Glasgow.

We can all acknowledge that the bill is welcome. People in the voluntary sector have been waiting for it for many years and it is good to see that it has arrived. We all regret the scandals that have taken place in the voluntary sector, which have undermined and shaken people’s faith in the concept of charity, despite the fact that only a very small number of organisations were involved and that they do not reflect the field as a whole. Nevertheless, people’s perceptions were shaken and voluntary sector organisations were left feeling undermined. That is despite the fact that charitable giving is still very much part of our culture, as witnessed in the response to the impact of last year’s tsunami.

In the light of those scandals, a large part of the bill’s purpose has been to build the charity brand, as people describe it. That is perhaps slightly uncomfortable marketingpeak, but the bill aims to build trust in and awareness of charities and to strengthen their identities. That is important not only with respect to donations and charitable giving, but for encouraging people to volunteer and to access services that are delivered by the voluntary sector.

The bill seeks to define what we mean by a charity, through listing the possible purposes. That is a significant improvement on what has gone before. I will mention a few details, as did Donald Gorrie. There is an argument for including play and recreation, as well as sport, as charitable purposes. During committee consideration of the bill, I had occasion to draw members’ attention to the difference between the charitable purpose of
amateur sport in the United Kingdom Charities Bill and that in the Scottish bill. In England and Wales, amateur sport will have to involve “skill and exertion”; in Scotland, it will not. I wonder whether the minister and deputy minister would like to speak with their colleagues in the Health Department about that, to find out whether the definition is entirely appropriate.

On the charitable purpose given in section 7(2)(c), I was pleased that the committee agreed that “the advancement of religion” should be broadened slightly to include philosophical positions that do not have a supernatural basis and that are therefore not to be described as “religion”. Donald Gorrie mentioned the need to ensure that forms of support other than care, such as advocacy, are included. I wonder whether the “relief of poverty” covers destitution, a phenomenon that is very much the consequence of UK immigration policy.

The charitable purposes, alongside the public benefit test, have been intended to build the identity, confidence and brand of charity. I have got a lot out of the Communities Committee’s scrutiny of the bill, for which I thank my fellow committee members, but I have been aware of a steadily growing list of proposed exceptions. First, there are the national collections. We would all want a solution that does not harm the national collections.

However, when a conflict between public benefit and independence arises, we should surely address the question of independence. Surely we could argue that the organisations concerned should benefit from a limit to the extent of state control, as the McFadden commission suggested. I am not sure whether the Scottish ministers have responsibility for the McFadden commission, but I will mention that the commission’s website has disappeared and has been replaced by an advertisement offering to arrange dates with Christian singles. I wonder who needs to address that.

Other organisations could be affected, including FE colleges, as Cathie Craigie mentioned. Again, there is a conflict between public benefit—which none of us would question—and independence. I still feel that the question to be addressed is the one that involves independence.

The exception to the charity brand that I have raised in committee on several occasions relates to designated religious charities. In his speech, the minister said that the purpose of exempting designated religious charities from large parts of the regulatory regime was in recognition of their internal mechanisms and processes. The Deputy Minister for Communities told the committee that the exemption reflects the status of religion in society. I am not sure whether there are clear reasons for that; I found it difficult to understand the purpose of the exemption. The Scottish Churches Committee told the Communities Committee that it feared that the civil authority—meaning this Parliament—was overstepping the line in the relationship between the church and the state. However, in a democracy, it is for the civil authority to draw that line. The Parliament should be convinced that there is a just reason for exempting religious charities from regulation before it does so.

I slightly regret that the status of independent schools has been seen as such a contentious issue. The voluntary sector is much broader than that and many people in it welcome the bill. I agree with much of what Tommy Sheridan said, although I disagree with some of it. I would rather that we addressed the wider aspects of the voluntary sector in welcoming the bill, which the Greens will support this evening.

Mike Rumbles (West Aberdeenshire and Kincardine) (LD): There is no doubt that the bill is good and the Communities Committee has worked hard on producing a good report on it.

I will focus on Tommy Sheridan’s amendment to the motion. The Liberal Democrats believe in diversity in the educational system in Scotland. If parents want to opt out of the state system, surely it is right and proper for them to do so; that can only be of benefit. I could not disagree more with Tommy Sheridan, because he seems to glory in fighting a class war that is long over and which he does not realise he has already lost. Some of what Tommy Sheridan said was bizarre. He seemed to cite the graduates of the Royal Military Academy Sandhurst as a privileged lot. As a graduate of Sandhurst, I can tell him that he needs to get a grip on reality.

Tommy Sheridan: Of the 180 officers graduating from Sandhurst, 120 came from Oxford or Cambridge, so they were quite privileged. Does the member agree that any parent who chooses to opt out of the state sector is entitled to make that choice, but that the independent institution that they choose should not then be subsidised by low-wage workers?

Mike Rumbles: Tommy Sheridan fails to understand that it is not the institution that is subsidised. The cost would have to be passed on to those parents who send their children to such educational establishments. That would be an extra tax, but those parents have already paid their tax—why should they pay it twice?

The bill is right to focus on the principle of a charity test. Paragraph 86 of the committee’s report states:
“The Committee welcomes the principle of introducing a ‘charity test’ for all bodies wishing to have charitable status in Scotland. It believes that it is important to set criteria that bodies should meet in order to benefit from tax relief and to ensure that there is public confidence in the charitable and voluntary sector as a whole.”

Section 7 of the bill states clearly that

“A body meets the charity test”

on two counts, the first of which is if

“its purposes consist ... of one or more ... charitable purposes”

such as “the advancement of education”, which is listed. Secondly, a body meets the test if

“it provides ... public benefit in Scotland or elsewhere.”

As far as I can tell, it is clear that independent schools meet the test.

Christine Grahame: I refer the member to section 8(2)(b), which states that regard must be had to

“where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive.”

That is the test for the independent, private, fee-paying sector—the “unduly restrictive” test.

Mike Rumbles: Absolutely. The independent sector meets that test with all flags flying. There is no question of that, given the number of bursaries that are available for people who want to apply and which are open, right across the country.

The committee goes too far in its recommendation to ministers in paragraph 150, which was referred to earlier. The paragraph states:

“the Executive should consider placing greater emphasis on the need to meet the public benefit test on the face of the Bill.”

What is wrong with the Executive’s current position? It is, quite clearly, a well-balanced, well-argued position that OSCR can deal with. It is surely straightforward.

Paragraph 141 of the committee’s report includes the following quotation from the Scottish Council of Independent Schools:

“the schools have tried, extremely staunchly ... to adhere to the principles on which they were founded .... They have tried not to give up their charitable principles through giving assistance, as far as it can be afforded, to children who cannot afford the fees .... such schools are charities because they provide for advancement of education without personal gain or profit. As they see it, they give back to society more that they receive in terms of public benefit.”—
[Official Report, Communities Committee, 12 January 2005; c 1570.]

I could not put it better myself.

16:05
Scott Barrie (Dunfermline West) (Lab): From today’s debate and the deliberations of the Communities Committee, it is clear that there is widespread consensus regarding the need for and the content of the Charities and Trustee Investment (Scotland) Bill—although, given some of the speeches that we have heard, that consensus is not as clear as I once thought it was.

As others have pointed out, a few well-publicised examples of charities abusing their status have sullied the charity brand, but the generosity that the Scottish people showed in the context of the recent tsunami disaster has demonstrated the strength of people’s faith in the charity sector. It is the desire to protect and improve the sector that makes this bill important.

The few—I emphasise that there have been only a very few—examples of misappropriation, if not downright fraud, have led to a slight loss of public confidence in the sector. The bill’s attempts to address that are to be welcomed.

I endorse the committee’s view, which is expressed in paragraph 21 of the report, that the bill has achieved an

“appropriate balance between ensuring that the charitable sector is properly regulated without imposing a heavy burden on the resources of charities.”

The vast majority of people who donate to charities of their choice want their donations to go towards providing relief or services or whatever the charities’ aims are, not towards supporting a complicated bureaucracy, including a regulating bureaucracy. That issue is particularly significant in relation to the charities that operate on a cross-border basis and which will need to register with the Charity Commission in England and Wales and with OSCR. As far as possible, we must ensure that the necessary regulatory frameworks in both jurisdictions are complementary.

I draw the minister’s attention to section 103, which deals with definitions and says that the definition of misconduct includes mismanagement. Whatever the legal advice that the committee received, I am not alone in believing that those two words—“misconduct” and “mismanagement”—have different meanings, colloquially. Mismanagement and misconduct do not have the same meaning and should not be used interchangeably. The former is a result of minor slip-ups or administrative error; the latter implies that someone is at it. If that section of the bill is left unamended, I believe, along with other members of the committee, that trustees who have action taken against them because of mismanagement will be lumped together unfairly with those who have action taken against them because of misconduct. That will act as a clear disincentive to
people giving up their time to become charity trustees. That needs to be examined at stage 2.

The public benefit test seems to have been the main topic of debate this afternoon. I echo Patrick Harvie’s comments and agree that it is slightly unfortunate that we have over-emphasised the issue of private schools. However, having said that, I will now talk about private schools.

I want to make it quite clear that I do not support private education. I suspect that that goes for the vast majority of committee members. However, that is not the issue that we are discussing. We are discussing whether there is a fair and robust public benefit test. It has been said that there will be a year zero following the bill’s passage; whatever went before that will be of no direct relevance and it will be up to any body that wants to achieve charitable status to prove the public benefit. Section 8 clearly states:

“No particular purpose is ... to be presumed to be for the public benefit.”

That seems to be the crux of the issue.

In passing, I say in response to Mary Scanlon’s arguments that we should not be brought into disrepute by bad charities and organisations. That is why I have been so frustrated that it has taken six years for legislation to come to the Parliament.

I am sure that all members acknowledge the huge contribution that charities make to Scottish society, especially in supporting our most vulnerable people. However, if charities are to perform their roles as effectively as possible, it is crucial that they have public confidence in their actions. Unfortunately, as a result of the well-documented activities of a tiny minority of people who are involved in charity work, confidence has been eroded over the years. That is the issue of private schools. However, having said that, I still regret that reaching this point has taken us so long.

I turn to some vital provisions in the bill that have not been mentioned and, in particular, to chapter 4, on the supervision of charities. The chapter will give OSCR the power to obtain information, to hold inquiries and to remove and suspend people from office. It will allow the putting in place of the monitoring and supervisory framework that is needed to restore and keep public confidence in our charitable sector, which has been absent for many years.

Independence, too, is close to my heart and I want to talk about the independence of charities and protecting them from local and national Government interference. That is absolutely imperative. Some of us will remember something called the Third Age Group, which an independent review found to be a creature of Fife social work services. That is an example of interference in a charity. In fact, that charity was set up by Fife social work services—that has never been, and should never be, the purpose of a charity. The independence of charities has to be protected from interference from national Government and local authorities.

I welcome the publicly accessible register of all bodies that are eligible to operate as charities. The Inland Revenue, which was responsible for registering Scottish charities, failed to monitor the
charities and there are now a number of non-functioning, dormant charities. If there had been, in Scotland, the kind of monitoring and supervision that is conducted by the Charity Commission in England and Wales, we would not be in the situation that we are in now. There are 28,000 charities in operation in Scotland, and they are desperate for the bill to be passed so that public confidence in their activities will be restored.

Like other members—Patrick Harvie, Scott Barrie, Karen Whitefield and Fiona Hyslop—I regret the fact that much of the debate has been taken up by discussion of private schools. The bill is about much more than private schools; it is important for the present and future of charities. The bill treats private schools no differently from any other organisation. Just like any other body, private schools will have to make the case to OSCR that they should be registered. I welcome paragraph 150 of the committee's report, which is key to all that. The committee has recognised the importance of ensuring that only organisations that have as their overriding purpose the provision of a benefit to the public should qualify for charitable status. I agree that there should be greater emphasis of that point in the bill.

I whole-heartedly welcome the bill and congratulate the Communities Committee on a very fine job. I look forward to the stage 2 and stage 3 debates on the amendments and then the passing of the legislation for which we and the voluntary and charitable sector in Scotland have waited so long.

16:17

Mr Frank McAveety (Glasgow Shettleston) (Lab): I did not intend to speak in the debate, but I was entertained by some of the earlier speeches and I want to ask two specific questions of the minister. The debate on charity reform has developed through the role that Jean McFadden has played over the past four or five years. The length of time that the reform has taken is of concern to all members, but it has been a welcome development, especially as the situation has been exacerbated by recent events involving some charitable providers misusing their rights as charities.

Like other members, I am disappointed that the debate has focused on what we might call a narrow public benefit rather than on the totality of the issue: the ways in which the charity sector can be modernised and reformed. Mr Sheridan claimed that we need to re-form something that is now outdated and no longer workable—that is a great encapsulation of SSP policy.

OSCR's role will be critical in ensuring the independence of the charitable sector. I trust OSCR to assess what is in the public benefit, even if that is schools in the independent, fee-paying sector. As always, the most extreme examples of fee-paying schools have been cited; the reality is that there are many other such schools. Whether I would prefer that form of education to be available is immaterial; the fact is that the schools provide a service and quality of education that some parents want for their children. What Mr Sheridan wants is a foundation for the elimination of the local independent sector—so we could have OSCR and FELIX in the same room, for a change. That would certainly be a very odd couple.

The broader debate is about what we do in relation to public benefit. Fee-paying schools need to be tested more rigorously for the contribution that they make to the wider community. I regret the fact that, as Tommy Sheridan identified, a number of years ago lottery donations ensured that some of those schools received benefit when many state sector schools did not receive similar benefit.

However, in this debate, I do not want to sound like someone who is "full of sound and fury, signifying nothing."

We want to ensure that people can make the contributions that they want. In essence, the SSP wants to eliminate public schools, whereas I love the state sector so much that I do not want Torquils, Mirandas and Farquhars to populate the schools as they do in the private sector. I prefer Kylies, Jordans, Chardonnays and Jasons to be on the register. The real issue is how to develop a structure and system that will benefit the charitable sector throughout Scotland.

We have heard much rhetoric about the class war. I often tell people that I am a former student of St Aloysius in Glasgow. There is a remarkable transformation in the social discourse that I can have when I mention that. The aspirational middle class in Glasgow say, "That is a fantastic achievement," but they are probably thinking, "How did someone who sounds like him manage to get through the gates in the first place?" The truth is that it was not the result of a bursary or a failed seminary opportunity; I went to St Aloysius Primary School in Elmvale Street in Springburn. Class prejudice, suspicion and snobbery still exist, but that is not what this debate is about; that debate is for another day.

A S Neill—probably the most radical Scottish thinker in education—operated an independent, fee-paying school. It was not necessarily the kind of school that I would have wished to attend, and the experience of those who assessed it was fairly negative. However, the reality behind that school is that an individual saw that the state sector did not provide what he felt was important for the
nourishment of children and argued for a much more radical and counter-cultural view of education. That school probably had charitable status and it might not have been caught by the SSP amendment. I do not think that Mr Sheridan would have intended that.

Christine Grahame: Does the member accept that the SNP amendment makes that point? As I said, there is a spectrum. At one end there are the very elitist schools and at the other end there are schools such as Donaldson’s. In the middle are the very schools that Mr McAveety is talking about, and that is why we cannot support the SSP amendment. Different schools have different educational cultures and some might very well fit into charitable status.

Mr McAveety: I acknowledge that. That point should be covered in much more detail in the later stages of the bill, so I do not want to take a conclusive position at the moment. However, I recognise that there is diversity of provision, even within the fee-paying sector, although it might not be as extreme as some people suggest.

I will end on two points of critical importance that have not been touched on in any detail. I welcome the Executive’s move on NDPBs and the cultural institutions. I regret that it took us that long. As a minister, I was involved in the previous discussions and I would have preferred it if those issues had been resolved well before we had to deal with them in today’s debate.

I hope that the minister can address my final points in her summing up. In England and Wales, the Inland Revenue has published a series of tests and a question-and-answer document that gives examples of whether clubs will meet the criteria to qualify as community amateur sports clubs and therefore qualify for benefits. I hope that sportscotland can provide guidelines for such organisations, and I would like to know whether the Executive is addressing that issue. Are the definition of amateur sport and the test of public benefit being discussed with sportscotland and other sporting associations throughout Scotland? Could the criteria that have been identified by the Inland Revenue be applied in Scotland? I know that there are nuances to consider and I hope that we can deal with them.

I thank the Executive for the current position. I hope that, through the debate on the bill, many of my concerns can be addressed in the future.

16:24

Tommy Sheridan: Mr McAveety mentioned OSCR several times. I could not help but think of another Oscar—Oscar Wilde—who used that famous phrase “the only thing worse than being talked about is not being talked about”.

It is welcome when fallen socialists concentrate so much of their time on the policies of the Scottish Socialist Party. I listened with bated breath to Mr McAveety and the other Labour members, apart from Scott Barrie, who was honest enough to say that he opposed private education. Mr McAveety was more concerned with attacking the SSP than with attacking the establishment elite of the private school sector.

It is regrettable that many speeches have concentrated on the amendments, but that may be the nature of today’s debate given the consensus that exists across the Parliament on the bill. If the amendments are defeated, I understand that the bill will be agreed to unanimously at stage 1. I hope that the bill receives unanimous agreement because, as I made clear in my opening speech, it is about providing the support network and cover to the legitimate activities of the many charities throughout Scotland that do fantastic work and deserve full credit for doing so.

However, as Tricia Marwick said, paragraph 150 of the stage 1 report is absolutely clear:

“The Committee recognises the importance of ensuring that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status. It suggests that the Executive should consider placing greater emphasis on the need to meet the public benefit test on the face of the Bill.”

That is the spirit in which I moved my amendment, which I hope will be supported in the same spirit.

I will respond to some points that members made. Mary Scanlon and I disagree passionately on political principles, but I respect her principles and I know that she respects mine. She asked whether I had visited many private schools. I have visited several, including St Aloysius’ College, Hutchesons’ Grammar School, George Watson’s College and Fettes College. After today’s debate, I may not be invited back to those schools, but most of the schools that invited me already knew my position on whether their charitable status should continue.

Indeed, when I visited Fettes some four years ago, I was very honoured when all the pupils stood up as I walked into the room. They were very polite and well mannered. After my rendition of the case for an independent socialist Scotland—fortunately, some of the pupils were still awake—one pupil asked an interesting question. He said, “Isn’t it the case, Mr Sheridan, that in the independent socialist Scotland that you envisage you would close down Fettes College?” I replied to him, as I did to Mary Scanlon earlier today, that we will not close down Fettes College. On the contrary, we will open up Fettes College so that every child in Scotland has the opportunity both to
benefit from the small class sizes and wide subject choice that Fettes offers and to participate in sport using similarly first-class sporting facilities.

It is arrant nonsense to suggest that we should not incorporate the private school sector into the public state sector because it would cost too much. It would be an investment. Given the public subsidy that the private school sector currently receives, the investment would repay itself over a mere couple of years.

**Mike Rumbles**: Is it SSP policy to bring the private schools into the state sector by purchasing them or by stealing them?

**Tommy Sheridan**: We would do neither, as we would incorporate them. If the question of compensation arose, that might be the one situation in which the SSP would support means testing. We could have a committee of pensioners and single parents—

**Tricia Marwick**: On a point of order, Presiding Officer. Today’s debate is on charity legislation. Mr Sheridan quite rightly opposes private schools but, frankly, that is not the issue, and Mr Rumbles’s intervention has not helped. Presiding Officer, could you possibly encourage Mr Sheridan to get back on track?

**The Presiding Officer (Mr George Reid)**: Yes. I would, above all, encourage Mr Sheridan to bring his remarks to a close. He has about 10 seconds left. [Applause.]

**Tommy Sheridan**: I knew that your comment would meet with approval, Presiding Officer. However, I must ask for your protection. After all, if my amendment had not been relevant to today’s debate, it would not have been accepted. Tricia Marwick should bear that in mind. Mr Rumbles asked me a direct question and, unlike some members in the chamber, I try to answer the questions that I am asked.

I will finish by referring to the eulogy to private schools that we have heard this afternoon. I am aware that such remarks are not deliberate, but it can be seen as insulting when members talk about the sacrifices of hard-working parents who want to send their children to private schools with charitable status as if they were somehow more than those made by the single parent who earns £13,000 a year and cannot afford to make the other kind of sacrifice.

Most of the bill should be welcomed, because its provisions are long overdue. However, it must give greater emphasis to what does or does not constitute public benefit.

16:31

**Donald Gorrie**: First, I apologise to the chamber for the fact that members have to listen to me twice. However, it gives me an opportunity to put right an omission in my first speech. I did not pay proper tribute to Jean McFadden and her commission; to members such as Jackie Baillie who have promoted this cause for many years; and to the voluntary sector. I should also pay tribute to the large number of people who gave evidence, which showed the amount of knowledge and concern about this matter. We must listen very carefully to the various charities to ensure that we do not inadvertently damage them in any way. After all, we are starting with a clean sheet and it is important that we get everything right.

We must be driven by the goal of providing benefit to the community and not allow rigid adherence to dogma to damage that. Although independence is the right sort of idea, we can get too hooked on a particular word. Indeed, such an approach might prevent certain beneficial organisations from becoming charities, which would be very unfortunate. OSCR should be able to scrutinise charitable or benevolent organisations properly and, if they follow the rules, they should be allowed to become charities.

The question whether OSCR should be able to give general advice is open to argument; however, it should be able to deal informally with organisations before a particular situation becomes an official dispute. For example, it can guide organisations through the process to ensure that they know that if they deal with matters in a certain way it will be easier for them to become charities.

We must also keep an eye on what is going on at Westminster and in the Inland Revenue, because we cannot depart too far from the basic concepts that they are seeking to adopt. I do not think that this bill strays too far in that respect; however, it could cause problems if the UK Charities Bill goes off in a different direction from ours.

Furthermore, many issues still have to be dealt with. In that respect, Frank McAveety mentioned sport and Annabel Goldie referred to guide dogs. Such examples illustrate my point that we must ensure that the final form of the bill deals correctly with all these matters and that no one is left out by mistake.

We should also give more thought to the emerging area of community enterprise and the social economy. We are getting away from this idea that charities are bunches of do-gooders who receive grants to go off and do something. More and more, they are developing non-profit-distributing but profitable organisations that work in the marketplace but deliver benefits to the community, and we have to ensure that the proposed legislation does not unintentionally hamper them.
They may well be helped by the Scottish charitable incorporated organisations. In my previous speech, I could not think of the word “incorporated”—it is not a word that I would normally use. The Scottish charitable incorporated organisations could help many people to develop social and charitable companies that are also profitable.

There are many good issues to pursue. The driving force must be what is beneficial to communities. We must not over-regulate. With the best will in the world, if somebody is an appointed regulator, there is a tendency to over-regulate rather than under-regulate. We must ensure in our rules that we do not fall into that trap. Regulation must be effective, but must be as light as possible.

I look forward to improving the bill, although I think that it is a very good start in dealing with a very important subject.

16:35

Mr David Davidson (North East Scotland) (Con): I congratulate the Communities Committee on a very good report, which I have read in full. Like the minister, Malcolm Chisholm, I congratulate the McFadden commission on its work. I want to echo Tricia Marwick’s comments: I am sure that we have all heard different parts of the charitable sector asking for this sort of legislation. We must ensure that we get rid of the bad-news stories that really damage public giving. The tsunami appeal was fantastic, but many people are cagey about supporting certain charities. They want charities to have a kitemark, so to speak. This legislation will enable us to build public confidence.

I ask the committee to continue with its good work in the next stages of the bill. We must consider the issues very carefully. As Donald Gorrie has just said, we should not over-regulate but should use a light touch. We should not put unnecessary burdens on small organisations, which are often very focused on what they do.

Two or three speakers have mentioned the need to work with the Inland Revenue. Such work is essential. As the national charitable bodies in particular have said, we do not want a huge difference between our system and the English and Welsh system, and we do not want to cause unnecessary difficulties with the Inland Revenue. Without such support, many charities that do much valuable work in Scotland would not be able to continue.

When people consider simply the amount of money that the public donate to charities, they often underestimate the worth of the voluntary and charitable sectors in Scotland. If the Scottish Executive had to pay in the normal way for the services that those sectors provide, the latest estimate is that the equivalent sum would be in excess of £6 billion. As many speakers have said, this legislation has to be about fostering and encouraging that work, and not about restricting it.

Like others, I am disappointed that far too much time was spent talking about independent schools. The minister himself said that all charities must pass the test and must prove themselves. That is the spirit of the legislation and I welcome it. I am sure that the committee will consider that point carefully as the bill progresses.

I was a little disappointed in the amendments. There was a bit of grandstanding going on. As far as I was aware, the committee agreed the report unanimously. Obviously, Mr Sheridan has the right to do what he did and the Presiding Officer agreed with that. However, his speech was a political rant and not really about the essence of the legislation—which is the development of public trust and confidence in the charitable sector. We must ensure that the sector can continue to serve everybody.

I agreed very much with Donald Gorrie when he said that this should not be a party-political issue. We are talking about the collective common good and I was pleased to see that the committee dealt with its work in a dispassionate and careful manner. I give credit to the committee for that.

Tommy Sheridan: The member has referred to the report a couple of times. In relation to the private school sector, the second last bullet point on page 141 of the report says:

“Many schools were more concerned about charitable status as a trademark of approval for their role in and contribution to society.”

Does Mr Davidson think that we should allow them to have that trademark?

Mr Davidson: If that is what individual establishments want to say, they have the right to say it. They have said it to the committee in evidence, and I have no argument with it whatsoever.

As far as other contributions are concerned, I agreed with some of the points made about colleges, including comments made by Fiona Hyslop. There is a need to ensure that bringing in the legislation does not damage anything that fosters education, and I ask the minister to consider and comment on that and to assure us that the point about colleges will be addressed. Annabel Goldie talked about some technical terms, but she also questioned services for the deaf and the blind and raised issues about animal welfare. There could be a need to consider those issues, and it would be helpful if the minister could give us some early guidance on the list in section 7 with regard to the points that many members have made today.
Patrick Harvie was absolutely right when he said that the bill is about confidence in charitable giving. It is about building confidence not just in charitable giving, but in the volunteering tradition in Scotland, and I know that the Executive strongly supports that. Patrick Harvie also talked about the advocacy organisations, which are essential, and I am sure that work will be done to ensure that those valuable organisations—often very small but working actively in the community to provide a good public service—will be included at some stage as the bill progresses.

Not much was said about misconduct, although Scott Barrie mentioned it. That is an important part of the bill, but it is not something that we want to highlight. The fact that it is in the bill and that people will have to meet all the tests should be adequate.

Frank McAveety talked about modernising the charitable sector. I think that the bill does that, and I and my party support and welcome the passing of stage 1 of the bill today.

16:42

Linda Fabiani (Central Scotland) (SNP): I begin by declaring an interest as a trustee of Just World Partners and of the Al-Kameli Trust, the former registered in Scotland and the latter in England.

The SNP generally welcomes the bill; of course we do. Christine Grahame and I were both on the committee that put together the report. It was extremely interesting and we found the evidence from all concerned highly enlightening. Fiona Hyslop summed up the issue when she referred to the three Cs in describing what we are trying to achieve. They are consistency, clarity and confidence: consistency of treatment by the regulator; clarity of interpretation by those operating charities; and confidence for the public that they are supporting or donating to bona fide charities. That is extremely important.

In closing this debate for the SNP, I want to cover some of the issues that have already been raised, but I also want to touch on some that have not yet been mentioned. In opening, the minister talked about OSCR and spoke of proportionate and balanced regulation and co-operation with other regulators. He also mentioned that, under the bill, Communities Scotland was taking over some regulatory functions from OSCR. I know that there will be co-operation and a reporting mechanism, and I look forward to hearing more about how that will work, because it is important that all charities are registered and monitored to some extent by the central agency, which will be OSCR.

Talking of co-operation, I would like to say that I believe that that is what committee members of all parties should do. When members are unable to attend an event, they should have confidence that their fellow members will report back to them accurately. I found the sniping on that issue—by both Mary Scanlon and the convener—extremely petty and demeaning of themselves and of the committee.

Tricia Marwick is very keen on the independence test, and other members mentioned third-party control and how we have to be careful about independence for all charities. We know that the national collections, for example, will be able to preserve their charitable status, because something will be done to look after them. However, we have to be careful about local authorities and arm’s-length organisations. Although most of us have confidence in most local authorities, there have been instances when that confidence has been rocked and Tricia Marwick mentioned one such instance. We look forward to discussing that in more detail at stage 2.

On the charity test and on charitable purposes, the benefit of the public and the common good, the minister said that we need a set of purposes that reflect Scotland’s needs. I was pleased to hear him say that we do not necessarily need to match what is done elsewhere in the United Kingdom, because what we have should be what Scotland needs. However, the committee has suggested that we could consider amendments at stage 2 to reflect more truly the objectives of the charitable sector in Scotland. Patrick Harvie gave a couple of examples of what the committee discussed: the broadening of religious purposes and the reconsideration of the relief of poverty. The RNLI asked the committee to consider adding the saving of lives to the preservation of health and well-being.

Scott Barrie mentioned charity trustees and the definition in the bill of misconduct. I know that he felt quite strongly about that at the committee, as did I. Many other members also had concerns. David Davidson has missed the point. Section 65(4) of the bill states:

“Any breach … is to be treated as being misconduct in the administration of the charity.”

The word “misconduct” implies more than bad practice, for all that civil servants and lawyers say that the dictionary definition covers a range of things. The perception is that if someone is found guilty of misconduct, they have been at it: they have had their hands in the till or they have deliberately done something wrong. Scott Barrie is right to say that that provision could put people off serving as a charity trustee. I would like the terminology to differentiate between problems that arise from incompetence or are unintentional and problems that are intentional or caused by misdemeanour. That change should be
straightforward and simple. I look forward to that discussion.

That brings me to public benefit, which has been the most contentious aspect of the discussion today. I am at a loss as to why Christine Grahame’s amendment has been so contentious. First, it addresses the colleges. We heard comments from both Fiona Hyslop and Cathie Craigie on the problem of further education colleges. The committee was concerned by the submission of the Association of Scottish Colleges that unless something is done to preserve their charitable status they could lose £13 million in tax relief. The minister did not mention what he is going to do about the matter, so I look forward to hearing about that.

That covers the first part of the SNP amendment. I do not see why that is contentious, nor do I see why the second part of the amendment is contentious. It does not mention independent schools, although Christine Grahame mentioned them in her speech in response to the SSP amendment and when she gave valid examples of what could arise under the bill. It is worth repeating that paragraph 150 of the committee’s report clearly reflects what is in Christine Grahame’s amendment. Paragraph 150 states:

“ensuring that only those organisations which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status.”

It also calls for a “greater emphasis on the need to meet the public benefit test on the face of the Bill.”

The SNP amendment is exactly what the committee has recommended. I fail to see the problem.

The SCVO, which was held up as a marvellous organisation which it is, and thanked for its contribution to the stage 1 consideration said in its submission:

“SCVO believes that the provision of explicit criteria of public benefit is critical to the effectiveness of the Act”.

The SCVO agrees that this is an important point. It suggests:

“The Bill should provide that ‘only those organisations otherwise eligible for charity status which have as their overriding purpose the provision of a benefit to the public should qualify for charitable status’”.

I suggest that every member of the Communities Committee, which compiled the report, should support the SNP amendment. I urge all other members to do the same.

16:49

The Deputy Minister for Communities (Johann Lamont): I do not know whether I should declare an interest, as I am married to someone who works for the SCVO. I do not know whether that is a delight or a burden—I will allow other people to judge that for themselves.

The Minister for Parliamentary Business (Ms Margaret Curran): Does he think that it is a delight or a burden?

Johann Lamont: He is too scared to say.

I am delighted to have the opportunity to sum up in this very important debate. This is the first stage 1 debate that I have been involved in from this side of the fence, so to speak, and it has been an interesting experience. I am happy that there is genuine consensus on the importance of the bill and that, in general, there are no divisions along party lines on the key issues that the bill identifies. That is a good-news story that gives confidence in the Parliament’s work of wrestling with the difficult issues that will make a difference in local communities.

We should remember the history—and understand the importance—of the commitment to introduce legislation on charities, which represented recognition that there had been a sapping of public confidence in charities. There was a fear that if charities were not operating in accordance with a common understanding of how they should be operating, there would be an impact on charitable giving. We should commend those people who through their work strove to ensure that that position would be turned round not just by the bill, but by restoring faith in the charitable sector.

Acknowledging that something is important does not make it easy. The charitable sector does not exist in straight lines or in boxes; it was not created and developed by policy wonks and bureaucrats. That means that it is difficult to legislate clearly and simply on what the sector does. It is important that when we legislate we recognise that diversity is to be celebrated, but that it is not easily managed. In legislating for the sector, we must be careful that we do not drive out those bits of it that we cherish so much.

A lot of hard work has gone into developing the bill and it is gratifying that the Communities Committee has endorsed it. I congratulate the committee and its convener on the role that they have played. I acknowledge the hard work that Jean McFadden’s commission did all those years ago in identifying the areas in which it was important to take action. I pay tribute to my colleague Margaret Curran, who caught and responded to the public mood and the desire for legislation by making the commitment to legislate that we are delivering on.

There is agreement that charities are vital to Scotland’s community and that they need a regulatory framework that protects the public
interest and helps them to flourish. It is evident to me that, as the committee noted, on certain issues we may not have got things quite right yet, but that indicates that we have a successful parliamentary scrutiny process. I am looking forward to analysing the committee’s recommendations before we propose amendments to the bill at stage 2.

Independence is not a new issue—Jean McFadden flagged it up. Everyone understood that bodies might have to choose between independence and charitable status. Although the Executive recognises the compelling case that has been made for the distinctive role of the cultural NDPBs because of their responsibilities for the national treasures, that is not an indication that we devalue independence.

Christine Grahame: Will the minister give way?

Johann Lamont: I want to progress a little.

Christine Grahame made a point about organisations that act in the public interest, but the fact that an organisation acts in the public interest is not sufficient to make it a charity.

I acknowledge the concerns about the FE sector, on which we will reflect. We have already made a commitment on third-party direction. However, I am concerned that we do not diminish the importance of the independence test or misrepresent its purpose. It was not just about addressing the position of NDPBs. As Malcolm Chisholm said, trustees—no matter how they are appointed—have the crucial role of working in the interests of their charity. When there is direction from elsewhere, there will be tension, at the very least.

Christine Grahame: I think that I am correct in saying that the McFadden commission examined the appointments system in an effort to resolve the contentious issue of third-party direction. I note that the bill does not take that up. I wonder whether the ministers are considering that as a way of uncoupling the system.

Johann Lamont: I refer to a point that I have made before. What is important is not where someone comes from, but how they act once they take up their position. A trustee’s responsibility is to operate in the interests of their charity.

I want to deal with independent schools. I say to the SSP representative that I will take no lectures on my commitment to the state sector, in which I worked for 20 years. Every day I delight in the fact that my children are educated in that sector. At the age of 11, I refused to take the scholarship test that would have allowed a working-class girl from Anderston to go to what I perceived to be a place of privilege. We understand that there is an issue to do with elitism, but I must tell Tommy Sheridan that I know from my experience of education that privilege and inequality exist inside the state sector, too.

It is deeply ironic that the example on which the SSP draws to make its case is the importance of its policy on free school meals. The SSP’s free schools meals policy would draw money out of the community in which I taught and give it to better-off communities. In the places where I taught, 70 per cent of the children already had free school dinners. Under the SSP policy, the new investment that is being put into school meals would be taken from those children and given to children elsewhere. Instead of spending funds on initiatives such as home start or on working with families and the disadvantaged, the SSP would spend money on things that prevent youngsters from achieving equality.

Tommy Sheridan: Will the minister give way?

Johann Lamont: No, I will not.

Mary Scanlon made a point about the independent sector. The public benefit test is a real test; it is not a tick-box test. Indeed, the huge significance of the proposals in the bill seem to have escaped Tommy Sheridan’s notice. No body or organisation will automatically become a charity; each one will have to prove its case. The report acknowledges the diversity of the independent sector. In acknowledging that, we should also recognise that the bill offers no guarantee of charitable status. Those that want charitable status will have to prove their case. Schools also have to contribute to the community. If a body loses its charitable status, its assets—which it gathered for charitable purposes—must continue to be used for charitable purposes. Those bodies would therefore still have to deliver on education.

The point was also raised that OSCR would need to understand the importance of the public benefit test. As I said, the test should be robust. We know that OSCR will have to consult on its guidance and that it can be asked to give evidence to committees of the Parliament. Indeed, it will also have to report to the Parliament. If any committee is unhappy with OSCR’s performance, it or the Parliament can promote legislation to address that.

In the time that remains, I want to respond to a few other points that were made in the debate. Donald Gorrie spoke about the list of charitable purposes. The Executive has made a commitment to address the points that were raised in respect of adding heads for sport and belief. We also agree to consider the points that Frank McAveety made.

I also want to refer briefly to the point that Patrick Harvie made about designated religious charities. In our communities at the moment, the Church of Scotland has a particular role to play.
We can argue about whether it should have such a role, but it is not for the bill to change that. Religion has a particular role in people’s lives. If we want to change the role that religious bodies play, we can do so by argument or legislation at another time. In the designation of religious charities, the Executive acknowledges that those charities have internal structures that regulate them; we are not saying they are being allowed to opt out of regulation. At the same time, we have argued that the powers that OSCR should retain over the designated religious charities are powers that relate purely to the protection of the charitable functions of the body. We will work with those who have concerns about the implications of the measure.

Scott Barrie made a point about the difference between misconduct and mismanagement. The Executive has reflected on the serious nature of that point. We do not want to endanger the very fabric of the voluntary sector or set challenges that deter people from becoming involved. I commit to looking further at the matter. The last thing that the Executive wants, simply because it used language with which lawyers are comfortable, is to say to the people who operate in the charitable sector that there may be a cost to them of doing so. There is no such cost, but we might want to look at how we can reassure people of that.

Mary Scanlon: Does the minister acknowledge that education, whether it is provided in the independent or the state sector, is none other than a public benefit?

Johann Lamont: We could argue all day about what we think education is and what we think the benefits of education are. I have nailed my colours to the mast on where I want my children to be educated; other people have to make their own decision. We must be clear about the matter; the charity test is for the schools to pass and not for us to facilitate. Given the scrutiny that the Parliament and the committee will afford in the development of the guidance, I am confident that the public benefit test will be robust.

I look forward to stage 2, at which time we can consider in detail the issues that have been flagged up today. I urge the chamber to support the general principles of the bill.
Decision Time

17:01

The Presiding Officer (Mr George Reid):
The first question is, that amendment S2M-2352.2, in the name of Christine Grahame, which seeks to amend motion S2M-2352, in the name of Malcolm Chisholm, on the general principles of the Charities and Trustee Investment (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Kane, Rosie (Glasgow) (SSP)
Leckie, Carolyn (Central Scotland) (SSP)
Lochhead, Richard (North East Scotland) (SNP)
MacAskill, Mr Kenny (Lothians) (SNP)
Martin, Campbell (West of Scotland) (Ind)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
McFee, Mr Bruce (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Robison, Shona (Dundee East) (SNP)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Sheridan, Tommy (Glasgow) (SSP)
Stevenson, Stewart (Banff and Buchan) (SNP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)

Against
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
May, Christine (Central Fife) (Lab)
McAteety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnoll, Mr Jack (Motherwell and Wishaw) (Lab)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Mundell, David (South of Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweddell, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Tosh, Murray (West of Scotland) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

**ABSTENTIONS**

MacDonald, Margo (Lothians) (Ind)

The Presiding Officer: The result of the division is:
For: 39, Against 77, Abstentions 1.

Amendment disagreed to.

The Presiding Officer: The second question is, that amendment S2M-2352.1, in the name of Tommy Sheridan, which seeks to amend motion S2M-2352, in the name of Malcolm Chisholm, on the general principles of the Charities and Trustee Investment (Scotland) Bill, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

For
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Fox, Colin (Lothians) (SSP)
Kane, Rosie (Glasgow) (SSP)
Leckie, Carolyn (Central Scotland) (SSP)
Martin, Campbell (West of Scotland) (Ind)
Sheridan, Tommy (Glasgow) (SSP)
Swinburne, John (Central Scotland) (SSCUP)

Against
Aitken, Bill (Glasgow) (Con)
Alexander, Ms Wendy (Paisley North) (Lab)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gillon, Karen (Clydesdale) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springfield) (Lab)
May, Christine (Central Fife) (Lab)
McAteety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McConnoll, Mr Jack (Motherwell and Wishaw) (Lab)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Mundell, David (South of Scotland) (Con)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweddell, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Tosh, Murray (West of Scotland) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)


The Presiding Officer: The result of the division is: For 8, Against 77, Abstentions 32.

Amendment disagreed to.

The Presiding Officer: The third question is, that motion S2M-2352, in the name of Malcolm Chisholm, on the general principles of the Charities and Trustee Investment (Scotland) Bill, be agreed to.

Motion agreed to.

That the Parliament agrees to the general principles of the Charities and Trustee Investment (Scotland) Bill.

The Presiding Officer: The fourth question is, that motion S2M-2319, in the name of Tom McCabe, on the financial resolution in respect of the Charities and Trustee Investment (Scotland) Bill, be agreed to.

Motion agreed to.

That the Parliament, for the purposes of any Act of the Scottish Parliament resulting from the Charities and Trustee Investment (Scotland) Bill, agrees to any increase in expenditure payable out of the Scottish Consolidated Fund in consequence of the Act.
I thought it might be useful to, before the Charities and Trustee Investment (Scotland) Bill enters stage 2, respond to a number of the points that the Committee raised in its stage 1 report, but which I did not have a chance to address in the stage 1 debate.

Paragraph 49 of the report states that “…the Committee does see a value in including a wider and more general reference to promoting a flourishing charitable and voluntary sector in Scotland and suggests that the Executive should give consideration to whether this would be most appropriate in the long title or in the body of the Bill”.

I would like to reassure the Committee that the whole Bill aims to promote a flourishing charitable sector in Scotland and that, although this aim is not in the title or the body of the Bill, it is very much the policy driving it. The accompanying Policy Memorandum states that “The overall policy objective on charities is therefore to establish a satisfactory regulatory regime that will encourage public confidence in charities…”

Paragraph 63 of the Committee’s report states that “The Committee invites the Executive to consider the case for giving transparency to the applications procedure and suggests that it would be useful to have a publicly accessible list of bodies that have applied for charitable status”.

We have looked further at this issue and discussed it with OSCR but feel that an amendment to the Bill is unnecessary. The Bill provides that OSCR will consult on the guidance it will apply when determining whether or not a body meets the charity test. We would expect the consultation to highlight a wide spectrum of views about what aspects should be taken into account in respect of different bodies. This may include requiring different types of evidence from different bodies. The guidance will be reviewed to ensure it is up to date or when OSCR is prompted to do so following inquiries. If someone believes a charity does not meet the charity test they can raise the matter with OSCR which, if appropriate, can launch an inquiry and if necessary direct the charity to make changes or remove it from the register.

Paragraph 78 of the report states that “…(the Committee) believe that a formal agreement with the Charity Commission that covers registration requirements and reporting formats will be crucial to ensure that charities and funding bodies working at the UK level are not overburdened by regulation to the detriment of their activities”.

The Executive is aware of the need to ensure that regulation is proportionate and the Committee might be interested to know that OSCR and the Charity Commission are already in the process of drawing up a joint protocol which will cover a number of areas of their work. We would certainly expect this close liaison to continue when OSCR takes up new powers under the Bill.

Paragraph 58 of the report highlights the need to promote an understanding of the requirements of the Bill. The Executive provides support to the sector, some of which is already earmarked for training. For example, the Councils for Voluntary Service (CVS) core funding of £3m pa for 3 years has recently been agreed by the Executive via SCVO. The CVS business plan sets out that part of this work will include for “the local CVS network providing information on the new charity law to the voluntary sector locally”. The Executive will also be discussing with the sector the wider training needs in relation to the new legislation.
Paragraph 190 of the report notes that “(i)n written evidence SCVO indicated that they did not ‘agree with the provision to make trustees personally liable for the expenses of an accountant appointed by OSCR to produce accounts when these are late’ and instead proposed a sliding scale of fines. The Committee suggests that the Executive might wish to reconsider the burden that this provision could place on smaller charities and whether it would be appropriate for it to be applied in all cases.”

The power contained in section 46 is not intended to be used in all cases where accounts are late. This would not only be a disproportionate response by OSCR, but it would place great administrative burdens on them as well as the burden to charities. If the accounts required by the Act are not submitted, OSCR will have a number of options available to it. It will be able to issue a warning letter informing the trustees that they have failed to produce the accounts on time, publish the fact that the charity is in default on their website and if the default is part of a pattern or there is no response, OSCR could consider launching an inquiry into the charity. Section 46 is intended to be used as a last resort so OSCR can obtain the necessary information in a case where the charity trustees are in serious breach of its duties. I believe that it is right that in such circumstances the trustees are liable for the expense of doing so and not OSCR.

In paragraph 213 the report states that appointments to the appeals panel will follow Nolan Committee procedures and be overseen by the Scottish Law Commission. This perpetuates a mistake in the Official Report of the Bill Team’s appearance before the Committee which we subsequently sought to correct. Appointments to the panel will in fact be overseen by the Commissioner for Public Appointments in Scotland.

Finally, paragraph 226 of the report highlights the divergence in the figures given by the Bill team and Edinburgh Council on the costs of administering the public benevolent collections licensing scheme. The Committee drew “the Executive’s attention to the fact that .... the costs to be borne by the City of Edinburgh Council may prove to be significantly higher than it has estimated.” I am aware that the costs of processing the public benevolent collection licences may not be the same as we first thought, even though these were estimates based on information of existing collection costs provided to the Executive by local authorities. The Executive plans to consult on the regulations relating to the collections ahead of their introduction and will be seeking input from the local authorities on the details of the regime and cost implications when we produce the accompanying Regulatory Impact Assessment.

I look forward to discussing the Bill further with the Committee during stage 2.

Johann Lamont MSP
Deputy Minister for Communities
Charities and Trustee Investment (Scotland) Bill

1st Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

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Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Malcolm Chisholm

6 In section 1, page 1, line 9, leave out subsection (1) and insert—

<( ) There is to be an office to be known as the Office of the Scottish Charity Regulator.
( ) There is established a body corporate, to be known as the Scottish Charity Regulator, which is to be the holder of that office.
( ) That office-holder is referred to in this Act as “OSCR”.
( ) OSCR has the functions conferred on it by or under this Act and any other enactment.>

Malcolm Chisholm

7 In section 1, page 1, line 18, at end insert <, and

( ) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR’s functions.>

Cathie Craigie

80 In section 1, page 1, line 20, at end insert—

<( ) OSCR may issue guidance pursuant to the discharge of its functions, but before doing so must consult representatives of the charitable sector and such other persons as it thinks fit.>

Malcolm Chisholm

8 In section 1, page 1, line 26, leave out <OSCR> and insert <the Scottish Charity Regulator>
In schedule 1, page 61, line 5, leave out <OSCR> and insert <The Scottish Charity Regulator (in this schedule referred to as “the Regulator”)>.

In schedule 1, page 61, line 9, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 18, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 29, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 30, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 34, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 37, leave out first <OSCR> and insert <the Regulator>.

In schedule 1, page 61, line 37, leave out second <OSCR> and insert <the Regulator>.

In schedule 1, page 62, line 2, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 62, line 6, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 62, line 8, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 62, line 11, leave out <OSCR> and insert <the Regulator>.

In schedule 1, page 62, line 13, leave out <OSCR> and insert <The Regulator>.
Malcolm Chisholm
22 In schedule 1, page 62, line 19, leave out first <OSCR> and insert <the Regulator>

Malcolm Chisholm
23 In schedule 1, page 62, line 19, leave out second <OSCR> and insert <the Regulator>

Malcolm Chisholm
24 In schedule 1, page 62, line 21, leave out <OSCR> and insert <the Regulator, whether or not as the holder of the Office of the Scottish Charity Regulator,>

Malcolm Chisholm
25 In schedule 1, page 62, line 22, leave out <OSCR> and insert <the Regulator>

Malcolm Chisholm
26 In schedule 1, page 62, line 24, leave out <OSCR> and insert <the Regulator>

Malcolm Chisholm
27 In schedule 1, page 62, line 27, leave out <OSCR> and insert <the Regulator>

Section 2

Malcolm Chisholm
28 In section 2, page 2, line 12, leave out subsection (4)

Christine Grahame
66 In section 2, page 2, line 12, leave out <But>

Section 3

Patrick Harvie
81 In section 3, page 2, line 26, leave out <a designated religious charity or>

Section 6

Malcolm Chisholm
29 In section 6, page 4, line 4, after <54(1)> insert <, 56(1) and 58(1)>

Malcolm Chisholm
30 In section 6, page 4, line 6, leave out from <(in> to <54(2)> in line 7
Section 7

Scott Barrie

1 In section 7, page 4, line 20, at end insert <(including the provision of non-formal education opportunities through youth work to promote the development of young people)>

Patrick Harvie

82 In section 7, page 4, line 21, leave out <religion> and insert <philosophical belief, whether or not involving belief in one or more deities>

Scott Barrie

4 In section 7, page 4, line 22, at end insert—
<( ) the saving of lives,>

Donald Gorrie

67 In section 7, page 4, line 23, leave out <civic responsibility> and insert <citizenship>

Malcolm Chisholm

31 In section 7, page 4, line 25, at end insert—
<(ga) the provision of recreational facilities with the object of improving the conditions of life for the persons for whom the facilities are primarily intended,>

Donald Gorrie

31A As an amendment to amendment 31, line 2, after <facilities> insert <or activities>

Donald Gorrie

31B As an amendment to amendment 31, line 3, after <facilities> insert <or activities>

Donald Gorrie

68 In section 7, page 4, line 26, at end insert—
<( ) the promotion of religious or racial harmony,
( ) the promotion of equality and diversity,>

Malcolm Chisholm

32 In section 7, page 4, leave out lines 28 to 31 and insert—
<(ia) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,>

Cathie Craigie

83 In section 7, page 4, line 33, leave out from <that> to end of line 34 and insert <intended to provide community benefit>
Malcolm Chisholm

33 In section 7, page 4, line 34, at end insert—

<(  ) In subsection (2)—

(a) in paragraph (d), “the advancement of health” includes the prevention or relief of sickness, disease or human suffering,

(b) in paragraph (g), “sport” means sport which involves physical skill and exertion,

(c) paragraph (ga) applies only in relation to recreational facilities which are—

(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or

(ii) available to members of the public at large or to male or female members of the public at large,

(d) paragraph (ia) includes relief given by the provision of accommodation or care, and

(e) for the purposes of paragraph (m), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).>

Christine Grahame

33A As an amendment to amendment 33, line 4, at end insert—

<(  ) in paragraph (e), “the advancement of civic responsibility or community development” includes—

(i) rural or urban regeneration, and

(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities.>

Donald Gorrie

33AA As an amendment to amendment 33A, leave out lines 2 and 3 and insert—

<(  ) paragraph (e) includes—>

Donald Gorrie

33B As an amendment to amendment 33, line 6, after <facilities> insert <or activities>

Patrick Harvie

33C As an amendment to amendment 33, line 12, leave out from <and> to end of line 15
Donald Gorrie
84* In section 7, page 4, leave out lines 33 and 34 and insert—

<(2A) If a body does not meet the charity test because its purposes are not listed as charitable purposes in subsection (2) but OSCR is satisfied that the body’s purposes are of a nature which means they should be so listed, OSCR may recommend to the Scottish Ministers that subsection (2) be amended to include a reference to purposes of that nature.

(2B) The Scottish Ministers may, following a recommendation by OSCR under subsection (2A), by order add to the list of charitable purposes in subsection (2).>

Donald Gorrie
85* In section 7, page 5, line 5, after <activities,> insert—

<( ) OSCR is not satisfied that the body conducts its affairs without external interference in its operations and management and that its trustees act in the interests of the body and of achieving its purposes and not in the interests of any outside body,>

Malcolm Chisholm
34 In section 7, page 5, line 4, leave out <a third party> and insert <the Scottish Ministers or a Minister of the Crown>

Christine Grahame
86 In section 7, page 5, line 6, at end insert <, or

(d) it is a public body whose constitution allows more than one third of the persons who would, if the body was a charity, be the charity trustees, to be directly or indirectly appointed by the persons specified in the statute which establishes the body or, if the body is not established by statute, the organisation which established the body.>

Malcolm Chisholm
35 In section 7, page 5, line 7, leave out subsection (4) and insert—

<(4A) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order.>

Christine Grahame
87 In section 7, page 5, line 9, at end insert—

<( ) In subsection (3)(d), a “public body” means any body established by statute or by local or central government.>

Section 8

Donald Gorrie
69 In section 8, page 5, line 20, leave out <by the public> and insert <directly or indirectly by the community as a whole>
Mr John Home Robertson

70 In section 8, page 5, line 22, after <benefit> insert <(including any charge or fee)>

Donald Gorrie

88 In section 8, page 5, line 22, at end insert—

<(  ) For the purposes of subsection (2)(b), a condition which requires a person to be a member of a particular group (including, for example, religious or ethnic groups, former members of a particular organisation or sufferers of a particular disease) in order to access the services provided by the body is not to be regarded as unduly restrictive if—

(a) the body’s purpose is to assist members of that group,
(b) the body acts fairly between all members of the group, and
(c) the community as a whole benefits directly or indirectly from the body’s work.>

Section 9

Donald Gorrie

71 In section 9, page 5, line 24, leave out <such> and insert <representatives of the charitable sector and such other>

Section 10

Patrick Harvie

89 In section 10, page 5, line 36, at beginning insert <clearly intended to be>

Christine Grahame

72 In section 10, page 6, line 3, after <its> insert <constitution or>

Malcolm Chisholm

36 In section 10, page 6, line 3, at end insert <, and

(  ) in the case of an SCIO proposed in an application under section 54(1), 56(1) or 58(1), the purposes set out in the SCIO’s proposed constitution accompanying the application.>

Section 11

Christine Grahame

73 In section 11, page 6, line 8, leave out <28> and insert <21>
Section 15

Malcolm Chisholm

37 In section 15, page 7, line 20, after <may> insert—

<(  ) exempt charities, or charities of a particular type, from any of the requirements imposed by the regulations,

(  )>

Section 19

Malcolm Chisholm

38 In section 19, page 10, line 5, leave out <which they consider to be of national importance> and insert <specified in the order>

After section 19

Christine Grahame

90 After section 19, insert—

<Information about charities removed from Register or defunct charities

(1) OSCR must maintain a list of all charities removed from the Register (under section 18 or otherwise) or defunct charities.

(2) The Scottish Ministers may by regulations make further provision as to the nature of the information to be contained in the list and the manner in which it may be held.

(3) Section 21 applies to the list maintained under subsection (1) as it applies to the Register.>

After section 20

Donald Gorrie

91 After section 20, insert—

<Assistance to charities and applicants

Assistance to charities and applicants

OSCR may assist charities and applicants by providing them with information about the regulatory regime established by this Act in general and the rules governing application for entry in the Register in particular.>

Section 28

Mr John Home Robertson

74 In section 28, page 13, line 18, after <purposes> insert <which may include consideration of information or representations received by OSCR>
After section 28

Donald Gorrie

92 After section 28, insert—

<Local charities

(1) Where a charity whose purpose is to benefit a local community (“a local charity”) appears to be failing, to a significant extent, to provide such a benefit, any community council whose area includes any part of the local community may request that OSCR make inquiries with regard to the local charity under section 28.

(2) OSCR must—

(a) inform the community council which made the request under subsection (1) of the outcome of its inquiries with regard to the local charity,

(b) if OSCR believes, as a result of those inquiries, that the charity is failing as mentioned in subsection (1), direct the local charity—

(i) to meet with representatives of the local community to discuss the charity’s past actions and future plans, and

(ii) to report to OSCR on the outcome of any meetings held under sub-paragraph (i) and on the action being taken by the local charity to address the failure mentioned in subsection (1).

(3) If, after receiving a report under subsection (2)(b)(ii), OSCR is not satisfied with the action being taken by the charity to address the failure mentioned in subsection (1), it may direct the local charity to replace its charity trustees.

(4) OSCR’s duties under subsection (2) and power under subsection (3) are without prejudice to OSCR’s duties and powers under sections 30 and 31.>

Section 30

Donald Gorrie

93 In section 30, page 14, line 32, at end insert—

<(A1) Before concluding that a charity no longer meets the charity test OSCR must—

(a) inform the charity that it may no longer meet the charity test and the grounds for that view, and

(b) give the charity an opportunity to respond.>

Cathie Craigie

94 In section 30, page 14, line 33, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Donald Gorrie

95 In section 30, page 14, line 33, after <28> insert <and after taking account of any response made under subsection (A1)(b)>
Section 31

Cathie Craigie

96  In section 31, page 15, line 7, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Cathie Craigie

97  In section 31, page 15, line 14, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Cathie Craigie

98  In section 31, page 15, line 17, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Section 34

Cathie Craigie

99  In section 34, page 17, line 18, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

100 In section 34, page 17, line 26, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

101 In section 34, page 17, line 29, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

102 In section 34, page 18, line 17, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Section 64

Patrick Harvie

103 Leave out section 64

Section 65

Donald Gorrie

75  In section 65, page 35, line 6, after <charity> insert <and not in the interests of any outside body>

Patrick Harvie

104 In section 65, page 35, line 8, after <purposes> insert <and with the provision of public benefit>
Donald Gorrie

76 In section 65, page 35, line 11, after <must> insert <take all reasonable steps to>

Malcolm Chisholm

39 In section 65, page 35, line 17, leave out subsections (5) and (6)

Section 66

Malcolm Chisholm

40 In section 66, page 36, line 5, leave out subsection (3)

Cathie Craigie

105 In section 66, page 36, line 14, leave out from beginning to <receive> in line 16 and insert <Subsections (1) to (4) override any provision made>

Malcolm Chisholm

41 In section 66, page 36, line 17, after <constitution> insert <referring specifically to the payment of remuneration to that service provider>

Section 67

Donald Gorrie

77* In section 67, page 36, line 32, after <includes> insert <functions undertaken for a charity by a charity trustee under a contract with that charity and>

Section 68

Cathie Craigie

106 In section 68, page 38, line 32, at end insert—

<( ) An employee of a charity may not act as or occupy the position of a charity trustee of the charity that employs them.>

Section 70

Patrick Harvie

107 In section 70, page 39, line 35, leave out <designated religious charity or>

Patrick Harvie

108 In section 70, page 40, line 1, leave out <designated religious charity or>
Section 71

Malcolm Chisholm

42 In section 71, page 40, line 7, at end insert <and, where the decision is made by a person to whom OSCR’s functions have been delegated by virtue of section 38, OSCR>.

Malcolm Chisholm

43 In section 71, page 40, line 18, at beginning insert <where the notice is given to a person specified in subsection (2),>.

Section 75

Donald Gorrie

78 In section 75, page 42, line 7, leave out from <not> to end of line and insert <award expenses incurred as a result of participation in the appeals process to any person who appeals a decision.>

( ) The Panel may instruct OSCR to pay a compensatory amount to any charity in whose favour the Panel finds, if the charity can demonstrate that it has suffered financial loss either directly or indirectly as a result of OSCR’s actions, if the Panel considers these to have been unreasonable.>

Cathie Craigie

109 In section 75, page 42, line 7, leave out <not award expenses to OSCR or> and insert <award expenses incurred as a result of participation in the appeals process>.

Cathie Craigie

110 In section 75, page 42, line 7, at end insert—

<( ) The Panel—

(a) may instruct OSCR to pay a compensatory amount to any charity in whose favour the Panel finds, if the charity can demonstrate that it has suffered financial loss either directly or indirectly as a result of OSCR’s actions, and

(b) must consult the charity concerned as to the amount of any such financial loss but, notwithstanding the results of that consultation, may set the compensatory amount as the Panel sees fit.>

Section 77

Malcolm Chisholm

44 In section 77, page 42, line 20, after <OSCR> insert <(or by a person to whom OSCR’s functions are delegated by virtue of section 38)>.

Malcolm Chisholm

45 In section 77, page 42, line 24, after <OSCR> and insert <(or the person to whom OSCR’s functions are delegated by virtue of section 38, as the case may be)>.
Section 82

Malcolm Chisholm

46 In section 82, page 47, line 13, after <information> insert <and identification>

Section 85

Malcolm Chisholm

47 In section 85, page 50, line 12, leave out from <badges> to end of line 13 and insert <any badges or certificates of authority which regulations made under section 82(1) require to be provided>

Section 93

Christine May

48 In section 93, page 54, line 37, at end insert <of the trust, in so far as is appropriate to the circumstances of the trust.>

Section 101

Donald Gorrie

111 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 7(2B),>

Malcolm Chisholm

49 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 7(4A),>

Malcolm Chisholm

50 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 19(8),>

Malcolm Chisholm

51 In section 101, page 58, line 35, at end insert—

<(  ) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),>

Donald Gorrie

112 In section 101, page 59, line 1, at end insert—

<(  ) order under section 7(2B),>
In section 101, page 59, line 1, at end insert—

<(  ) order under section 7(4A),>

In section 101, page 59, line 1, at end insert—

<(  ) order under section 19(8),>

In section 101, page 59, line 2, after <63(d),> insert—

<(  ) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),>

Schedule 4

In schedule 4, page 65, line 28, at end insert—

<Recreational Charities Act 1958 (c.17)
In section 6(2) of the Recreational Charities Act 1958, the words from “or”, where second occurring, to “1962” are repealed.>

In schedule 4, page 66, line 1, at end insert—

<Paragraph 5 of Schedule 2 to that Act of 1962 is repealed.>

In schedule 4, page 66, line 4, leave out <IV> and insert <VI>

In schedule 4, page 66, line 4, at end insert—

<(  ) in paragraph (a), for “that Part” substitute “Part VI”,>

In schedule 4, page 66, line 10, after <(b)> insert—

<(  ) for “that Act” substitute “the Education (Scotland) Act 1980”,
( )>
Malcolm Chisholm

60 In schedule 4, page 66, line 12, at end insert—

<At the end of section 79(5) of that Act insert “or, in the case of an endowment the
governing body of which is entered in the Scottish Charity Register, a scheme approved
for that endowment under section 40 or 41 of the Charities and Trustee Investment
(Scotland) Act 2005 (asp 00)”>.

Malcolm Chisholm

61 In schedule 4, page 67, line 27, leave out <The Parole Board for Scotland> and insert <Scottish
Children’s Reporter Administration>

Malcolm Chisholm

62 In schedule 4, page 67, line 28, leave out <Office of the>

Malcolm Chisholm

63 In schedule 4, page 68, line 5, leave out <Parole Board for Scotland> and insert <Scottish
Children’s Reporter Administration>

Malcolm Chisholm

64 In schedule 4, page 68, line 6, leave out <The Office of the>

Section 103

Donald Gorrie

113 In section 103, page 59, leave out lines 19 to 29 and insert—

< ( ) in relation to a charity (other than an SCIO), means the persons having the
general control and management of the administration of a charity,>

Donald Gorrie

79 In section 103, page 59, line 23, leave out from <a> to end of line 24 and insert <there is a
governing council or body, the members of that council or body, except to the extent that the
governing council or body has delegated management or control of the charity to a committee or
group, in which case the members of that committee or group to the extent of that delegated
power)>

Patrick Harvie

114 In section 103, page 60, leave out lines 7 and 8

Scott Barrie

5 In section 103, page 60, line 13, leave out <includes> and insert <does not include minor>

Malcolm Chisholm

65 In section 103, page 60, line 14, after <the> insert <holder of the>
The following amendments appear in the wrong place on the 1st Marshalled List of Amendments for Stage 2:

Donald Gorrie

84* In section 7, page 4, leave out lines 33 and 34 and insert—

<(2A) If a body does not meet the charity test because its purposes are not listed as charitable purposes in subsection (2) but OSCR is satisfied that the body’s purposes are of a nature which means they should be so listed, OSCR may recommend to the Scottish Ministers that subsection (2) be amended to include a reference to purposes of that nature.

(2B) The Scottish Ministers may, following a recommendation by OSCR under subsection (2A), by order add to the list of charitable purposes in subsection (2).>

This amendment currently appears at the top of page 6 of the Marshalled List. It should appear immediately after 32 on page 4 of the Marshalled List. Amendment 84 will therefore be disposed of after amendment 32.

Donald Gorrie

85* In section 7, page 5, line 5, after <activities,> insert—

<( ) OSCR is not satisfied that the body conducts its affairs without external interference in its operations and management and that its trustees act in the interests of the body and of achieving its purposes and not in the interests of any outside body,>

This amendment currently appears on page 6 of the Marshalled List, before amendment 34. It should appear immediately after amendment 34. Amendment 85 will therefore be disposed of after amendment 34 rather than before it.
Charities and Trustee Investment (Scotland) Bill

Groupings of Amendments for Stage 2 (Day 1)

Office of the Scottish Charity Regulator (OSCR)
6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 61, 62, 63, 64, 65

OSCR: functions and powers
7, 80, 91

OSCR: annual reports
28, 66

Designated religious charities
81, 103, 107, 108, 114

Applications for entry in Scottish Charity Register: further procedure
29, 30

Charitable purposes

Third-party involvement
34, 85, 86, 35, 87, 49, 52

Public benefit
69, 70, 88

Guidance on charity test
71

Charity names
89, 72, 36, 73

References to charitable status
37

Protection of assets following removal from Register
38, 50, 53

Information about charities removed from Register or defunct charities
90

Inquiries about charities etc.
74, 92, 93, 95

Powers of OSCR and Court of Session
94, 96, 97, 98, 99, 100, 101, 102
Duties of charity trustees
75, 104, 76, 39

Remuneration and employment of charity trustees
40, 105, 41, 77, 106

Decisions made by person other than OSCR: notice and appeals
42, 43, 44, 45

Scottish Charity Appeals Panel: expenses and compensation
78, 109, 110

Regulations about fundraising
46, 47, 51, 54

Exercise of power of investment
48

Minor and consequential amendments and repeals
55, 56, 57, 58, 59, 60

Definition of “charity trustee”
113, 79

Definition of “misconduct”
5
Present:

Scott Barrie  Cathie Craigie
Donald Gorrie (Deputy Convener) Linda Fabiani
Christine Grahame Patrick Harvie
John Home Robertson Mary Scanlon
Karen Whitefield (Convener)

Charities and Trustee Investment (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 1).

Amendments 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 4, 67, 31, 68, 32, 33AA, 33A, 33, 35, 71, 36, 37 and 38 were agreed to without division.

The following amendments were agreed to (by division—

34 (For 6, Against 3, Abstentions 0)
70 (For 8, Against 1, Abstentions 0).

The following amendments were disagreed to (by division—

81 (For 1, Against 8, Abstentions 0)
82 (For 1, Against 8, Abstentions 0).

Amendments 1, 69 and 89 were moved and, with the agreement of the Committee, withdrawn.

Amendments 80, 66, 31A, 31B, 83, 33B, 33C, 84, 85, 86, 87, 88, 72 and 73 were not moved or pre-empted.

Sections 3, 4, 5, 11, 12, 13, 14, 16, 17 and 18 were agreed to.

Section 1, schedule 1 and sections 2, 6, 7, 8, 9, 10, 15 and 19 were agreed to as amended.

The committee ended consideration for the day, section 19 having been disposed of.
Scottish Parliament
Communities Committee
Wednesday 20 April 2005

[THE CONVENER opened the meeting at 09:33]

Charities and Trustee Investment (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the 12th meeting in 2005 of the Communities Committee. I remind all those who are present that mobile phones should be switched off.

The first and only item on the agenda is the Charities and Trustee Investment (Scotland) Bill, which the committee will consider at stage 2 for the first time today. Members should have before them a copy of the bill, the marshalled list of amendments, the correction note to the marshalled list, which was issued yesterday by the clerks, and the revised groupings list for day 1, which was also issued yesterday.

Members have been issued with a copy of a letter that was received last week from the Deputy Minister for Communities, in which the minister explains the Executive’s position on several issues that she did not have the chance to address during the stage 1 debate. I welcome Johann Lamont and her officials to this morning’s meeting.

It might be helpful if I point out a few things before we start, so that we can speed things along. If a member does not want to move their amendment, they should just say, “Not moved.” In the event of that happening, any other member can move the amendment at that point, but I will not specifically invite other members to do so. Assuming that no other member wants to move the amendment, I will go to the next amendment on the marshalled list. If a member wants to withdraw an amendment, I will ask whether anyone objects to the amendment being withdrawn. If any member objects, I will immediately put the question on the amendment. If I am required to use my casting vote, I intend to vote for the status quo, which, on this occasion, will be the bill as it stands.

Section 1—Office of the Scottish Charity Regulator

The Convener: Amendment 6, in the name of the minister, is grouped with amendments 8 to 27 inclusive and 61 to 65 inclusive.

The Deputy Minister for Communities (Johann Lamont): Thank you very much. I am very happy to be here. I used to enjoy doing stage 2 because I did not have to do any thinking; I just got to boss people about. I shall try to think harder and not be bossy on this occasion.

We are at an important stage in the bill process and I welcome the general consensus that there has been around the bill. I also welcome the commitment of the Executive, the committee and the Parliament to act in the best interests of the sector and to seek to produce legislation that will support the charitable sector and encourage it to flourish. It is an interesting combination: ordinary people will understand the bill’s consequences and care about them, but the bill is also very technical, so we might end up having some technical arguments about things that might seem to be a bit obscure. However, we should never forget our common commitment to legislating to protect and develop a sector that we all recognise as important.

The amendments in the first group are technical. They relate to the legal framework that is required to set up the charity regulator, but they do not change our policies. The Executive consulted widely on what form the Office of the Scottish Charity Regulator should take to ensure that it would be both independent and effective. The conclusion, with which I was pleased to see that the committee agreed, was that OSCR should be a non-ministerial office-holder in the Scottish Administration and a body corporate.

Setting up the regulator as an office-holder will require an order to be made under section 104 of the Scotland Act 1998, which allows for necessary or expedient amendments to be made in consequence of an act of the Scottish Parliament. That was discussed extensively with the Scotland Office, because OSCR will be the first office-holder in the Scottish Administration that is a body corporate rather than an individual. We have agreed that, for the purposes of the order under the Scotland Act 1998, we will first create a specific office in our bill. The Scottish charity regulator, which is a body corporate, can hold that office. The regulator can then be added to the list of office-holders in the Scotland Act 1998 by an order at Westminster.

Choosing such a form for OSCR will allow it to be independent, free from direction from Scottish ministers and responsible to the Parliament. With a board of members, OSCR will meet the modern governance practices that are recommended by the better regulation task force in its report “Independent Regulators”. Board members will be appointed by ministers under the normal public appointments process, which is overseen by the commissioner for public appointments.

Following enactment, the necessary affirmative order under the Scotland Act 1998 will be progressed through both houses of the United
Kingdom Parliament. That is the procedure that we must follow to establish the regulator as a non-ministerial office-holder in the Scottish Administration.

The amendments in the group make the necessary technical adjustments to pave the way for that order. Specifically, amendment 6 first establishes an office or position that will be known as the Office of the Scottish Charity Regulator. A separate body corporate is then established—that is a body with a legal personality, which is known as the Scottish charity regulator. That body is then appointed to be the holder of the position that was firstly established.

To minimise the number of changes, and because we have all become used to referring to the charity regulator as OSCR, that term is used throughout the bill to mean the office-holder. The functions that are set out in the bill will remain the functions of OSCR, because only a legal personality can hold functions and powers. However, some of the provisions in the bill—such as the details in schedule 1 on membership and constitution—have to be more specific and must be changed to refer to the Scottish charity regulator or the regulator.

Amendment 8, which is merely consequential to amendment 6, updates the reference in section 1(6) to “the Regulator” instead of “OSCR”. Amendment 65, which is also consequential to amendment 6, updates the interpretation section to make it clear that OSCR will be the holder of the Office of the Scottish Charity Regulator. Amendments 9 to 27 and 61 to 64, which are similarly consequential, update the references in schedules 1 and 4 respectively.

I move amendment 6.

The Convener: Thank you. No other member wants to participate in the debate. The minister might well not want to wind up the debate.

Johann Lamont: That is right.

Amendment 6 agreed to.

The Convener: Amendment 7, in the name of the minister, is grouped with amendments 80 and 91.

Johann Lamont: We lodged amendment 7 following a recommendation by the committee in its stage 1 report. The amendment, which adds a new function for OSCR to section 1(2), makes it clear that OSCR may give information and advice, or make proposals, to Scottish ministers on matters that relate to its functions. As the committee noted, that will allow OSCR to advise ministers during the preparation of regulations under the bill. I know that OSCR supported the committee’s recommendation and I am sure that there will be other occasions when it will want to make use of the provision.

Amendment 80 would add a specific reference to OSCR providing guidance on its functions and require it to consult on any guidance that is produced. We are concerned that placing a requirement on OSCR to consult sector representatives on every item of guidance or advice that it issues would place too onerous a burden on the regulator. OSCR will produce guidance on a variety of subjects, including minor administrative issues. It is right that OSCR should, and will, consult on the guidance in relation to the charity test, but to expect OSCR to consult on all other minor issues is unnecessary and perhaps over-burdensome. I appreciate that there are concerns about how the consultation process will work and perhaps those concerns can be highlighted in the debate. We want to ensure that an inclusive approach is taken to consultation. In addition, OSCR’s decisions are appealable. If a charity believes that OSCR has made a bad decision, it can appeal. If the charity’s appeal is successful, OSCR will have to amend any guidance on the issue accordingly.

I believe that amendment 91 is unnecessary. OSCR already has a function under section 1(2) to encourage and facilitate compliance by charities. Section 1(3) further states that OSCR may do anything that is calculated to facilitate the performance of its functions. Those provisions allow OSCR to provide advice on compliance. Further detail on the procedure for applying for entry on the register will be set out in regulations under section 6. OSCR has begun to produce guidance on the current regulatory regime and I expect it to continue to do so. Amendment 91 would repeat powers that OSCR already has and attempt to encourage actions that OSCR is already taking.

I therefore ask members not to move amendments 80 and 91.

I move amendment 7.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): I will restrict my remarks to the amendment in my name, which is amendment 80.

During the committee’s deliberations on the Charities and Trustee Investment (Scotland) Bill and prior to the bill coming to the committee, almost every member of the public and every representative of an organisation who gave evidence to the committee felt that the consultation and their involvement in preparing the legislation could be held up as an example for other areas of the Executive’s work. We would like OSCR, when it carries out its functions under the bill, to maintain such an inclusive process, to involve and consult people and to at least give the charitable sector the opportunity to comment on what is being proposed.
I listened carefully to what the minister said. She spoke about OSCR being expected to consult on every issue and I accept that that might be a burden for it. Nevertheless, we must ensure that OSCR continues with the good practice that has been established, so that charitable organisations—and anyone with an interest in the sector—are involved and have the opportunity to shape the way in which OSCR will operate.

Donald Gorrie (Central Scotland) (LD): I will speak to amendment 91. I hope that the minister will clarify a few points; she has already clarified some matters.

Amendment 91 seeks to clarify the position on the giving of advice. It seems that there is a risk of turf wars developing between OSCR and existing umbrella organisations for charities—of which there are quite a few—and on matters such as the provision of advice. I have sought to make it clear that OSCR is the body that should give advice on how to obtain registration, but that it should not provide general advice for the sector as a whole.

Amendment 91 has two objectives. First, it seeks to avoid conflict on the giving of advice. Secondly, it seeks to make it clear that OSCR should have dialogue with people and organisations, whether they are existing charities or would-be charities. OSCR should not just say, “No, you do not qualify,” but should help them and explain to them the rules under which they must operate. The amendment has a positive side and a negative side: the positive side is that it seeks to ensure that OSCR will be constructive in helping applicants and the negative side is that it seeks to avoid turf wars. It was suggested that other amendments on the provision of advice would be lodged, but they have not been. That indicates that the issue is not as difficult as it might have been.

It would help if the minister made it clear that OSCR is the body that will give advice on its activities and that it should be encouraged to do that rather than to rush into stopping organisations becoming charities. The Executive should do its best to ensure that OSCR and the voluntary sector come to an amicable agreement on advice giving in general. That is the purpose behind amendment 91. I am interested in hearing what the minister has to say.

Johann Lamont: Important issues have been flagged up. Although we do not want amendments 80 and 91 to be supported, we acknowledge that important issues underpin them. We will make progress on consultation and the need to be inclusive. Cathie Craigie identified, rightly, the principles that underpin consultation. Consultation exercises must be inclusive and recognise those bodies that have a particular interest in being involved in developing guidance and which have a particular understanding of the issues.

In the past, the fact that some consultations have been tokenistic has been flagged up. We are keen to ensure that any consultation that OSCR conducts is not tokenistic. Sometimes everyone has been consulted, but the consultation has not been real because people have not had the time to contribute to it. It is a question of ensuring that OSCR consults fully on significant matters. On less important issues, or on issues that are very technical or narrowly defined, OSCR should not have to go through a process that is technically inclusive, but which perhaps just creates work.

We feel that amendment 80 is too broad, in that it would pin down OSCR to having to consult everyone on everything. Cathie Craigie is right to say that what underpins consultation is recognition of the different elements in the sector and ensuring their involvement in the process. I reassure Cathie Craigie that if she were not to move amendment 80, we would take the view that OSCR would have to recognise the importance of the sector and work alongside it. I do not have any sense that that is not understood.

In relation to amendment 91, Donald Gorrie made a point about turf wars. Sometimes that debate is characterised as being a question of whether a body can be the police and a pal at the same time. There are some anxieties around that, on which we hope to give reassurance. It is obvious that OSCR’s primary role is as a regulator. That said, it is not OSCR’s role simply to say to one body, “No, you cannot be a charity” and to another, “Yes, you can be a charity.” If an organisation were to approach OSCR for advice on what they had to do to become a charity, it would be nonsense for OSCR not to give them that advice. We hope that that is understood. Indeed, if someone were to seek general information about the sector, OSCR may not have the responsibility for giving such advice, but it certainly has a responsibility to signpost the organisations or people who can provide information on the broader issues that are involved in gaining charitable status.

I confirm that OSCR’s primary role is that of a regulator and of giving advice on how to become a charity. It also has a role in supporting charities that want to comply. The Executive’s intention for OSCR is not for charities to be left to their own devices and for them simply to be given a mark at the end of the process. Our intention is for OSCR to support those organisations and not make life more difficult for them. I hope that that clarifies the points that were raised.

Amendment 7 agreed to.
The Convener: Amendment 80, in the name of Cathie Craigie, was debated with amendment 7.

Cathie Craigie: In the light of the minister’s assurances, I will not move amendment 80. Between now and stage 3, I hope that I will have the opportunity of speaking to the minister in more detail on the matter.

Amendment 80 not moved.

Amendment 8 moved—[Johann Lamont]—and agreed to.

Section 1, as amended, agreed to.

Schedule 1

OFFICE OF THE SCOTTISH CHARITY REGULATOR

Amendments 9 to 27 moved—[Johann Lamont]—and agreed to.

Schedule 1, as amended, agreed to.

Section 2—Annual reports

The Convener: Amendment 28, in the name of the minister, is grouped with amendment 66. If amendment 28 is agreed to, I cannot call amendment 66 because of pre-emption.

Johann Lamont: The amendments in the group relate to section 2, which deals with OSCR’s annual reports. Amendment 28 is our response to paragraph 38 of the committee’s stage 1 report. We have considered the committee’s recommendations carefully and agree that it is not necessary for ministers to have powers to direct OSCR on the form or content of its annual report.

Each year, OSCR will lay a copy of its annual report before the Parliament. I am sure that it will wish to ensure that the report clearly describes the outcome of its work, the results of any actions that have been taken and other issues relating to its functions over the year. I hope that the removal of the power of direction will provide the committee with the necessary assurance that the Executive is committed to OSCR being an independent charity regulator that acts in the interests of the public and the sector that it regulates.

However, I reassure the committee that OSCR, as a public body, will not be completely free of financial controls. Public accountability will be provided by the fact that OSCR will be part of the Scottish Administration. Under the terms of the Public Finance and Accountability (Scotland) Act 2000, OSCR’s accounts must be prepared in accordance with directions that are issued by the Scottish ministers and must be sent to the Auditor General for Scotland for auditing.

If the committee agrees to Executive amendment 28, Christine Grahame’s amendment 66 will be unnecessary. If the committee does not agree to our amendment, we ask the committee to resist amendment 66. I bow to no-one in terms of my grammatical expertise. I am assured—I trust that I will not be proven wrong on the matter—that the inclusion of the word “But” at the beginning of section 2(4) is not a grammatical error. The word is used deliberately to make it clear that OSCR must comply with a direction notwithstanding the fact that the forgoing provision otherwise allows complete discretion to OSCR.

I move amendment 28 and ask Christine Grahame not to move amendment 66.

Christine Grahame (South of Scotland) (SNP): With respect, I disagree with the minister’s assessment of what is grammatical. It is very clumsy to begin a subsection with the word “But”, but I will not push the matter because we are content with the minister’s comments.

The Convener: Minister, do you want to wind up?

Johann Lamont: I might wind myself up about whether something that is clumsy can also be grammatical, but I will leave that thought sticking to the wall.

The Convener: The question is, that amendment 28 be agreed to. Are we agreed?

Linda Fabiani (Central Scotland) (SNP): Okay, but.

Members: Yes.

Amendment 28 agreed to.

The Convener: I am delighted that we agreed to the amendment, despite Linda Fabiani’s “but”. Amendment 66 is therefore pre-empted.

Section 2, as amended, agreed to.

Section 3—Scottish Charity Register

The Convener: Amendment 81, in the name of Patrick Harvie, is grouped with amendments 103, 107, 108 and 114.

Patrick Harvie (Glasgow) (Green): I acknowledge that my amendments might be out on a limb, but I appreciate having the opportunity to debate the matter again. Members know that I raised the matter of designated religious charities a number of times at stage 1. I assure members that I tried to do so with an open mind. I have been genuinely interested in trying to identify the reasons for making certain religious charities subject to a level of regulation that is different from that for other charities. I am atheist and a secularist, but I have no problem with religious organisations being granted charitable status and I want to say on the record that I acknowledge the significant public benefit that they provide and the dedication with which many of their members work.
Surely a large part of the bill’s purpose is to establish clearly what charity is and to introduce a common regulatory regime that can inspire confidence in the concept. No system will be perfect and, regrettably, some exceptions might be required, but we should keep exceptions to a minimum and be clear about the reasons for them. I have heard no convincing reasons why the bill should provide for designated religious charity status. It is not about the capacity of the regulator, as OSCR told us. It is not about placing heavy obligations on small charities, because if that were the case we would be concerned about not just small religious charities but all small charities. It is not about being consistent with the views of the sector. I have spoken to a good number of people in the voluntary sector who share my view.

In evidence, the Scottish Churches Committee seemed to imply that by seeking to regulate religious charities, the civil authority—Parliament—was in danger of crossing a line. During the stage 1 debate, I argued that in a democracy it is for the civil authority to draw that line and that the bill attempts to do that for all charities.

The only clear explanation that I have heard for having a different level of regulation for selected religious charities was provided by the Deputy Minister for Communities, who told the committee that the approach reflects "The status of religion in society". [Official Report, Communities Committee, 2 February 2005; c 1728.]

However, legislation should not be regarded as a mirror that reflects society as it is, as a piece of art might do. By passing the bill, we define the status of religious organisations in law. In a modern, pluralistic society such as ours, in which faith plays a less significant role in most people’s lives than it used to do and in which many people are not religious and many more are only nominally so, a religious charity should be valued, supported and regulated in the same way as any other charity is.

Even if we accepted that the bill should reflect the status of religion rather than try to define it, DRC status would seem an odd choice. If we were honest about the status of religion in most people’s lives, I regret to say that we would have to put shopping on a higher pedestal. I say that with real regret, as an atheist and as a Green, because the over-consumption of meaningless consumer junk is far more destructive than superstition. However, that would be our position if our intention were to reflect people’s priorities.

Some members might think that I am being a bit trivial or needlessly provocative about all this, but even if the only effect of lodging the amendments in this group is to prompt a more substantial explanation of the purpose of the arrangement, it will have been worth while.

I move amendment 81.

10:00

Donald Gorrie: Patrick Harvie raises an important point that deserves debate. We cannot divorce ourselves from history and, for many years, religion—in Scotland’s case, the Christian religion—performed such social do-gooding activities as there were and provided a lot of charitable support for the sick, the poor and other disadvantaged groups. We have to accept that that history is in our mainstream.

As I understand it, under the bill, designated religious charities must have structures that ensure reasonable good management and good behaviour within the organisation. Part of the purpose with which we have approached the bill has been to try to remove duplication of effort and, if a particular religion organises its affairs correctly, I see no reason for OSCR to be involved in duplicating that work.

The parts of the bill that do not apply to designated religious charities are relatively minor. Under the main thrust of the bill, it is still the case that, if a designated religious charity is seriously misconducting its affairs, OSCR can get involved. The bill strikes a reasonable balance between the state getting too involved in affairs of church—our ancestors slaughtered each other cheerfully on that issue for many years and the bill does not trespass too much, or perhaps at all, over that barrier—and reasonable control of any misconduct in designated religious charities that OSCR can control better. On the whole, I am content with the bill and against the amendments in the group.

Scott Barrie (Dunfermline West) (Lab): Patrick Harvie said that he hoped that he was not being unnecessarily provocative. I do not necessarily think that he is being provocative; he is just wrong. I, like him, have no religious beliefs and describe myself as an atheist—that is what I recorded in the official census that took place a few years ago—but I agree with Donald Gorrie that we must acknowledge the role that religion and religious organisations have played in the shaping of Scotland and the role that they continue to play in civic Scotland.

Section 64 clearly defines designated religious charities. As Donald Gorrie says, we are not exempting designated religious charities from regulation; there is a slightly different regulatory framework for them but, in many respects, the differences are minor and regulation is not the issue that Patrick Harvie suggests it to be. It is unnecessary to delete the whole section on designated religious charities, which strikes a
good balance between acknowledging that that sector requires to be regulated and acknowledging that it has had and still has a different role in Scotland. That role should be recognised.

Johann Lamont: I thank Patrick Harvie for lodging amendment 81 to bring the issue to debate. We are starting not with a fresh sheet and no history, but with bodies that were deemed to be charities and activities that were deemed to be charitable. With the bill, we are attempting to find a way of regulating the sector without destroying the bits of it that are lively, eccentric and do not fit comfortably into boxes, and religious charities are one such bit.

Patrick Harvie suggested—and this has been said by others—that there will not be the same level of regulation for designated religious charities. I contend that there will be significant regulation, but that it will be managed in a slightly different way. The test for the legislation is whether those charities will be regulated and the committee must satisfy itself that they will be rather than ask whether we are giving too much place to religion in society.

Patrick Harvie mentioned the broader issue of priorities in our communities and priority being given to shopping over religion. There are broader issues such as whether the Church of Scotland should have a particular place, but we should not be discussing such issues when we are debating the Charities and Trustee Investment (Scotland) Bill. We are in the business of regulating the sector as it is and must decide whether the fact that there are designated religious bodies that will be designated religious charities should impact on our ability to regulate the sector rather than whether that says something about our society. A different test is involved.

I will talk about my experience, for what it is worth. As a young woman, perhaps I thought that charities should not do three quarters of the things that they did and that the state should do such things. I certainly thought that religious organisations should not do such things. As an elected member, one of the most humbling things that I have seen is people of faith and people of no faith working together in a dedicated way to create communities in which people of faith and people of no faith combine and work to support their communities through charitable and voluntary endeavours. We should not be debating the role of religion in society, but we should recognise that religion drives some people’s charitable activities. Rather than arguing about religion as a result of the bill, I simply want it to be recognised that folk come to the charitable sector for all sorts of reasons. We are determined that people will not abuse the sector and to promote and support bits of the sector that will make a difference in our communities so that those bits flourish. I hope that that makes sense.

I do not think that people want to resist arguing about the role of religion; for me, however, the test is simply that the bill will ensure that the regulatory framework for charities is in place. We have said that, under existing charity law, religious charities that satisfy strict criteria, including having an established system of internal controls, may be granted exemption from some of OSCR’s regulatory controls, and we want to continue that approach. Members may wish to note that in the consultation on accounts, no exemption will now be proposed for designated religious charities, so the same regulation that has been proposed for other charities would apply to them.

A balance has been struck in the bill, which recognises the diversity of the sector. In the past, religious bodies have been designated if it can be established that they have internal controls that match our regulatory demands. We do not see the need to stop that process, with which people have been comfortable, especially if that were to be done as a consequence of an argument about where we view religion in society. That is such a big issue that it should be dealt with in a different place.

Patrick Harvie: The minister mentioned communities in which people of faith and people of no faith work together in a dedicated way to create clear public benefit in the sense that the bill seeks to define it. We should recognise that the dedication of those people is of an equal measure and that society should regulate their activities equally.

I accept that the status in question is reserved for organisations that can demonstrate a level of internal structure, regulation or internal controls and that those are established. However, there could be designated charity status rather than designated religious charity status and it would not matter for which charitable purpose an organisation qualified—it would merely be a question of whether the organisation had internal controls. Other, non-religious organisations might, today or eventually, meet that criterion.

I question the suggestion that removing DRC status would undermine the ability of churches to continue to provide the public benefit that they provide or to contribute to civic society. The suggestion that removing that status would risk destroying a part of the voluntary sector overstates the case significantly.

I hope that that addresses the points that members have made. I press amendment 81.

The Convener: The question is, that amendment 81 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.
The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 81 disagreed to.

Section 3 agreed to.

Sections 4 and 5 agreed to.

Section 6—Applications: further procedure

The Convener: Amendment 29, in the name of the minister, is grouped with amendment 30.

Johann Lamont: Amendment 29 is a purely technical amendment that adds to section 6 references to the sections relating to applications to convert to a Scottish charitable incorporated organisation or for SCIOs to amalgamate. Its purpose is to ensure that those applications are included in the ministers’ regulation-making powers that are contained in section 6. Those powers will allow ministers to make further provisions covering the details of the application procedure for entry on the register for charitable companies and registered friendly societies that want to be SCIOs and for SCIOs that are amalgamating.

Amendment 30 is also a technical amendment to section 6. It follows a recommendation by the Subordinate Legislation Committee that the references to sections 4 and 54(2) in section 6 are superfluous, as both those sections also refer to the regulations made under section 6(1).

I move amendment 29 and encourage the committee to support amendment 30.

Amendment 29 agreed to.

Amendment 30 moved—[Johann Lamont]—and agreed to.

Section 6, as amended, agreed to.

Section 7—The charity test

The Convener: Amendment 1, in the name of Scott Barrie, is grouped with amendments 82, 4, 67, 31, 31A, 31B, 68, 32, 84, 83, 33, 33A, 33AA, 33B, 33C, 111 and 112. If amendment 84 is agreed to, I will not be able to call amendment 83, as there will be a pre-emption.

10:15

Scott Barrie: This is a rather eclectic group of amendments. The purpose of amendment 1 is to extend the definition in section 7 of “charitable purposes” to include provision of non-formal education opportunities and, in particular, to recognise the significant contribution that youth work makes to the wider education agenda.

Both in the committee and in the chamber, several of us have highlighted the importance of youth work. If we are serious about making life and opportunities better for young people in particular, and for society in general, the status of youth work must be recognised and built on. The Scottish Executive’s proposed youth work strategy focuses on a number of issues, including the significant role of youth work in the lives of many young people throughout Scotland. It is expected that the strategy will raise several challenges and opportunities for the youth work sector, including that of securing sustainable funding. Extending the definition of education under “charitable purposes” to include youth work would assist the sector in meeting future challenges and in maximising the opportunities for young people under the proposed national youth work strategy by increasing its access to funding.

One purpose of amendment 1 is to enhance the attractiveness of youth work organisations to potential funders. However, amending the bill in such a way would also highlight the significant contribution that the youth work sector—including voluntary organisations and local authority youth work services—makes to supporting the development of young people in our society. In addition, it would help to recognise the significant number of voluntary organisations in the youth work sector and their provision of a wide range of youth work services and activities.

I turn to amendment 4. We should recognise as a charitable purpose, along with the advancement of health, the saving of lives. I realise that section 7(2)(m) talks of “any other purpose that may reasonably be regarded as analogous” and that, to some extent, the saving of lives and the advancement of health might be regarded as the same side of one coin. Nevertheless, I believe that the saving of lives goes further than the advancement of health. I do not think that anyone would argue that the advancement of health should not be included in the charitable purposes; nevertheless, there are charities that might not fit strictly into that definition, but which would clearly fit into a definition that included the saving of lives. For example, I am not sure whether we could say that the Royal National Lifeboat Institution is about the advancement of health, although it is clearly about the saving of lives. We should recognise
that, and amendment 4 would help to clarify what is meant, bringing such organisations firmly within the definition of “charitable purposes”.

There are many other amendments in the group, in the name of the minister and of other members of the committee; however, I will touch only on amendment 82, in the name of Patrick Harvie. I believe that amendment 82 should be resisted. The issue goes back to the debate that we have just had about the advancement of religion. We must be careful that we do not go much further than the vast majority of people in Scotland would want us to go, irrespective of whether they hold any religious beliefs or follow religious practices.

I move amendment 1.

Patrick Harvie: I was disappointed to hear what Scott Barrie just said. I hope that members will consider amendment 82 to be rather less controversial than amendment 81 on designated religious charities. Amendment 82 is an attempt to propose a more straightforward way of recognising the charitable purpose that is currently listed, without causing some organisations to feel that they are being misrepresented.

The minister’s amendment 33 suggests that the advancement of religion should remain listed as a charitable purpose and that other philosophical beliefs should be regarded as analogous. Many humanists would be less than thrilled to think that they are thought of as analogous to a religious organisation. Whether members have sympathy with that feeling or not, it seems pretty clear that religion is a subset of philosophical belief; therefore, it is odd to list it as the charitable purpose and then to extend coverage to other philosophies by interpretation. That is like replacing the existing purpose in section 7(2)(g), on sport, with “the advancement of football” and inserting a later clause saying that tennis and rugby are to be considered as analogous to football. Amendment 82 would be a more straightforward way of achieving the same end and would be less likely to make philosophical organisations that do not have gods feel like they have been shoehorned into the bill.

On Scott Barrie’s amendments 1 and 4, as someone with a background in youth work, I am extremely supportive of the intention to ensure that youth work and the development of young people are seen as a charitable purpose. I will support those amendments.

Donald Gorrie: I have six amendments—some of which are amendments to amendments—in the group. They centre around four words: citizenship; harmony; activities; and analogous.

Amendment 67 suggests deleting the term “civic responsibility” and inserting the word “citizenship”. That has been suggested by a number of organisations and has some merit. “Citizenship” includes the concept of civic responsibility but is wider, in that it includes volunteering. The use of that word might encourage voluntary organisations to do things locally that might not be seen as being to do with civic responsibility but which are to do with good citizenship and should be encouraged. “Citizenship” is a good, wide term that meets what all of us want to happen in our communities. I recommend amendment 67 to the committee.

Amendments 31A and 31B are amendments to a Government amendment. Amendment 31 deals with the provision of recreational facilities. In amendments 31A, 31B and 33B, I have suggested that “or activities” be added. To my mind, facilities are buildings, pitches and so on whereas activities are the things that you do in them, on them or, indeed, somewhere else. Leading a group of young people to go camping in the hills is an activity, but the facilities are provided by God or by a big park regime rather than by the charity.

From a previous conversation, I understand that the Executive thinks that “facilities” covers activities. I will be interested to hear what the minister has to say about that, because my understanding of the English language must be different. However, if the Government believes that the term “facilities” covers activities, I suppose that that would stand up in a law court. I believe that we must realise that people who, for example, run football leagues but who own no pitches are doing good charitable work that we should support.

Amendment 68 deals with the promotion of religious or racial harmony, equality and diversity. We would all agree that those are good things that should be supported. One could argue that equality and diversity cover a wide range of things, but I assume that OSCR would take account of what form of diversity was proposed and, if it was a perverse form of diversity, would decide not to accept the organisation as a charity. The areas that I mentioned have been developing recently and deserve encouragement. I hope that members will support amendment 68.

Amendment 84 relates to the word “analogous”. Section 7(2)(m) defines a charitable purpose as being “any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.”

To my mind, “analogous” is a curious word to use in that sense. It comes from the word “analogy”, which concerns spiritual, artistic or individual views on things, and is not suited to a bill. If the Executive believes that “analogous” is a good word and means what the Executive wants it to mean, I can live with that. However, the intention of amendment 84 is to set out a simple system of
extending the list of charitable purposes so that OSCR, Scottish ministers and Parliament would have to agree that a new type of activity was a suitable purpose. If that is felt to be too cumbersome a way forward, I am happy to listen to arguments. However, I am concerned about the use of the word “analogous”. I have some sympathy with Cathie Craigie’s amendment 83, which tries to deal with the issue in a different way by widening the definition. It will be interesting to listen to that debate.

On the other amendments, I have great sympathy with Scott Barrie on the issue of youth work. If there is some technical objection to his amendment 1, I would listen to that, but I am very supportive of the purpose of amendment 1 and of the inclusion of “the saving of lives” in amendment 4.

Executive amendment 33 clarifies much of what it thinks things mean. It is helpful and should be supported, although it uses the dread word “analogous”. Despite that, it covers Patrick Harvie’s point, so I am prepared to support the Executive’s amendment rather than Patrick Harvie’s amendment 82.

I hope that members will support amendments 67 and 68, which deal with the concepts of citizenship and harmony. I will be interested to hear the Executive’s response on the insertion of the word “activities” and on how we will deal with new purposes that we have not thought of.

**Johann Lamont:** With the permission of the convener, I will respond on all the amendments and highlight the Executive amendments. As the debate is substantial, the committee will forgive me if I go on a bit and have less time to sum up.

Scott Barrie’s amendment 1 is the first of several amendments to section 7(2) on the list of charitable purposes. It might be useful if I first set out the Executive’s general intentions in relation to charitable purposes. Charitable purpose forms the first part of the charity test. At present, having a charitable purpose will be the main test for most bodies that seek charitable status, especially for those under the first three heads, which encompass the advancement of religion and education and the relief of poverty. However, under the new regime, that will form only one part of the test, as all bodies will also have to show that they provide public benefit.

The list of charitable purposes in the bill is a reasonably full listing of all the purposes that are agreed as being charitable. Generally speaking, it is a continuation of the existing position in charity law. It is hoped that that consistency will bring reassurance to bodies that are already accepted as charities. However, it is also intended to give a clearer picture of what is considered charitable, and to meet more closely what we consider to be the public’s expectation of what a charity is.

To turn to the specific amendments, I understand the point made by Scott Barrie, echoed by Donald Gorrie, on youth work. My professional background emphasised to me the fact that not all education takes place in a classroom; indeed, it could be argued that sometimes little education takes place in a classroom. For some of the young people I worked with, informal education through youth work—not only that provided by local authorities but in particular that provided by the voluntary sector—was very important.

To suggest that we do not think it necessary to support Scott Barrie’s amendment 1 is not to gainsay the importance of organisations such as YouthLink Scotland. I understand that the amendment’s purpose is to attempt to clarify the fact that non-formal education, especially through youth work, is included within the advancement of education purpose. However, an issue arises in that the amendment makes no attempt to define the term “youth work”. Further, the amendment could potentially narrow the definition of “the advancement of education”, rather than widen it, which I do not think is Scott Barrie’s intention.

If we were specifically to include a particular matter, there would be a danger that other types of non-formal education might be excluded because they were not listed. I hope that Scott Barrie is reassured by what I said about our commitment to youth work and our acknowledgment of its role in education and by the fact that I have confirmed that non-formal education will be covered by the wide definition of the phrase “the advancement of education”. If Scott Barrie wants further reassurance, we might discuss the matter before stage 3.

10:30

As Patrick Harvie said, amendment 82 would remove special treatment for religious charities and provide equal opportunities for bodies that are concerned with beliefs that do not relate to a deity or fall within the commonly understood definition of a religion. We could have a philosophical argument about whether religion is a subset of philosophical belief, but I think that some religious people would contend that it is not and I do not know how far forward such an argument would take us.

We have tried to be helpful in relation to analogous purposes—I will return to that. We are not saying that humanism is a religion; we are saying that some of its features are analogous to religion, which is intended to be helpful. My concern is that amendment 82 would make the
charitable purpose too wide and move away from the historical position. The current charity heads include “the advancement of religion”, which reflects the important historical position of religion in society—a position that still holds for some. As I have said, the decision about the status of religion in society is not necessarily a matter that we want to deal with in the bill. I hope that Patrick Harvie will not move amendment 82 and instead accept Executive amendment 33, which addresses the substance of the point that he makes.

Scott Barrie will be happy to know that the Executive supports amendment 4, which would add “the saving of lives” to the list of charitable purposes. The amendments that have been lodged highlight the challenges that we face when we draft legislation. We must attempt to capture the nature of the charitable sector and what it can be without unnecessarily excluding organisations that it would be common sense to include and that people think should obviously be charities. The committee’s stage 1 report noted that unless the bill included the clarification that amendment 4 will provide, bodies such as the RNLI or mountain rescue services might not be able to be charities. That is not our intention.

The Executive supports Donald Gorrie’s amendment 67, which would improve the charitable purpose in section 7(2) by replacing the phrase “civic responsibility” with the word “citizenship”. Amendment 33 will provide more detail of the activities that will be covered by several of the items in the list of charitable purposes. Amendments 33A and 33AA are relevant in that context and would clarify that “the advancement of citizenship or community development’’ includes “rural or urban regeneration, and … the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities”.

Therefore, the Executive supports amendments 67, 33, 33A and 33AA.

Executive amendment 31 relates to recreational charities. The committee’s report recommended that the advancement of recreation and play should be included in the list of charitable purposes in section 7(2). The Recreational Charities Act 1958 states that the provision of recreational facilities in the interests of social welfare is charitable. The 1958 act applies in Scotland only for the purposes of tax and the Inland Revenue considers the act in relation to the conferral of charity status in Scotland. I understand that the Inland Revenue estimates that some 1,700 Scottish charities qualify for charitable status under the 1958 act, although it is clear that many of those organisations could have qualified through the “other purposes” route. Although amendment 31 makes no reference to the 1958 act, it will ensure that bodies that were engaged in purposes that were regarded as charitable under the act will continue to be charities if they also meet the public benefit test.

Members will be aware that had the Charities Bill survived the pre-election rush it would have amended the 1958 act in relation to recreational facilities in England and Wales that are provided in the interests of social welfare and would have removed from that act the special provision for miners’ welfare trusts. Amendment 31 will add a purpose to the list in section 7(2), which will ensure that bodies that provide “recreational facilities with the object of improving the conditions of life for the persons for whom the facilities are primarily intended” will be charitable. Proposed new paragraph (c) in amendment 33 will add further detail on what is to be covered by that purpose.

I understand and appreciate the point that Donald Gorrie highlights in amendments 31A and 31B and I am aware that other members share the concern that the definition of “facilities” could exclude “activities”. We all know of organisations in our local communities that do not have buildings but still provide benefit to youngsters who play football, for example. I do not want to be in a position in which, like Humpty Dumpty—I think it was Humpty Dumpty, anyway—I say that words mean what I want them to mean, so I very much appreciate Donald Gorrie’s point. However, the intention is to ensure not only that physical objects are covered, such as a village or community hall, but that activities such as coaching may also be included in “recreational facilities”. We believe that the wording of our amendment already covers the organising of activities previously included in the provisions of the Recreational Charities Act 1958.

There might be a concern that distinguishing between “facilities” and “activities” could lead to an unnecessary and artificial consideration of what constitutes facilities on the one hand and activities on the other. One could argue that getting people on to a mountain by whatever means could mean that someone has facilitated their mountain climbing. I am concerned that the substance of Donald Gorrie’s argument could unnecessarily exclude groups, and I undertake to revisit what the Executive understands to be the definition of “facilities” before stage 3. I hope that, given my commitment actively to revisit the matter, Donald Gorrie will not move amendments 31A and 31B at this stage, because I would be concerned if what we understood “facilities” to mean could not be tested at a later stage with unhelpful consequences for local organisations.

The Executive supports Donald Gorrie’s amendment 68, which adds additional purposes to the list to cover the promotion of religious or racial
harmony and the promotion of equality and diversity. Not only will the additions provide reassurance that those important purposes are indeed charitable, but they will lead to a list of purposes that is more consistent with what is proposed in the Home Office bill. There is merit in both those reasons, but I think that the committee will agree that most important is that those vital issues, which support the Executive’s commitment to mainstreaming equalities and the Parliament’s founding principle of equal opportunities, be included. Indeed, the committee recommended such changes in paragraphs 102 and 103 of its report.

The Executive’s amendment 32 responds to paragraph 106 of the committee’s stage 1 report, which called for clarification of the fact that support and advice relating to the provision of accommodation and care are a charitable purpose. The amendment will replace the purposes in sections 7(2)(j) and 7(2)(k) on the provision of accommodation and care. The new purpose will cover “the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage.”

That is sufficiently wide to cover what was suggested, especially when taken in conjunction with proposed new paragraph (d) in amendment 33, which will provide further clarification and will ensure that the provision of accommodation or care is included in the provision of relief in amendment 32.

I have already mentioned several parts of amendment 33, which the Executive has lodged to clarify the extent of a number of the main purposes in the test. As well as providing reassurance to the sector, the changes will also bring greater consistency with the Home Office proposals.

Proposed new paragraph (a) in amendment 33 will clarify that “the advancement of health” includes “the prevention or relief of sickness, disease or human suffering.”

That will cover many well-known charities that are close to the public’s view of the charity sector.

Proposed new paragraph (b) in amendment 33 confirms the existing position that “the advancement of amateur sport” refers to “sport which involves physical skill and exertion”.

That reflects the historical position of sport being considered to be a charitable purpose mainly because of the benefits to health that it can provide. That might restrict the types of sport that can be considered as charities, probably ruling out snooker, darts and chess from the heading, but many such sports could qualify as charitable under other purposes, such as section 7(2)(e) on community development or the new purpose in relation to recreational facilities. In other cases, sports clubs might choose to register with the Inland Revenue as community amateur sports clubs. If such applications are successful, they will be able to benefit from many of the same benefits as charity status would have brought.

Proposed new paragraphs (c), (d) and (e) in amendment 33 have already been mentioned. They will provide further clarification of the definition of “recreational facilities”, the provision of “relief” and “the advancement of…philosophical belief” respectively. Donald Gorrie’s amendment 33B would amend proposed new paragraph (c) in the same way as his amendment 31A proposes, to include recreational facilities “or activities”. I repeat the commitment that I gave earlier to take that forward.

Patrick Harvie lodged amendment 33C as a consequence of his amendment 82. If “religion” were replaced by “philosophical belief” in section 7(2)(c), amendment 33 would not need to make further reference to philosophical belief. However, if amendment 82 is not agreed to, amendment 33C should also not be agreed to.

I move on to amendments 84, 111 and 112 from Donald Gorrie. I said at the beginning that the bill takes us into interesting highways and byways, but I never thought that I would have to reach a comfortable definition of the word “analogous”. If we cannot even agree on how to pronounce it, I am not sure whether we will agree on what it means.

Section 7(2)(m) includes in the list of purposes in relation to the charity test “any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.”

That gives the list the necessary flexibility to evolve as the sector grows and changes while still providing a relatively tight list of purposes that are to be considered charitable. If it is any comfort to Donald Gorrie, I understand that the word has been used in legislation for 100 years, so it might have gathered meaning over time.

Amendment 84 would remove that flexibility and would allow the list of charitable purposes to change only if ministers extended it by affirmative order on OSCR’s recommendation. As well as removing the flexibility for OSCR and the courts, the amendment would introduce the potential for the purposes to be widened to include any matter that OSCR recommends, whether or not it is analogous to the other purposes.
The list of purposes is set out in primary legislation and is being fully debated by Parliament. The purposes are designed to give everyone a clear picture of what is to be considered charitable. Ministers should not be able to change that, even under the affirmative procedure, without the full legislative scrutiny that the list is being given. Therefore, I urge Donald Gorrie not to move amendment 84.

Amendment 83, from Cathie Craigie, has not yet been debated. I will listen carefully to what she says. The amendment would replace section 7(2)(m) with a much wider definition that would include any purpose that is “intended to provide community benefit.”

The amendment is so broad in scope that it would allow almost any activity to be regarded as charitable, including many that the public might not consider should qualify. Given that the second part of the charity test examines public benefit, it might be argued that if the amendment were agreed to, we might as well abandon the list of charitable purposes.

Widening the test in such a way would greatly increase the potential for a different definition of charities in other parts of the UK, which would cause difficulties with access to tax relief, although that is not the testing point of the amendment. As I said, I recognise some of the concerns that drove the amendment. I wait to hear what Cathie Craigie says, but the anxiety is that the scope would be so broad that it would work against our commitments in the rest of the bill.

Cathie Craigie: The minister is probably right that section 7(2) covers a variety of charitable purposes and gives a clear picture of the sector. However, we return to the word “analogous”. I am scared to speak when we have so many English scholars at the table and I was grateful for Donald Gorrie’s definition, which I hope he found in a dictionary. The meaning of “analogous” is up in the ether and could be anything.

In her opening remarks, the minister spoke about clarity in the bill so that people who are involved in or who are outwith the sector can understand the meaning and intentions of the legislation. Section 7(2)(m) is not as clear as I would like it to be. However, I accept what the minister said. In no way do I wish to propose an amendment that would render the purposes meaningless. We have enough information on the record from the minister to allow people who will have to interpret the legislation to understand the intention behind the provisions clearly. I do not know whether it is appropriate to say so at this stage, convener, but, having heard what the minister said, I will probably not move amendment 83.

Christine Grahame: I am trying to get my head round all of this. Just as I get my head round it, I am pre-empted by the minister, who accepts my amendment, or my amendment falls. I formally move amendment 33A—

The Convener: I should say at this point—

Christine Grahame: That I do not move it.

The Convener: That is correct. It is not appropriate to do so. You will be asked at a later point. I am just asking you to speak to your amendment.

Christine Grahame: I am dreadfully sorry. I am without a script.

I am grateful for the minister’s comments. I accept Donald Gorrie’s amendment 33AA, which seeks to amend my amendment 33A. My amendment speaks for itself and seeks to extend the concept of civic responsibility.

I have a great deal of sympathy with Scott Barrie’s amendment 1. I was ready to support it, until the minister developed her argument about the advancement of education, which addresses the situation. Patrick Harvie’s amendment 82 is covered by amendment 33, as Donald Gorrie suggested.

I am sympathetic to Donald Gorrie’s amendment 33B, but I presume that the issue will be dealt with at a later stage if necessary. However, I was persuaded by Donald Gorrie that amendment 68 is necessary. I had thought that “the advancement of human rights” in section 7(2)(h) was sufficient, but having heard the debate I believe that it is not. The minister is right to agree that amendment 68’s provisions should be on the face of the bill.

Cathie Craigie’s amendment 83 is far too broad. I am quite happy with the word “analogous”. Whether I say it properly or not, it is an appropriate word—10 brownie points for the grammar there. For the same reason, I am not content with Donald Gorrie’s amendment 84, which would replace the paragraph containing the word “analogous”. Has that dealt with most of the amendments?

The Convener: That is entirely up to you.
Christine Grahame: I think that it has. I had wanted to say something, given that my amendment 33A had been accepted.

The Convener: If that concludes your comments, I invite those few members who have not participated in the debate so far to comment.

Mary Scanlon (Highlands and Islands) (Con): I was already prepared to support Scott Barrie’s amendment 4, but, like the minister, I just want to mention on the record the mountain rescue teams, who go out in all sorts of weather and risk their lives to save others. I fully support them and I am pleased that the minister has accepted amendment 4.

The Convener: Minister, do you have anything to add?

Johann Lamont: I would need to be awful hard hearted not to support an amendment that referred to saving lives—that would be a step too far, even for me. Amendment 4 reflects the complex issues with which we are grappling.

It is a positive part of the process that all sides can introduce provisions that it would be impossible for a single group of folk to identify on their own. The process has been helpful. I hope that I have given Scott Barrie enough assurances on youth work. I re-emphasise my commitment to re-examine the issue of facilities and activities.

The Convener: I ask Mr Barrie to wind up and to indicate whether he wishes to press or withdraw amendment 1.

Scott Barrie: I listened carefully to what the minister said. It is with fear and trepidation that I venture to disagree with her. As a former English teacher, I think that it was Lewis Carroll’s Mad Hatter and not Humpty Dumpty who said that words meant what he wanted them to mean, not what someone else wanted them to mean. However, it is a long time since I read “Alice in Wonderland”, so I could be wrong.

By lodging amendment 1, I was in no way trying to close other avenues—I take on board what the minister said about that. My intention was to include youth work in the bill because of the importance that I, others and the Executive attach to it, but I take the point that including a specific reference to it might disadvantage other parts of the non-formal education sector. If the bill defines education in its widest possible sense, including all forms of non-formal education, I am content to withdraw amendment 1, with the committee’s approval. I might want to discuss the matter with the minister before stage 3 to make sure that that is the case, but I do not want to disadvantage other parts of the sector at the expense of youth work.

Amendment 1, by agreement, withdrawn.

Amendment 82 moved—[Patrick Harvie].

The Convener: The question is, that amendment 82 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Harvie, Patrick (Glasgow) (Green)

AGAINST
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Fabiani, Linda (Central Scotland) (SNP)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Home Robertson, Mr John (East Lothian) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 1, Against 8, Abstentions 0.

Amendment 82 disagreed to.

Amendment 4 moved—[Scott Barrie]—and agreed to.

Amendment 67 moved—[Donald Gorrie]—and agreed to.

Amendment 31 moved—[Johann Lamont].

The Convener: Does Donald Gorrie wish to move amendment 31A?

Donald Gorrie: In the light of the reassurances from the minister, I will not move amendment 31A.

Amendments 31A and 31B not moved.

Amendment 31 agreed to.

Amendment 68 moved—[Donald Gorrie]—and agreed to.

Amendment 32 moved—[Johann Lamont]—and agreed to.

Amendments 84 and 83 not moved.

Amendment 33 moved—[Johann Lamont].

Amendment 33A moved—[Christine Grahame].

Amendment 33AA moved—[Donald Gorrie]—and agreed to.

Amendment 33A, as amended, agreed to.

Amendments 33B and 33C not moved.

Amendment 33, as amended, agreed to.

The Convener: I would be grateful for members’ assistance at this point. As you have been so good over the last group, I will suspend the committee for a short comfort break. We will return at 11:05.
Meeting suspended.

11:07

On resuming—

The Convener: Amendment 34, in the name of the minister, is grouped with amendments 85, 86, 35, 87, 49 and 52. That seems to be a long list, but it is not nearly as long as the previous one.

Johann Lamont: In dealing with this group of amendments, the first thing on which we should all agree is the importance of all charities being independent bodies. Perhaps the stage 1 discussions illustrated some of the complexities in establishing how we ensure that independence in law. I believe that we would also all agree that we have to be very careful about the mechanism that we employ to ensure that.

As it was introduced, the bill sought to prevent bodies whose constitution allows control by a third party from passing the charity test. Several potential problems were identified during committee evidence, especially in relation to the national collections non-departmental public bodies. We have reviewed the test, and the amendments that we have lodged reflect the best way of dealing with the matter, which was clearly of concern to the committee and to others. Any way of dealing with the matter, which was clearly of concern to the committee and to others. Any body that has a ministerial power of direction in its constitution will not be eligible for charitable status, but other bodies that are under some form of control by a related body or other third party will continue to be eligible. Those bodies will, of course, still be subject to the important provisions in section 65, which require charity trustees to act in the interests of the charity. Trustees will additionally continue to be required to comply with existing duties under other legislation or legal commitments.

To fulfil our commitment in respect of the five national collection NDPBs, the affirmative order-making power in amendment 35 will allow ministers to seek specific exemptions from that requirement. Ministers will also be able to grant exemption from the requirement in section 7(3)(a) that a charity’s constitution cannot allow for distribution or application of its property on its being wound up, or at any other time, for a purpose that is not charitable. Amendment of the bill in that way will allay the committee’s concerns and it will meet, as far as is possible, the sector’s wish that charities be independent of Government control.

I understand the motives behind amendment 85, but I do not believe that it would solve the difficulties that it seeks to address in relation to the independence test; it could be argued that it might create new difficulties. It would not only exclude all the bodies that the existing section 7(3)(b) would exclude, but might exclude even more by prohibiting any “external interference”. That term is undefined, which perhaps reflects earlier discussions about third-party control, which created difficulties, as the committee acknowledged. The amendment partly restates the general obligation on charity trustees to act in the interests of the charity as part of the exclusion test, but it does not refer to duties that might arise from other legislation, such as health and safety requirements and contractual obligations. As well as being technically defective, amendment 85 would have an impact that I believe Donald Gorrie does not intend, so I ask him not to move it.

Amendments 86 and 87 seek to incorporate the McFadden proposals for the independence of charities. In the past, it has been discussed whether that approach to independence would get to the nub of what we seek. It is my view that the approach to independence that is outlined in amendments 86 and 87 does not address the principle of independence, in that they are about how charity trustees are appointed and not about how they act once they have been appointed. It might be argued that the amendments make presumptions about whether how someone is appointed defines how they act later, but I am not convinced by that argument. We have said that before and, although we will listen to the debate, we see no reason to change our position. Amendment 86 does not address in any way the concerns about the national collections NDPBs, which would be excluded from charitable status under the test. I ask Christine Grahame not to move amendment 86.

I move amendment 34.

Donald Gorrie: As the minister said, section 7 is a difficult section to get right and we must get the independence issue as well organised as possible. I am not a great admirer of the ladies and gentlemen who draft bills; they seem to live in their own universe.

The Convener: They look crushed.

Donald Gorrie: In this case, however, I give them due credit. They have produced an elegant solution to a difficult question. The Executive amendments are helpful and the various people who contacted me because they were concerned about the bill as it stood believe that the Executive amendments will solve their problems.

Amendment 85 is my endeavour to approach the issue differently. As it stands, the bill rests entirely on the constitution of a charity expressly permitting a third party to direct and so on. To found too much on the constitution of an organisation is a mistake in that no one in any organisation ever reads its constitution unless
there is a crisis of some sort; they just get on with the job. How the bill, rather than the constitution, will work in practice is the issue. I was trying to say that there should be no external interference in the operations and management of the day-to-day work of a charity, but there is an argument that my wording could cause other problems even if it sorts out some problems. I am content to let members consider carefully what the Executive proposes. If they think that it will solve the problem, that is fine. At the moment, I am inclined not to press amendment 85. We will find out at stage 3 whether anyone has pointed out any problems with the Government’s intelligent way of trying to deal with the problem.

On amendment 86, I have some sympathy with the concern about the number of outside appointees, but in amendment 85 and elsewhere I have tried to concentrate on the fact that, once they are appointed, charity trustees should have to focus entirely on the purposes of the charity and not on those of some other body. I think that that is a better way of dealing with the issue than counting heads would be, although I will be interested to hear what Christine Grahame has to say.

11:15
The Convener: I invite Christine Grahame to speak to amendment 86 and to any other amendments in the group.

Christine Grahame: I preface my statement in support of amendment 86 by saying that I do not seek to impugn the current trustees of the various national collections; that is not my intention at all. I accept that the test that trustees should act with integrity and in the interests of their charity is an undercurrent in the bill. Amendment 86 does not question that. That said, there is an issue not just about independence but about perceived independence. It is necessary that there be distance between the people who act as trustees and the bodies that may appoint them.

The minister was right to refer to the proposal of the McFadden commission—amendment 86 seems to be the most appropriate formulation of that test. I do not have the relevant set of evidence in front of me, but I think that the National Library of Scotland fulfils the stated criteria—fewer than one third of its trustees are appointed in the manner described. The fact that one of the national collections is already in that situation suggests that the proposal in amendment 86 would not imperil the national collections. It is my understanding that there could still be Government involvement, but that it would not be as direct as it has been.

It is extremely important that the same test that applies to a charity that is a two-person band working in a particular area should also apply to the grander charities. At the moment, I do not think that is perceived to be the case with some of our larger charitable bodies, such as the national collections. I suggest that the application of the formula that is set out in amendment 86 would provide a rigorous test that could never be challenged. The application of that formula would ensure not only that such independence exists, but that it is seen to exist, which is extremely important.

Patrick Harvie: In general, I am much more inclined to support Christine Grahame’s amendments than—

Christine Grahame: Did you want me to speak to amendment 87, which is consequential on amendment 86? [Interruption.]

The Convener: I would be grateful if members would remember to keep their mobile phones switched off, which seems from time to time to be a problem for some members. I remind them that it is not acceptable to leave mobile phones on.

Christine Grahame was invited to speak to all the amendments in the group. I will allow Patrick Harvie to speak first and will—

Patrick Harvie: I am happy to let in Christine Grahame—

The Convener: I convene the committee and I will decide when people speak.

Patrick Harvie: I beg your pardon.

The Convener: I will use my discretion to allow Christine Grahame to comment on other amendments in the group.

Patrick Harvie: I am more inclined to support Christine Grahame’s amendments than I am to support amendment 34. Although the distinction between the method of appointing trustees and the way in which they behave once they are appointed is an important one to understand, it is not the end of the story. The way in which trustees are appointed may affect the relationship between the two organisations—one being part of the state and the other being independent, or so we hope. Even if the trustees behave absolutely impeccably and with independent minds once they are appointed, the organisation knows that its future trustees will be appointed in a particular way, which would undermine the concept of independence. I support Christine Grahame’s amendment 86; it provides a more robust way of establishing the required independence.

The Convener: Perhaps Ms Grahame would like to cease her conversation and contribute to the debate?

Christine Grahame: I apologise, convener, but it was more than a conversation; it was a dialogue about the amendments in the group.
I am sympathetic to what Donald Gorrie had to say and my reading of what he said is that we may return to the issue. I, too, will return to the substance of my amendment 86. Obviously, amendment 87 is consequential on—or married to—amendment 86.

The Convener: I invite the minister to wind up the debate on the amendments in the group and to indicate whether she will press or seek agreement to withdraw amendment 34.

Johann Lamont: I think that politicians have to be careful; there is a touch of the pots and kettles about a politician suggesting that anybody else lives in a parallel universe. Nevertheless, I welcome the general support that the committee has given to the Executive’s approach to the independence of boards and to amendment 34.

Donald Gorrie made the distinction between the everyday workings of trustees and constitutions. The fact of the matter is that a constitution is central to any decision that OSCR takes about whether an organisation should become a charity. Constitutions govern how trustees conduct themselves, so it is legitimate that reference be made to the constitution in section 7.

I accept what Christine Grahame said about not impugning people’s motives and about perception. However, the danger is that amendment 86 would give the perception but not the reality of independence. I heard her argument, but it could equally be argued that someone who was appointed from anywhere could go on to influence inappropriately the conduct of business. The test of being a trustee is whether the person acts in the best interests of their charity, regardless of where they come from. That is the significant element of their appointment.

It could also be argued, in respect of the point that Patrick Harvie seemed to be making, that the way in which someone is appointed affects the way in which they conduct their business. He suggested that, even if trustees appeared to be conducting business independently, they would remember how they were appointed. Surely that charge applies equally to all trustees regardless of where they were appointed from?

The test that has been laid down in the bill is a harder test than those which members have proposed. The danger is that amendment 86 appears to offer a comfort zone, but it is not the harder test of the way in which a trustee conducts their business.

I welcome the fact that Donald Gorrie has indicated that he will not press amendment 85. I make the commitment, as I have done previously, to reconsider the issue; it is clear that people are grappling with it. If some of the issues that have been highlighted need to be addressed before stage 3, I am comfortable about doing so.

I press amendment 34.

The Convener: The question is, that amendment 34 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 6, Against 3, Abstentions 0.

Amendment 34 agreed to.

Amendments 85 and 86 not moved.

Amendment 35 moved—[Johann Lamont]—and agreed to.

Amendment 87 not moved.

Section 7, as amended, agreed to.

Section 8—Public benefit

The Convener: Amendment 69, in the name of Donald Gorrie, is grouped with amendments 70 and 88.

Donald Gorrie: The purpose of amendment 69 is to try to prevent anyone from arguing that because he or she as a member of the public has not benefited individually from a charity, that charity’s right to charitable status should be removed. The phrase “by the public” could be interpreted as meaning that each individual member of the public must benefit, which is clearly not the case for almost every charity because many of them are limited to a specific group of people or geographical area.

Instead of using the phrase “by the public”, which is to my mind ambiguous, I think that we should say that benefit should be felt “directly or indirectly by the community as a whole”.

With a housing association, for example, tenants benefit directly, but the rest of the community also benefits if it is a well-run housing association that provides housing and creates community activity. The Executive should think seriously about supporting amendment 69, which would clarify the meaning of the bill and prevent objections to OSCR on false grounds.

The purpose of amendment 88 is to clarify the rules that govern charities that serve specific groups,
"including, for example, religious or ethnic groups, former members of a particular organisation or sufferers of a particular disease".

Many charities have been set up to help specific groups of people. I have bored colleagues about the old Edinburgh charity that used to try to help teetotal tailoresses in Leith, but which ran out of customers. Many charities have a defined group that they try to help, and amendment 88 tries to set out a rule whereby such an organisation would still qualify as a charity despite its being aimed only at a specific group if

“(a) the body’s purpose is to assist members of that group,
(b) the body acts fairly between all members of the group, and
(c) the community as a whole benefits directly or indirectly”.

The first of those provisions is obvious. On the second point, there is a risk that a clan charity, Gorrie family charity, ethnic minority charity, religious charity or charity that involves any other particular group might sound okay but might actually benefit a wide family connection rather than the whole group. For example, a charity might not act fairly with all the members of a clan or religious or ethnic community. We should prevent that from happening, and OSCR should check that a charity acts fairly with its various members. As a result, amendment 88 endeavours to clarify the rules about charities that deal with particular groups. I am interested to hear whether the minister has a better proposition.

I move amendment 69.

11:30

Mr John Home Robertson (East Lothian) (Lab): I am not yet sure whether amendment 70 is a probing amendment or whether it clarifies the effect and purpose of section 8. In any case, I hope that the debate will serve a useful purpose. I will decide in due course whether to move the amendment.

As we know, the bill is rightly intended to clear up a rather loose and muddled framework of regulation for Scottish charities, with the objective of enhancing the status and work of thousands of genuine charities and, where necessary, weeding out any bodies that might not comply with the criteria that we are setting for OSCR.

As a result, we have the list of charitable purposes in section 7, which has just been debated, and the crucial overriding public benefit criterion in section 8. Initially, I felt that the terms of section 8(2)(b) were perfectly clear. It says:

“In determining whether a body provides ... public benefit, regard must be had to ... where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive.”

I assumed that that would permit charitable status to be granted to bodies that provide services or facilities to everyone. However, I also assumed that that would, perfectly legitimately, permit charitable status to be granted to bodies that provide benefits to justifiably restricted groups, such as people who live in a particular area, who are affected by a particular disability, who have special needs or whatever.

However, until the question was asked during the stage 1 debate, it never occurred to me that section 8(2)(b) could possibly sanction restriction of access to benefits in the form of unaffordable charges or fees. It would not be in anyone’s interests to leave any room for doubt on that fundamental point. In an intervention on Christine Grahame in that debate, I said that I thought that she was advancing a characteristically contrived point and that if she was serious about the matter, she might have been expected to seek to amend the bill at this stage: she has not done so and people can reach their own conclusions on that. However, I am serious about this issue. I think that it would be a travesty if the provision of a benefit that is primarily for well-off people were to be endorsed as a charitable purpose. I invite the committee to consider whether amendment 70, which would change the words of the proviso in section 8(2)(b) by inserting specific reference to charges and fees, would help to clarify the point.

I suppose that the obvious example is the case of private schools. Most people think it quite bizarre that schools that are primarily for the education of children from high-income families are treated as charities. In my East Lothian constituency, people find it very odd that a local secondary school such as Musselburgh Grammar School is liable to pay more rates than the neighbouring private school, Loretto School, in the same town. Of course, Loretto has the benefit of charitable relief from rates; that is the kind of matter that ought to be clarified.

I stress that I do not want to get into a debate about whether private schools are a good or a bad thing. For the record, I attended a private school, but I did not have any choice in the matter. My children attended state schools, and people can draw whatever conclusions they like from that. The issue is neither here nor there. Instead, the committee needs to address the question of what should be regarded as charitable and what should not be regarded as charitable under the proposed legislation.

I think—and I hope—that the current draft of the bill is sufficient to ensure that access to charitable benefits cannot primarily be for people who can afford to pay expensive fees or charges. However, if there is any doubt whatever on that point, and if amendment 70 would help to clarify an important
principle in Scotland’s new charity legislation, I urge the committee and the Executive to consider agreeing to it. If the amendment were to be accepted, section 8(2)(b) would read, “where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.” I hope that that is helpful. I will be interested to hear what colleagues, the minister in particular, have to say about amendment 70.

Patrick Harvie: I agree with John Home Robertson that a large part of the purpose of our considering this bill is to define what is charitable and what is not. Although some of the words in the middle of his speech were clearly not charitable, when he was addressing the substance of the argument, he spoke well. Unless the minister’s response is extremely robust, I hope that John Home Robertson will move amendment 70, which I will support, as I will amendment 88.

To be honest, I am less clear about the value of amendment 69. I will wait to hear the arguments of the minister in reply.

Christine Grahame: I am delighted that John Home Robertson lodged amendment 70. He got there first. Like John Home Robertson, I make no comments about the worthiness or otherwise of the fee-paying school sector or the fee-paying health sector. That is a separate issue and the point that we are concerned with is one of principle. Well before John Home Robertson spoke about the amendment, I was minded to support it because it supplies an extremely important clarification and develops the phrase “unduly restrictive”. In a charitable manner, I thank John Home Robertson for lodging the amendment and will give it my full support if it is moved.

Mary Scanlon: I am pleased to say that I will not be giving amendment 70 my full support, which is hardly a surprise.

I have concerns about section 8(2)(b), which I raised during our stage 1 discussions. I realise that I have not lodged an amendment in this regard, but the term “unduly restrictive” causes me and many others concern. Before I address amendment 70, I would like to refer to some of the evidence that we gathered during stage 1. The written submission from the Scottish Council of Jewish Communities particularly registered with me. It said that the fact that it raised and disbursed money within the Jewish community might mean that it would be seen to be unduly restrictive and would therefore be unable to pass the public benefit test. Another example that I gave during stage 1 related to the Highland clans. People from all over the world come to clan gatherings in the summer and of course the clans are unduly restrictive. I raise the issue because I feel that the provision could be abused at some point.

On amendment 70, during stage 1 I asked whether the fees that are charged at private schools could be considered to be unduly restrictive. I believe that Jane Ryder from OSCR said that the issue would be considered. I do not feel that it is OSCR’s role to decide what is unduly restrictive. If people choose to send their children to Loretto—and to pay a fee for that on top of their taxes, rates, council tax and so on—rather than Musselburgh Grammar School, that should be their choice. If they choose to send their child to Fettes College that should be their choice; it should be a matter of individual choice. We received a letter from Fettes following the stage 1 discussions. I do not have it in front of me, but it mentions the enormous upkeep of the buildings at Fettes, which are not only a cultural asset but a community benefit to Edinburgh. Members may not agree with that, but part of the reason for the charging of the fees is to pay for the maintenance of those enormous historical buildings.

John Home Robertson said that private schools are primarily for people who are well off. When we took pre-legislative evidence in Perth, we heard from a trade unionist who said that he had made significant financial sacrifices in order to send his child to a private school. Let us not all assume that only people who are well off send their children to private school. Many people on all sides of the political spectrum choose to make such sacrifices to send their children to private school.

I am deeply against amendment 70 because it is a step too far. It is not for OSCR to take away the freedom of choice that individuals have to pay for their child’s education.

Linda Fabiani: As a trade unionist who is fairly well off, I think that amendment 70 has been pretty well covered.

I will focus on amendments 69 and 88, about which I have concerns. My first concern is that both those amendments contain the word “indirectly”. I am not comfortable about having that term in the bill, because it is very hard to define in this context.

I understand where Donald Gorrie is coming from on amendment 88. I have sympathy with the sentiments behind the amendment and I hope that the Executive will take those on board. We should consider other ways of covering the issue. I am not keen on including examples of groups in the bill, as is done in brackets in amendment 88. To be unduly picky, as we are all on about grammar today, I point out to Mr Gorrie that paragraph (b) of the proposed new subsection should say “among” all members of the group, rather than “between”.

Scott Barrie: I did not intend to say much, if anything, on this group of amendments, but some of what Mary Scanlon said cannot go
unchallenged. I said in the stage 1 debate that it was unfortunate that too much of that debate focused on the issue of private schools. Of course, I went on and did exactly the same as most other members.

Mary Scanlon has missed the point in her criticism of amendment 70, which I support. The amendment is not about taking away choice; it is about whether institutions that operate in a restrictive way should be deemed to be charities. The amendment does not say that nobody will be able to send their children to private school if they choose to do so, nor does it say that we will abolish the private education sector. It is saying that private schools that operate in an unduly restrictive way will no longer be deemed to be charities. That is in keeping with what the vast majority of the people of Scotland understand a charity to be. Amendment 70 clarifies considerably the point that the vast majority of committee members raised during stage 1 and bears out the sentiments that members expressed in the parliamentary debate. The amendment is worthy of support.

11:45

The Convener: I intend not to participate in most of the debates during stage 2, but I feel that I need to say something at this point because I have a constituency interest.

It has been unfortunate that most of the debate on the reform of charity law has concentrated on whether some independent schools should get charitable status. I certainly have my own views about that: if parents want to pay to send their children to a particular school, that is entirely their choice, but the public purse should not subsidise them for exercising the right to express that choice.

However, a number of public schools in Scotland provide a valuable service to many children. I refer to schools such as Glencryan School—I mean the Craighalbert centre—in Cathie Craigie’s constituency, or St Philip’s School in my constituency, which provides an education for some of Scotland’s most vulnerable and damaged children who are creating difficulties in the communities in which they live. Local authorities refer such young people to St Philip’s so that they can be educated and receive assistance to address some of their behavioural problems. Such independent schools are concerned that any changes to charity law in Scotland should allow them to continue to receive charitable support. That is vital and I hope that, in her response to the points that have been raised in the debate, the minister will acknowledge those concerns.

Johann Lamont: The public benefit test is one of the main pillars of the bill and the fact that, in future, no charity will be presumed to provide public benefit is a major step forward. Instead, each body will have to be able to demonstrate to OSCR that it provides public benefit.

I accept that the committee has been concerned about how strict the public benefit test should be. That was debated in the committee and the Parliament at stage 1, and paragraphs 149 and 150 of the committee’s report recognised the complexities of providing a definition of public benefit and concurred with the Executive’s approach in the bill. The committee also recognised the importance of ensuring that only organisations that have as their overriding purpose the provision of benefit to the public should qualify for charitable status and suggested that consideration should be given to the bill placing greater emphasis on the need to pass the public benefit test.

I am grateful that the committee concurred with our approach and I have emphasised my view that the provision that is set out in the bill is the best way of achieving a rigorous, fair and transparent test that can adapt to changing opinions. We must rely on OSCR, as the independent regulator acting in the public interest, to operate the test fairly. However, the test could not be more central to the bill and unless a body can pass the test, it will not be a charity.

I turn to the amendments on public benefit. Amendments 69 and 88 attempt to specify that benefit can be provided directly or indirectly and that bodies that provide benefit to particular groups of people can be charities. I make the point that “directly or indirectly” covers everybody. The public benefit test does not exclude indirect benefit and already acknowledges that bodies that provide benefit to particular groups of people can be charitable provided that any conditions that are placed on receiving the benefit are not unduly restrictive. In such instances, it will be for OSCR to decide in each case whether any conditions are unduly restrictive.

I understand the point that Donald Gorrie is wrestling with. He used the example of a Gorrie clan charity. The first question would be whether there could be public benefit in doing anything to support the broader Gorrie clan; if not, the body might fall at the first hurdle. That reinforces the point that we want OSCR to deal with such issues case by case because such instances are specific, and OSCR is challenged to do that. Because of our commitment to equal opportunities, the public benefit test does not affect a charity that targets a particular group because it is discriminated against.
We are concerned that if amendments 69 and 88 are accepted—in particular, if the reference to a body acting
“fairly between all members of the group”
is incorporated into the bill—it could lead to a body’s resources being spread too thinly to offer any real benefit. It is important for OSCR to be able to consider such bodies case by case. OSCR will be required to consult on the guidance that it will use to determine public benefit.

Amendment 70 further clarifies how the public benefit test applies to charging.

The point that the convener made about independent schools and the diversity of the independent sector probably encapsulates why the bill promotes the formula that it does. The bill guarantees an objective test. The aim is not to attack independent schools—some of them will be in and some will be out. It will be a matter for OSCR, having consulted on the guidance, to determine the public benefit test.

The convener highlighted well the fact that independent schools are diverse—indeed, in a former life, I would probably have supported youngsters who were referred to schools such as St Philp’s School. Some people suggested that we should simply use the bill as a vehicle for acting against private or independent schools, which is impossible, and I think that some people wished to debate issues that are different from those that the bill covers—it could be argued that Patrick Harvie tried to do that earlier. However, the quality or value of the independent sector, excluding the special needs sector, is a separate issue that does not relate to the bill.

Can bits of the independent sector qualify under the public benefit test? We have set up an objective system that will not judge people’s choices but which establishes that there must be public benefit if charitable status is to be secured. Considering whether a condition is unduly restrictive is reasonable and it is the Executive’s view that amendment 70 clarifies the position. It is possible that certain organisations—I am not talking specifically about independent schools—may use the level of fees that are charged as a means of being exclusive, even in the sector in which they operate. Therefore, it is reasonable for OSCR to be asked to have regard to whether a condition is unduly restrictive, with the clarification that amendment 70 will provide. Therefore, I urge the committee to support amendment 70 and urge Donald Gorrie to seek to withdraw amendment 69 and not to move amendment 88.

Donald Gorrie: First, I want to comment on amendment 70, which I did not do previously. It is clear that we are not talking about the future of fee-paying schools—Mary Scanlon was misleading in that respect. The issue is whether fee-paying schools will qualify as charities, which OSCR must judge in accordance with the rules that we lay down when the bill is passed. The Executive’s argument might be that amendment 70 is covered anyway, because “any condition” obviously includes fees. However, I am all in favour of stating the obvious and am pleased that the Executive agrees to the amendment, which states the obvious—that is, that fees are included. We are not talking simply about fee-paying schools. A sports body with a modest subscription might be okay, but OSCR might reasonably think that an organisation with a golf course—which shall be nameless—that it is expensive to be a member of is not a charitable organisation. Amendment 70 covers a wider sphere and clarifies matters. I therefore support it.

I still think that amendments 69 and 88, which are my amendments, make a good point—I even think that my grammar is correct and may argue about that with Linda Fabiani later. Such amendments are always difficult and I may not have got things right yet, but my purpose is correct and I am prepared to—

The Convener: It is all right, Mr Gorrie. You do not need to say what you intend to do at this point.

Donald Gorrie: I will accept further discussion with the Executive to try to clarify the points that I have raised about the need for the bill to be as clear as possible on how the charities that help particular groups of people should operate.

Amendment 69, by agreement, withdrawn.

Amendment 70 moved—[Mr John Home Robertson].

The Convener: The question is, that amendment 70 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Fabiani, Linda (Central Scotland) (SNP)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 8, Against 1, Abstentions 0.

Amendment 70 agreed to.

Amendment 88 not moved.

Section 8, as amended, agreed to.
Section 9—Guidance on charity test

The Convener: Amendment 71, in the name of Donald Gorrie, is in a group of its own.

Donald Gorrie: Like many of my amendments, amendment 71 states the obvious. As it stands, section 9 states:

“OSCR must, after consulting such persons as it thinks fit, issue guidance”.

My suggestion is that section 9 should state that OSCR is required to consult “representatives of the charitable sector and such other persons as it thinks fit”. Arguably, OSCR would do that anyway, but legislation should guard against the possibility that a future occupant of the post will not be as reasonable as the present one and will fail to do things that might appear obvious to others. I hope that the minister will consider my proposed wording a useful addition.

I move amendment 71.

The Convener: As no other members want to speak, I ask the minister to respond.

Johann Lamont: One of my frustrations is that it is not always obvious when I am stating the obvious. That can cause its own difficulties. The bill already places OSCR under a duty to consult whomever it thinks fit, which of course includes the charitable sector. OSCR will also be expected to be reasonable and proportionate in all its actions. Therefore, it is unlikely that OSCR would ever consider it reasonable not to consult the charitable sector on such an important matter as the guidance that it issues on the charity test. However, I understand that amendment 71 would provide the sector with reassurance about our intention, so I am happy to accept the amendment.

I move amendment 71.

The Convener: As no other members want to speak, I ask the minister to respond.

Johann Lamont: One of my frustrations is that it is not always obvious when I am stating the obvious. That can cause its own difficulties. The bill already places OSCR under a duty to consult whomever it thinks fit, which of course includes the charitable sector. OSCR will also be expected to be reasonable and proportionate in all its actions. Therefore, it is unlikely that OSCR would ever consider it reasonable not to consult the charitable sector on such an important matter as the guidance that it issues on the charity test. However, I understand that amendment 71 would provide the sector with reassurance about our intention, so I am happy to accept the amendment.

I move amendment 71.

Section 9, as amended, agreed to.

Section 10—Objectionable names

12:00

The Convener: Amendment 89, in the name of Patrick Harvie, is grouped with amendments 72, 36 and 73.

Patrick Harvie: I hope that amendment 89 will allow us to explore the meaning and consequences of section 10(1)(d), which makes it clear that charity names that are offensive will not be acceptable. I am unclear exactly to whom names would have to be offensive in order to be ruled out of order. A number of small charities in England and Wales, particularly those serving the lesbian, gay, bisexual and transgender community, have had problems as a result of people believing that their names are objectionable. Examples are the use of the word “queer” or perfectly innocent innuendos, particularly by organisations that are targeting a client group who would not find the name offensive in any way and who are in no way being in your face to people who might find the name objectionable or offensive. I hope that the minister will be able to explain to us who a name would have to offend in order to be ruled out of order. If the response is reasonable, I will be happy not to press my amendment, but I look forward to hearing her comments. I have no comments to make on the other amendments in the group.

I move amendment 89.

The Convener: I ask Christine Grahame to speak to amendment 72 and any other amendments in the group.

Christine Grahame: Which amendment am I speaking to?

The Convener: Amendment 72.

Christine Grahame: Ah yes. Amendment 72 simply adds to the information considered under section 10, which currently provides that reference to a body’s purposes can determine whether its name is misleading. According to paragraphs (a) and (b) of section 10(2), those purposes must be set out in the statement that accompanies an application to OSCR or in an entry in the register. Therefore, in the case of a charity, its purpose would be set out in its entry in the register; the amendment would add to that its constitution, which is also a useful source of information. The purpose of the amendment is simply to provide additional information—I see that I am getting a smile from the minister for that one.

Amendment 73 is a technical amendment, which I hope I understand. I am about to explain it—I was distracted earlier because I was thinking about it. Section 11 relates to change of name. The amendment relates to the interaction of the
bill with company law. It is my understanding that a special resolution involving 21 clear days’ notice to members has to be given in relation to a resolution to change the name of a company that is a charity. If notice were given to OSCR under section 11 42 days before the date set for the extraordinary general meeting or the annual general meeting in question and OSCR did not respond within the 28 days allowed under section 11(3), the effect of deemed consent would be lost since it would then be too late to issue 21 days’ notice of the resolution. I hope that the minister understands that, but I put it to her as a technical matter—the interaction of two pieces of legislation—that must be addressed seriously.

I have a great deal of sympathy with amendment 89, and I will be interested to hear what the minister has to say about it.

Johann Lamont: I am a bit concerned that I may have misled Christine Grahame by smiling, which I know is unusual. However, she should not interpret my body language too closely or I will be in real trouble.

Amendment 36 corrects a technical omission by ensuring that section 10, on objectionable names, extends to applications for SCIos as well as applications relating to other charities.

Patrick Harvie’s amendment 89 seeks to restrict the definition of objectionable names to those that are intentionally offensive. I absolutely understand the point that he is making; however, I would put the opposite argument. If someone were to give a charity a name that I found offensive—perhaps a misogynist or racist name—but the person said that they did not mean to be offensive and claimed ignorance, that might be a defence for the charity continuing under that name. The objectivity of OSCR in relation to the matter is helpful. I take the point that he makes, which is that organisations may give themselves names that other people—inappropriately—find offensive. Nevertheless, we would not want organisations that we would deplore out of our commitment to equal opportunities to be able to use the defence of ignorance. I hope that he accepts my assurance that we recognise the role of OSCR in looking at the names of charitable organisations.

Amendment 72, which would add the constitution of the charity to the places that OSCR can consult in identifying a charity’s purpose, is unnecessary. Section 10 refers to the purposes that will be outlined in a charity’s entry in the Scottish charity register. In applying to be placed on the register, a body will send OSCR a copy of its constitution and OSCR will use the purposes that are listed in the constitution, as well as those that are stated in the application, in compiling the entry on the register.

Amendment 73 would reduce from 28 to 21 the number of days that OSCR has to respond to a notice from a charity that it intends to change its name. The amendment is intended to allow a charitable company 21 clear days, following OSCR’s notice period, to notify members of the special resolution to change the company’s name. I believe that a notice period of 21 clear days is required under the Companies Act 1989.

Notice of the proposed change must be given by a charity to OSCR at least 42 days in advance of the change taking effect. In the case of a charitable company, that will be 42 days before the annual general meeting—the date of the name change. However, the 42-day notice period is the minimum that is required, and a charitable company could give OSCR more than 42 days’ notice before the AGM. That would enable the company to be confident of OSCR’s agreement once the 28 days were up and allow it to give its members 21 days’ notice of the special resolution to change its name. In practice, a charitable company would have to give OSCR a minimum of 49 days’ notice before the name change to ensure that, after the 28-day period in which OSCR would consider the change, it would still have sufficient time to give its members notice. Therefore, we do not believe that amendment 73 is necessary.

Moreover, OSCR has expressed concern that the time periods in which it must act are often tight. It is, therefore, against the adoption of amendment 73, which it considers too onerous in giving it a tighter time period in which to make decisions for all charities, not just for charitable companies. I hope that Christine Grahame will accept that explanation.

I ask Patrick Harvie to withdraw amendment 89 and Christine Grahame not to move amendments 72 and 73. I urge the committee to support the Executive’s amendment 36.

Donald Gorrie: The minister has said what I intended to say about Patrick Harvie’s amendment 89. It is well-intentioned but lacks sensitivity. The fact that someone did not mean to be rude to someone else is not a satisfactory defence. Amendment 89 does not, therefore, stand up totally.

On amendment 73, I am now totally confused about the 21-day rule. Like other members, I received a brief from a worthy organisation that explained it all; however, the minister has now explained it completely differently. For the moment, I will go with the minister, but I will have to try to understand it in due course.

The Convener: I ask Patrick Harvie to wind up and to press or withdraw amendment 89.

Patrick Harvie: I entirely take the point that the minister makes. Although I still feel some
uncertainty about the way in which the provision in
the bill will be implemented, I am happy to
withdraw my amendment and explore other
options in advance of stage 3.

Amendment 89, by agreement, withdrawn.

The Convener: Amendment 72, in the name of
Christine Grahame, has already been debated
with amendment 89. Ms Grahame, do you intend
to move amendment 72?

Christine Grahame: In the light of what the
minister said, I will not move amendment 72. On
amendment 73—

The Convener: I must stop you there because
we have still to reach that point.

Amendment 72 not moved.

Amendment 36 moved—[Johann Lamont]—and
agreed to.

Section 10, as amended, agreed to.

Section 11—Change of name

The Convener: Amendment 73, in the name of
Christine Grahame, has already been debated
with amendment 89. At this point, Ms Grahame,
you may indicate whether you intend to move the
amendment.

Christine Grahame: Thank you. My head is
turning to mince as the day goes on. In the light of
what the minister said, I will not move amendment
73 at the moment. Donald Gorrie and I will have to
have a long, slow drink and work out what it all
means.

The Convener: What an interesting proposal.

Amendment 73 not moved.

Section 11 agreed to.

Sections 12 to 14 agreed to.

Section 15—References in documents

The Convener: Amendment 37, in the name of
the minister, is in a group on its own.

Johann Lamont: Amendment 37 will allow
ministers to exempt charities transferred to the
register under transitional arrangements from the
regulations made under section 15. It is designed
to give those charities time to use up old
stationery—how practical—and to order new
stationery that complies with the regulations made
under section 15.

I move amendment 37.

The Convener: Do committee members have
any desire to speak about this practical
amendment?

Christine Grahame: I am terribly grateful to the
minister because I thought that there was some
sinister motive behind the amendment, but now I
understand that it is about paperwork.

Amendment 37 agreed to.

Section 15, as amended, agreed to.

Sections 16 to 18 agreed to.

Section 19—Removal from Register: protection
of assets

The Convener: Amendment 38, in the name of
the minister, is grouped with amendments 50 and
53.

Johann Lamont: The provisions in section 19
ensure that a body removed from the register must
continue to use its charitable assets for the
purposes set out in its entry on the register before
it was removed. It also allows OSCR to apply to
the Court of Session to protect the charitable
assets. The court may approve a scheme
proposed by OSCR for the transfer of the former
charitable assets to another charity if it is
necessary or desirable to do so, or if the existing
charitable purposes would be better achieved by
transferring the property to a charity.

If the bill is enacted, some charities with property
purchased with public funds might lose their
charitable status. Although section 19(8) allows
ministers to disapply the provisions in relation to
property that they consider of national importance,
there has been some uncertainty about what
property that would cover.

Amendment 38 will change section 19(8) to
allow ministers to protect any property specified in
an order under that subsection. Examples that
make the amendment necessary are that some
NDPBs might, in due course, not continue to hold
charitable status. Ministers might consider that
such bodies’ property, particularly heritable
property such as buildings and offices, should not
continue to be subject to charitable control,
applied to existing charitable purposes or
transferred to other bodies that are not charities
but which remain public property. In recognition of
the fact that that widens the power in section
19(8), amendments 50 and 53 change the process
for making the order from the negative to the
affirmative procedure.

I move amendment 38.

Amendment 38 agreed to.

Section 19, as amended, agreed to.

The Convener: I am sure that committee
members, the minister and her officials will be
delighted to learn that that brings us to the end of
day 1 of our stage 2 consideration of the bill.
I propose that at our next meeting we should consider amendments to the end of section 69, which is the end of chapter 9, on charity trustees. All amendments up to that section should be lodged with the clerks by 12 noon on Friday 22 April. Should members have amendments to later sections, they are welcome to submit them as soon as possible.

Meeting closed.
2nd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1 Schedule 1
Sections 2 to 74 Schedule 2
Sections 75 to 94 Schedule 3
Sections 95 to 102 Schedule 4
Sections 103 and 104 Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

After section 19

Christine Grahame
90 After section 19, insert—

<Information about charities removed from Register or defunct charities>

(1) OSCR must maintain a list of all charities removed from the Register (under section 18 or otherwise) or defunct charities.

(2) The Scottish Ministers may by regulations make further provision as to the nature of the information to be contained in the list and the manner in which it may be held.

(3) Section 21 applies to the list maintained under subsection (1) as it applies to the Register.>

Section 20

Christine Grahame
138 In section 20, page 10, line 21, leave out <38(1) or (2)> and insert <38(2)>

After section 20

Donald Gorrie
91 After section 20, insert—

<Assistance to charities and applicants>

Assistance to charities and applicants
OSCR may assist charities and applicants by providing them with information about the regulatory regime established by this Act in general and the rules governing application for entry in the Register in particular.>
Section 22

Donald Gorrie

144 In section 22, page 11, line 6, after <OSCR> insert <reasonably>

Section 28

Mr John Home Robertson

74 In section 28, page 13, line 18, after <purposes> insert <which may include consideration of information or representations received by OSCR>

After section 28

Donald Gorrie

92 After section 28, insert—

<Local charities

(1) Where a charity whose purpose is to benefit a local community (“a local charity”) appears to be failing, to a significant extent, to provide such a benefit, any community council whose area includes any part of the local community may request that OSCR make inquiries with regard to the local charity under section 28.

(2) OSCR must—

(a) inform the community council which made the request under subsection (1) of the outcome of its inquiries with regard to the local charity,

(b) if OSCR believes, as a result of those inquiries, that the charity is failing as mentioned in subsection (1), direct the local charity—

(i) to meet with representatives of the local community to discuss the charity’s past actions and future plans, and

(ii) to report to OSCR on the outcome of any meetings held under subparagraph (i) and on the action being taken by the local charity to address the failure mentioned in subsection (1).

(3) If, after receiving a report under subsection (2)(b)(ii), OSCR is not satisfied with the action being taken by the charity to address the failure mentioned in subsection (1), it may direct the local charity to replace its charity trustees.

(4) OSCR’s duties under subsection (2) and power under subsection (3) are without prejudice to OSCR’s duties and powers under sections 30 and 31.>

Section 29

Donald Gorrie

145 In section 29, page 14, line 13, after <OSCR> insert <reasonably>
Section 30

Donald Gorrie
93 In section 30, page 14, line 32, at end insert—

(A1) Before concluding that a charity no longer meets the charity test OSCR must—
(a) inform the charity that it may no longer meet the charity test and the grounds for
that view, and
(b) give the charity an opportunity to respond.

Cathie Craigie
94 In section 30, page 14, line 33, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Donald Gorrie
95 In section 30, page 14, line 33, after <28> insert <and after taking account of any response made
under subsection (A1)(b)>

Section 31

Cathie Craigie
96 In section 31, page 15, line 7, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Cathie Craigie
97 In section 31, page 15, line 14, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Cathie Craigie
98 In section 31, page 15, line 17, leave out <OSCR is satisfied> and insert <it appears to OSCR>

Section 33

Malcolm Chisholm
119 In section 33, page 17, line 2, at end insert <and it has not previously prepared a report of the
subject matter of those inquiries under this subsection or subsection (2).>

Malcolm Chisholm
120 In section 33, page 17, line 3, at end insert—

( ) A report prepared under this section may relate to two or more inquiries.

Malcolm Chisholm
121 In section 33, page 17, line 12, leave out <the report> and insert <a report prepared under
subsection (1)>
Malcolm Chisholm

122 In section 33, page 17, line 14, leave out <the report> and insert <a report prepared under this section>

Malcolm Chisholm

123 In section 33, page 17, line 14, leave out <the inquiries> and insert <inquiries made under section 28>

Section 34

Cathie Craigie

99 In section 34, page 17, line 18, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

100 In section 34, page 17, line 26, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

101 In section 34, page 17, line 29, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Cathie Craigie

102 In section 34, page 18, line 17, leave out <the Court of Session is satisfied> and insert <it appears to the Court of Session>

Section 35

Donald Gorrie

146 In section 35, page 18, line 36, after <OSCR> insert <and after hearing representations from the charities or bodies specified in the scheme and from any other person with an interest,>

Section 38

Christine Grahame

139 In section 38, page 20, line 14, leave out subsection (1)

Christine Grahame

140 In section 38, page 20, line 22, leave out <any of the functions referred to in subsection (1)> and insert <OSCR’s functions under sections 28 to 35 (other than section 30), and any of OSCR’s general functions relating to those provisions,>
Christine Grahame

141 In section 38, page 20, line 36, leave out subsection (7)

Christine Grahame

142 In section 38, page 21, line 2, leave out <(1) or>

Christine Grahame

143 In section 38, page 21, line 4, leave out subsection (9)

Section 45

Cathie Craigie

147* In section 45, page 24, line 8, at end insert—

<(  ) the manner in which irregularities or potential irregularities in accounting records
or in a statement of account must be brought to the attention of OSCR by auditors
or any other person charged with preparing that information,>

Section 56

Malcolm Chisholm

124 In section 56, page 29, line 24, leave out second <section> and insert <sections (Determination of
application for conversion) and>

Malcolm Chisholm

125 In section 56, page 29, line 26, leave out from beginning to <apply> and insert <Section 54(2)
applies>

Malcolm Chisholm

126 In section 56, page 29, line 27, leave out <they apply> and insert <it applies>

Malcolm Chisholm

127 In section 56, page 29, line 27, at end insert <(but sections 4 and 5 do not apply in relation to an
application for conversion)>

After section 56

Malcolm Chisholm

128 After section 56, insert—

<Determination of application for conversion
(1) Before determining an application for conversion, OSCR must consult—
(a) the appropriate registrar, and>
(b) such other persons as it thinks fit, about whether the application should be granted.

(2) OSCR may grant an application for conversion only if it considers that the charity, if converted into a SCIO as proposed, would continue to meet the charity test.

(3) OSCR must refuse an application for conversion if—
   (a) it considers that the SCIO’s proposed name falls within section 10,
   (b) the SCIO’s proposed constitution does not comply with one or more of the requirements of section 50 and any regulations made under that section, or
   (c) the application must, by virtue of regulations under section 6(1), be refused.

(4) If OSCR considers that a charity, if converted into a SCIO as proposed in an application for conversion, would continue to meet the charity test, OSCR may refuse the application on grounds other than those set out in subsection (3) only if it is satisfied by any representations received from those whom it consulted under subsection (1) that such a refusal would be appropriate.

Section 57

Malcolm Chisholm

129 In section 57, page 30, line 6, leave out from second <the> to <56(5)(a)> in line 7 and insert <each of the resolutions of the converting company or registered society referred to in section 56(5)>

Malcolm Chisholm

130 In section 57, page 30, line 30, after <In> insert <section (Determination of application for conversion) and in>

Section 58

Malcolm Chisholm

131 In section 58, page 31, leave out lines 5 and 6

Malcolm Chisholm

132 In section 58, page 31, line 7, at end insert <(but sections 4 and 5 do not apply in relation to an application for amalgamation)>

Section 63

Malcolm Chisholm

133 In section 63, page 33, line 27, at end insert—
   <( ) the maintenance of registers of information about SCIOs (for example, registers of members, of charity trustees or of charges over the SCIO’s assets)>

722
Section 64

Patrick Harvie
103 Leave out section 64

Section 65

Donald Gorrie
148 In section 65, page 35, line 5, leave out first <the> and insert <what the trustee considers to be the best>

Donald Gorrie
75 In section 65, page 35, line 6, after <charity> insert <and not in the interests of any outside body>

Patrick Harvie
104 In section 65, page 35, line 8, after <purposes> insert <and with the provision of public benefit>

Donald Gorrie
76 In section 65, page 35, line 11, after <must> insert <take all reasonable steps to>

Donald Gorrie
149 In section 65, page 35, line 15, leave out <is to> and insert <may>

Malcolm Chisholm
39 In section 65, page 35, line 17, leave out subsections (5) and (6)

Section 66

Malcolm Chisholm
134 In section 66, page 35, line 24, after <charity> insert <(in the capacity of a charity trustee or otherwise)>

Malcolm Chisholm
40 In section 66, page 36, line 5, leave out subsection (3)

Cathie Craigie
105 In section 66, page 36, line 14, leave out from beginning to <receive> in line 16 and insert <Subsections (1) to (4) override any provision made>

Malcolm Chisholm
135 In section 66, page 36, line 17, after <any> insert <authorising>
Malcolm Chisholm

**Withdrawn**

Malcolm Chisholm

**136** In section 66, page 36, line 20, at end insert—

<\(\) For the purposes of subsection (5)(a), an “authorising provision” is a provision which refers specifically to the payment of remuneration—

(a) to the service provider concerned,

(b) where that service provider is a charity trustee, to a charity trustee, or

(c) where that service provider is connected to a charity trustee, to any person so connected.>

Donald Gorrie

**150** In section 66, page 36, line 20, at end insert—

<\(\) Where, immediately before the coming into force of this section, it was the practice of a charity to include among its charity trustees a number of persons employed by the charity, nothing in this section affects the charity’s ability to continue that practice, provided that—

(a) OSCR is satisfied that the practice is, in the charity’s circumstances, reasonable, and

(b) the proportion of charity trustees who are employed by the charity is always less than half of the total number of charity trustees.>

Donald Gorrie

**151** In section 66, page 36, line 20, at end insert—

<\(\) Where a person is—

(a) employed by, and

(b) a charity trustee of,

the charity, the person is not, despite subsection (1), entitled to receive any remuneration in the capacity of charity trustee.>

Section 67

Donald Gorrie

**77** In section 67, page 36, line 32, after <includes> insert <functions undertaken for a charity by a charity trustee under a contract with that charity and>

Donald Gorrie

**152** In section 67, page 36, line 37, after <married,> insert—

<\(\) who is the civil partner of the trustee,>
Section 68

Cathie Craigie

106 In section 68, page 38, line 32, at end insert—

<( ) An employee of a charity may not act as or occupy the position of a charity trustee of
the charity that employs them.>

Section 70

Patrick Harvie

107 In section 70, page 39, line 35, leave out <designated religious charity or>

Patrick Harvie

108 In section 70, page 40, line 1, leave out <designated religious charity or>

Section 71

Malcolm Chisholm

42 In section 71, page 40, line 7, at end insert <and, where the decision is made by a person to whom
OSCR’s functions have been delegated by virtue of section 38, OSCR>

Malcolm Chisholm

43 In section 71, page 40, line 18, at beginning insert <where the notice is given to a person
specified in subsection (2),>

Section 75

Donald Gorrie

78 In section 75, page 42, line 7, leave out from <not> to end of line and insert <award expenses
incurred as a result of participation in the appeals process to any person who appeals a decision.

( ) The Panel may instruct OSCR to pay a compensatory amount to any charity in whose
favour the Panel finds, if the charity can demonstrate that it has suffered financial loss
either directly or indirectly as a result of OSCR’s actions, if the Panel considers these to
have been unreasonable.>

Cathie Craigie

109 In section 75, page 42, line 7, leave out <not award expenses to OSCR or> and insert <award
expenses incurred as a result of participation in the appeals process>
In section 75, page 42, line 7, at end insert—

( ) The Panel—

(a) may instruct OSCR to pay a compensatory amount to any charity in whose favour the Panel finds, if the charity can demonstrate that it has suffered financial loss either directly or indirectly as a result of OSCR’s actions, and

(b) must consult the charity concerned as to the amount of any such financial loss but, notwithstanding the results of that consultation, may set the compensatory amount as the Panel sees fit.

Section 77

In section 77, page 42, line 20, after <OSCR> insert <(or by a person to whom OSCR’s functions are delegated by virtue of section 38)>

Section 82

In section 82, page 47, line 13, after <information> insert <and identification>

Section 85

In section 85, page 50, line 12, leave out from <badges> to end of line 13 and insert <any badges or certificates of authority which regulations made under section 82(1) require to be provided>

Section 93

In section 93, page 54, line 37, at end insert <of the trust, in so far as is appropriate to the circumstances of the trust>
Before section 95

Malcolm Chisholm

115 Before section 95, insert—

<Power of charity to participate in certain financial schemes

(1) Every charity has power to participate in common investment schemes and common deposit schemes.

(2) Subsection (1) does not apply where a charity’s constitution excludes such participation by referring specifically to common investment schemes or, as the case may be, common deposit schemes.

(3) In this section, “common investment scheme” and “common deposit scheme” have the meanings given to those expressions in sections 24 and 25 of the Charities Act 1993 (c.10).>

Section 97

Malcolm Chisholm

116 In section 97, page 56, line 29, leave out subsections (2) and (3) and insert—

<(2A) The Scottish Ministers may by order—

(a) disapply section 3(3) in so far as it would otherwise apply to any body entered in the Register under subsection (1) for such period ending no later than 18 months after the commencement of this section as may be specified in the order,

(b) provide—

(i) that any unregistered charitable body (or any such body of a particular type) may, despite any contrary provision in this Act, refer to itself as a “charity” for such period ending no later than 12 months after the commencement of this section as may be so specified, and

(ii) that any enactment is to apply (with such modifications, if any, as may be so specified) to any such body as if it were entered in the Register for so long as it refers to itself as a “charity”.

(2B) In subsection (2A), “unregistered charitable body” means a body which—

(a) is established under the law of a country or territory other than Scotland,

(b) is entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(c) does not require to be entered in the Register under subsection (1).>

Section 100

Malcolm Chisholm

117 In section 100, page 58, line 24, leave out <or consequential> and insert <, consequential, transitional, transitory or saving>
Section 101

Donald Gorrie

111 In section 101, page 58, line 34, at end insert—
   <( ) an order under section 7(2B),>

Malcolm Chisholm

49 In section 101, page 58, line 34, at end insert—
   <( ) an order under section 7(4A),>

Malcolm Chisholm

50 In section 101, page 58, line 34, at end insert—
   <( ) an order under section 19(8),>

Malcolm Chisholm

51 In section 101, page 58, line 35, at end insert—
   <( ) regulations under section 82(1) containing provisions of the type described in
   section 82(2)(h),>

Donald Gorrie

112 In section 101, page 59, line 1, at end insert—
   <( ) order under section 7(2B),>

Malcolm Chisholm

52 In section 101, page 59, line 1, at end insert—
   <( ) order under section 7(4A),>

Malcolm Chisholm

53 In section 101, page 59, line 1, at end insert—
   <( ) order under section 19(8),>

Malcolm Chisholm

54 In section 101, page 59, line 2, after <63(d),> insert—
   <( ) regulations under section 82(1) containing provisions of the type described in
   section 82(2)(h),>
Schedule 4

Malcolm Chisholm
55 In schedule 4, page 65, line 28, at end insert—
<Recreational Charities Act 1958 (c.17)
In section 6(2) of the Recreational Charities Act 1958, the words from “or”, where second occurring, to “1962” are repealed.>

Malcolm Chisholm
56 In schedule 4, page 66, line 1, at end insert—
<Paragraph 5 of Schedule 2 to that Act of 1962 is repealed.>

Malcolm Chisholm
57 In schedule 4, page 66, line 4, leave out <IV> and insert <VI>

Malcolm Chisholm
58 In schedule 4, page 66, line 4, at end insert—
<(  ) in paragraph (a), for “that Part” substitute “Part VI”,>

Malcolm Chisholm
59 In schedule 4, page 66, line 10, after <(b)> insert—
<(  ) for “that Act” substitute “the Education (Scotland) Act 1980”,
( )>

Malcolm Chisholm
60 In schedule 4, page 66, line 12, at end insert—
<At the end of section 79(5) of that Act insert “or, in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.>

Malcolm Chisholm
137 In schedule 4, page 66, line 26, at end insert—
<Companies Act 1985 (c.6)
In section 380 of the Companies Act 1985, after subsection (4) insert—
“(4ZA)This section does not, despite paragraphs (a) to (c) of subsection (4), apply to any resolution of a company which is—
(a) registered as a company in Scotland, and
(b) entered in the Scottish Charity Register,
where that resolution is of either of the types mentioned in section 56(5) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”>

Malcolm Chisholm

61 In schedule 4, page 67, line 27, leave out <The Parole Board for Scotland> and insert <Scottish Children’s Reporter Administration>

Malcolm Chisholm

62 In schedule 4, page 67, line 28, leave out <Office of the>

Malcolm Chisholm

63 In schedule 4, page 68, line 5, leave out <Parole Board for Scotland> and insert <Scottish Children’s Reporter Administration>

Malcolm Chisholm

64 In schedule 4, page 68, line 6, leave out <The Office of the>

Section 103

Donald Gorrie

113 In section 103, page 59, leave out lines 19 to 29 and insert—

<( ) in relation to a charity (other than an SCIO), means the persons having the general control and management of the administration of a charity,>

Donald Gorrie

79* In section 103, page 59, line 23, leave out from <a> to end of line 24 and insert <there is a governing council or body, the members of that council or body, except to the extent that the governing council or body has delegated management and control of the charity to a committee or group, in which case the members of that committee or group to the extent of that delegated power)>

Patrick Harvie

114 In section 103, page 60, leave out lines 7 and 8

Scott Barrie

5 In section 103, page 60, line 13, leave out <includes> and insert <does not include minor>

Malcolm Chisholm

65 In section 103, page 60, line 14, after <the> insert <holder of the>
In section 104, page 60, line 33, leave out <97,>
Charities and Trustee Investment (Scotland) Bill

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Definition of “charity trustee”
113, 79

Definition of “misconduct”
5

Note: the following amendments have already been debated—

With 6 - 61, 62, 63, 64, 65

With 7 – 91

With 81 – 103, 107, 108, 114

With 1 – 111, 112

With 34 – 49, 52

With 38 – 50, 53
Present:
Scott Barrie                      Cathie Craigie
Donald Gorrie (Deputy Convener)  Linda Fabiani
Christine Grahame                Patrick Harvie
John Home Robertson              Mary Scanlon
Karen Whitefield (Convener)

Charities and Trustee Investment (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 2).

The following amendments were agreed to (without division):
94, 96, 97, 98, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 149, 39, 40 and 152.

The following amendments were agreed to (by division)—
99 (For 5, Against 4, Abstentions 0)
100 (For 5, Against 4, Abstentions 0)
101 (For 5, Against 4, Abstentions 0)
102 (For 5, Against 4, Abstentions 0).

Amendment 104 was disagreed to (by division: For 3, Against 6, Abstentions 0).

Amendments 90, 138, 144, 74, 146, 147, 148, 134 and 135 were moved and, with the agreement of the Committee, withdrawn.

Amendments 91, 92, 145, 93, 95, 139, 140, 141, 142, 143, 103, 75, 76, 105, 136, 150, 151, 77 and 106 were not moved.

Sections 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 59, 60, 61, 62, 64, 68 and 69 were agreed to without amendment.

Sections 30, 31, 33, 34, 56, 57, 58, 63, 65, 66 and 67 were agreed to as amended.

The Committee ended consideration of the Bill for the day, section 69 having been disposed of.
Charities and Trustee Investment (Scotland) Bill: Stage 2

09:32

The Convener: This is our second day of stage 2 consideration of the Charities and Trustee Investment (Scotland) Bill. Members should have before them a copy of the bill, the marshalled list of amendments and the list of groupings, which was issued on Monday. I welcome Johann Lamont, the Deputy Minister for Communities, to the committee.

After section 19

The Convener: Amendment 90, in the name of Christine Grahame, is in a group on its own.

Christine Grahame (South of Scotland) (SNP): Thank you, convener. As you can hear, I have a cold and am rather the worse for wear. I think that I am turning into a baritone.

Amendment 90 reflects the committee’s views as expressed in paragraph 67 of our stage 1 report. The committee recommended that,

“in addition to a list of current and active charities, there would also be merit in maintaining a list of charities that are no longer functioning. It considers that this would be of particular benefit where charities that are no longer functioning have remaining revenue or other assets. It would also allow such charities to be revived where appropriate and their assets to be used for the public benefit.”

Such a list would also make the status of charities clear to the public. As we know, the lack of such information was part of the problem that arose prior to the introduction of the bill, when there were—if I may use the colloquialism—iffy charities. Amendment 90 would make charities if-less.

Donald Gorrie might want to speak about the amendment at some point. He, too, was in favour of maintaining such a list.

I move amendment 90.

Donald Gorrie (Central Scotland) (LD): Christine Grahame is correct that I shared the concern that some of the groups from which we heard expressed about information being available on defunct charities. I believe that we should make it as easy as possible for local communities to pursue issues about local charities. Indeed, I have a separate amendment about that. The wording of amendment 90 may not entirely fit the bill, but I will be interested to hear the minister’s comments.

We certainly need to make it as easy as possible for communities to seek out and revive defunct charities. In aggregate, there are huge amounts of money lying about here and there in
small sums in the accounts of defunct charities. It would also be helpful to have a list of the charities that have been removed from the register. We should certainly do something about the defunct charities. I hope that the minister will agree to help in that regard, even if she cannot support the amendment.

The Deputy Minister for Communities (Johann Lamont): Whether a list should be kept of those organisations that have been deemed to be no longer charities and what action should be taken when a charity becomes defunct are probably two separate issues.

Arguably, amendment 90 would not achieve its aims and might do more harm than good. The public need the register to be clear, so only bodies that are charities should appear on the register. We need to consider what purpose would be served by requiring a list to be maintained of ex-charities, possibly including their previous charity numbers. Such an argument may not be absolutely compelling, but amendment 90 could add to confusion. Under the bill, the Office of the Scottish Charity Regulator is already required to publish a report on action that it takes against charities, including every case in which a charity is removed from the register.

If the information on the proposed list is required simply as a matter of historical record, we believe that OSCR could be requested to provide that information in the isolated instances in which it was necessary to establish whether a body was previously a charity. If, in time, I am proved wrong and OSCR is overwhelmed with requests for such information, it will be free to set up such a list and make it publicly available without the need to amend the legislation.

I am aware that the committee recommended a similar list for charities that are no longer functioning but have remaining revenue and assets. However, such a list is unnecessary, as section 47 allows financial institutions to inform OSCR of any dormant charity accounts. In addition, the consultation on the accounting regulations proposes that regulations made under section 45 should require that accounts for dormant charities must continue to be sent to OSCR. That would allow OSCR to intervene if the assets of a charity that disappears could, under section 41, be better used by another charity.

I hope that I have been able to give Donald Gorrie the reassurance that he sought. As I have indicated, I believe that Christine Grahame’s amendment 90 is unnecessary.

Christine Grahame: I am not satisfied with what the minister has said. Amendment 90 is not about a major issue, but the whole point of the legislation is to give ordinary people clarity, which is what my simple amendment would give them.

Amendment 90 also states clearly:

“The Scottish Ministers may by regulations make further provision as to the nature of the information to be contained in the list and the manner in which it may be held.”

Therefore, for instance, regulations could prescribe that charities that are removed from the register should continue to be listed for a year before all reference to them is removed. The amendment would give OSCR flexibility on what appears on the register.

It would be useful to allow people to see which charities have been removed from the register. People could click on OSCR’s website to see the list of charities that have been removed from the register and the date on which they were removed. If people want to find out about defunct charities, they should be able to see which charities are defunct and which defunct charities still have assets. Amendment 90 would simply provide people with a point of reference so that they would not need to check all the accounts that have been submitted. The whole point of the bill is to ensure that ordinary people feel secure about the various charities and their status at any time. A defunct charity might be revived at some point.

Amendment 90 is a simple, straightforward amendment that would require OSCR to keep a record. The amendment reflects views that were given to the committee and it reflects the committee’s unanimous views. We thought that such a list would be useful to people.

Although I am prepared to seek the committee’s leave to withdraw amendment 90, I am keen to hear what the Executive will have to say at stage 3. If the Executive produces amendments that would alleviate the concerns, it might not be necessary for me to relodge my amendment. However, I give the minister notice that, if I am given leave to withdraw amendment 90, I would be prepared to bring back a similar amendment at stage 3 to advance the argument further.

The Convener: In light of Ms Grahame’s comments, I ask the minister whether she has anything further to add.

Johann Lamont: If amendment 90 is withdrawn, I would be happy to clarify matters and to pursue some of the practical points that Christine Grahame has raised.

Amendment 90, by agreement, withdrawn.

Section 20—Co-operation

The Convener: Amendment 138, in the name of Christine Grahame, is grouped with amendments 139 to 143.

Christine Grahame: I think that I am sinking; I am trying to remember why on earth I lodged amendment 138. It looks technical.
Scott Barrie (Dunfermline West) (Lab): That will explain it then.

Christine Grahame: I think that I lodged amendment 138 because it is not appropriate for section 20(3) to refer to section 38(1) when defining who must co-operate with OSCR. I am dreadfully sorry that I cannot do any better than that. If anyone else can help, they would be welcome to do so.

The Convener: The minister might have a slight advantage. She might understand Christine Grahame’s mind a little better than Christine Grahame understands it.

Johann Lamont: I will try not to demolish Ms Grahame’s arguments. Amendments 138 to 143 deal with Communities Scotland’s regulation of charitable registered social landlords.

I welcomed the committee’s agreement in its stage 1 report that it was appropriate for Communities Scotland to continue its regulatory role in relation to charitable RSLs. That is in keeping with our desire for proportionate regulation. I acknowledge that there are concerns that that might lead to the bill being interpreted and enforced differently with different types of charity, but my response to those concerns continues to be that OSCR will retain control over the charity test and entry in the register. RSLs will have to register with OSCR and OSCR will continue to apply and review the charity test. I believe that that provides sufficient comfort to those people who may have anxieties. Again, we have tried to strike a balance between the exercise of regulatory functions and recognition of how the sector operates in the real world. Anyone who has connections with RSLs will be aware of the degree of regulation by which they are covered.

Members will have noticed that the Executive has lodged amendments that seek to clarify that decisions that are made by someone with delegated powers will be subject to the bill’s full appeals process; I will speak to those amendments later. At this stage, it is sufficient to highlight the fact that OSCR must review decisions that have been taken by a person to whom its functions have been delegated when it is requested to do so. I hope that that provides further reassurance that OSCR will retain control over the bill’s interpretation, although its decisions will, of course, be subject to appeals that are made to the Scottish charity appeals panel and judgments that are made by the Court of Session. I ask members to resist the amendments in this group.

The Convener: I hope that the minister has clarified why Ms Grahame might have lodged amendment 138. In her haze of confusion, Ms Grahame failed to move her amendment.

Christine Grahame: I move amendment 138, although I do not intend to press it. Amendments 138 to 143 are in my name, but Linda Fabiani was to speak to them. That is why I am so ill informed.

Linda Fabiani (Central Scotland) (SNP): And so ill.

Christine Grahame: I did not speak to any of the other amendments in the group. I do not know whether it would be appropriate for Linda Fabiani to do so now.

Amendment 138, by agreement, withdrawn.

Section 20 agreed to.

After section 20

Donald Gorrie: It is difficult to remember but, in the light of the discussion that we had last week, I agreed not to move my amendment 91 because the matter was adequately covered in other ways.

Amendment 91 not moved.

Section 21 agreed to.

Section 22—Power of OSCR to obtain information from charities

The Convener: Amendment 144, in the name of Donald Gorrie, is grouped with amendment 145.

Donald Gorrie: Both amendments insert the word “reasonably”, to ensure that OSCR acts reasonably in requiring information from a charity. The amendments have been suggested by the Law Society of Scotland, which, I am sure, is a very reasonable body. I am sure that OSCR is also a reasonable body; nevertheless, the law should cover against some future OSCR not being so reasonable. It is fair to state in the bill that OSCR must have good reasons for requiring information under sections 22 and 29. It is not a matter of life and death, but the word “reasonably” improves both sections.

I move amendment 144.

Johann Lamont: The embodiment of reasonableness, I will attempt to respond to Donald Gorrie’s comments.

I do not believe that amendments 144 and 145 are necessary. As the Law Society has acknowledged in suggesting the amendments, OSCR is a public body and is therefore already under a duty to act reasonably. OSCR will be covered by the Ethical Standards in Public Life etc (Scotland) Act 2000 and will have to live up to modern expectations of good regulation.

Amendment 144 relates to OSCR’s powers to obtain the documents and information that it
requires in relation to a charity’s entry in the statutory register. By its nature, that information is confined to what is required specifically for that narrow purpose. Additionally, there is a restriction in section 22 so that OSCR may not require the disclosure of confidential information in connection with proceedings at the Court of Session.

More generally, section 1(4) specifically provides that OSCR may not do anything to contravene any express prohibition that is contained in any enactment, including the provisions of the bill. OSCR is therefore subject to all the restrictions that are contained in the Data Protection Act 1998 and other legislation relating to the exchange of information and it must act only within the confines of the powers that are granted to it by the bill.

Amendment 145 relates to OSCR’s powers to obtain documents or information for inquiries. One of OSCR’s fundamental functions is to identify and investigate apparent misconduct. It must make inquiries to ensure that charities comply with the requirements of the bill. Again, we expect OSCR to be reasonable in making demands for information for its inquiries. The restriction on disclosure of confidential information under section 29 is identical to the restriction under section 22. There is a further provision in section 29(4), under which documents or information that are disclosed in connection with an inquiry can be used only in connection with that inquiry. Finally, a requirement on any person to provide documents or information under section 29(1) is subject to a specific right of review by OSCR under section 70. In addition to the above, a person who does not consider that OSCR has acted reasonably may seek judicial review.

The existence of those checks and balances should provide sufficient comfort to those who are concerned that OSCR would not act reasonably. Therefore, I do not support the amendments, as they are not necessary. I am also concerned that, if passed, they may raise the question why every other action that is taken or decision that is made by OSCR should not be subject to similar specific qualifications in the bill. I urge Donald Gorrie to withdraw amendment 144 and not to move 145.

Donald Gorrie: I am content to withdraw amendment 144. I would not wish indirectly to encourage OSCR to be unreasonable under other sections of the bill. The minister has also given reasonable assurances about the reasonableness of OSCR.

Amendment 144, by agreement, withdrawn.

Section 22 agreed to.

Sections 23 to 27 agreed to.

Section 28—Inquiries about charities etc

The Convener: Amendment 74, in the name of John Home Robertson, is grouped with amendments 92, 93 and 95.

Mr John Home Robertson (East Lothian) (Lab): I will leave it to Donald Gorrie to address the three amendments in his name. I will speak to and move amendment 74, which would specifically enable OSCR to make inquiries about a charity when the regulator has received relevant information or representations from a third party about that charity. Colleagues may recall my suggestion at an earlier stage that there could be some form of public notification of applications for charitable status. I offer amendment 74 as an alternative way of ensuring that people who have genuine concerns about either the objectives or the conduct of a charity can be heard and that OSCR can react to such information.

I stress that I do not want—and I am sure that nobody on this committee would want—OSCR to waste time on frivolous or malicious complaints; however, there should be a system to enable the regulator to act on genuinely relevant information when that comes to OSCR’s attention. Charities depend on public confidence, so it is in the interests of the charitable sector to have an effective mechanism to deal with information about organisations that go wrong.

In 26 years in Parliament, I have come across just two cases of what I regarded as serious concerns about individual charities. I raised both those cases in the House of Commons at different times, and it soon became clear that the old regulatory system was pretty much incapable of dealing with such concerns. It might be helpful if I describe those two cases briefly. I express the hope that the new system might be able to react better to such circumstances.

First, the Atlantic Salmon Conservation Trust (Scotland) made it its business to acquire the net fishing rights on several Scottish rivers and to close down long-established legal netting stations—which, incidentally, destroyed a significant number of jobs in remote areas. The objective of conserving wild salmon is perfectly legitimate; however, it came to my attention that there was a separate motive for some of those who were involved in the organisation in seeking to increase the number of salmon that would be killed by anglers, which would increase the value and revenue of rod fishing at beats elsewhere on the rivers. I obtained a copy of a letter to rod fishing proprietors from the Duke of Roxburgh, no less, on behalf of the trust, dated 23 August 1988, which said:

“As all the Tweed proprietors, and proprietors of all the main tributaries are likely to benefit enormously over the course of the next few years from the removal of the bulk of
the netting presence and the subsequent control of the Tweed salmon stocks for conservation, it would be nice to think that all proprietors interested in salmon conservation would contribute to the A.S.C.T.(S)—

the Atlantic Salmon Conservation Trust (Scotland)—

“possibly in proportion to their assessable value.”

So, the trust was not just a conservation body; it was also a vehicle for a tax-efficient investment by proprietors so that their businesses could, to quote the Duke of Roxburgh, “benefit enormously”. That is not recognisable as a charitable purpose, and a lot of people protested about that case; however, nothing was done about it. The investment worked, and the Atlantic Salmon Conservation Trust (Scotland) is still a charity that owns extensive fishing rights throughout Scotland. The Inland Revenue in Scotland made its decision that the trust was a charity, and there was no way of getting its status reviewed, regardless of the Duke’s letter or any other information.

The other example that I cite is a rather more worrying and distressing story involving the Algrade Trust, which used to operate a residential home for people with learning difficulties in the village of Humbie, in East Lothian. The trust’s constitution refers to providing for the "spiritual, physical and material welfare and education of the mentally handicapped".

The word “spiritual” is the worrying one.

The operation of the home went badly wrong. When I raised the matter in the House of Commons in June 1996, I pointed out that the trust was getting £420,000 from the Department of Social Security to care for its residents, but was spending just £36,000 on staffing. I will quote Hansard, because I need to be a little bit careful. I said:

“I believe that large sums of money that should have been spent on the care of handicapped people have been diverted into the former trustees’ religious organisation, and into property that now belongs to individual former trustees.” —[Official Report, House of Commons, 16 January 1996; Vol 269, c 648.]

The home was closed following the intervention of the local authority and proper care arrangements were made for the former residents, but the Algrade Trust still exists and still has substantial assets. According to the most recent accounts that I have seen, it has £587,000, and the site at Humbie was sold in 2000 for £350,000. One might expect that all that money would be applied for the benefit of former residents and other people with learning difficulties, but I see from the trust’s accounts that there is £124,000 in what is called a Christian work fund, which I presume is for the trust’s religious activities.

I have made repeated attempts to get the authorities to intervene to resolve the problems at the Algrade Trust, but, 10 years on, questions still need to be answered. I hope that OSCR will be able to address such issues.

I apologise for going on at length, but the examples that I gave are relevant. Obviously the overwhelming majority of Scottish charities do their jobs well and conscientiously, but it is inevitable that things will go wrong occasionally. I have given a couple of examples from my experience of cases in which the old system for the supervision of charities appears to have failed, despite the best efforts of whistleblowers. That is why I am suggesting that it would be useful to give OSCR a specific power to act on information when it sees fit. I put that point to the minister and suggest that it would be useful to have provision for that in the bill. I appreciate that the drafting of amendment 74 might be technically inappropriate, but I urge the minister and colleagues on the committee to consider the point that it makes. If we cannot deal with it now, it might be appropriate to return to it at stage 3.

I move amendment 74.

Donald Gorrie: I have three amendments in this group; the final two are on the same subject, which I will come to in a moment.

Amendment 92 relates to the same issue that John Home Robertson raised, but focuses on a different aspect of it. I do not think that the point was drawn to our attention when we took evidence on the bill, but, since then, a colleague produced a case from his constituency that raised it. The bill is thorough in dealing with clear financial or other irregularities. Amendment 92 is concerned with people who have been lazy or incompetent or, for whatever reason, have not pursued actively what their charity is supposed to do.

The complaint to which I refer came from a community council in connection with an organisation in which, for various reasons, there had been changes in the trusteeship and which seemed to be failing to pay out the money that it should have been paying to advance people’s education. There seemed to be high running costs and little benefit to the community.

Amendment 92 is a first stab at the issue and I do not necessarily expect the committee or the minister to accept it. There should be provision to enable a community—a community council is a good vehicle for this—to ask OSCR to intervene. It would not be open to any Tom, Dick or Harry to create lots of trouble. However, if a community council is persuaded that a trust or charity is not helping the local community as much as it should, it could draw OSCR’s attention to the situation. If, after looking into the matter, OSCR thought that the complaint had substance, it would contact the charity and get it to discuss things with the...
community council and other local representatives. Following the outcome of that discussion, OSCR could pursue the matter further—or not. In any case, there should be some mechanism that allows an organisation such as a community council to be able to put its case to OSCR with regard to examining how a local charity is doing.

Amendment 93 concerns an issue that I feel strongly about. The changeover from the existing system to the new system in the legislation will be difficult for a lot of charities, and OSCR might at first sight decide that many quite worthy organisations that are currently charities should not keep that status. It might well be that such organisations did not present their case as well as they should have done.

Amendment 93 seeks to give those organisations a second kick at the ball. OSCR should have to specify why a charity is not meeting the charity test, as that would allow the charity in question to put forward better arguments or alter its operation to meet OSCR's points. Members might have views on the amendment's wording, but it is important that existing charities should get as much of a chance as possible to retain their charitable status. I hope that the minister will be sympathetic to amendment 93.

Amendment 95 is consequential on amendment 93.

10:00

Christine Grahame: I have a great deal of sympathy for amendment 74. Allowing third parties to come forward in the circumstances that John Home Robertson described would strengthen OSCR's powers. Whistleblowing can be so important and although it might be implied in section 28, it is not explicitly stated.

I see where Donald Gorrie is coming from with amendment 92. However, I cannot agree to it, because I really do not feel that community councils are always representative of their communities. Some are representative, but others are made up of people who have bees in their bonnets about things. Indeed, sometimes, a community council might well be simply six folk who have nominated themselves without having a huge election—would that community councils were more democratic in some cases.

I was quite sympathetic to amendment 93, but my problem is that it is a mandatory, not discretionary, provision. It says:

"Before concluding that a charity no longer meets the charity test OSCR must ... inform the charity that it may no longer meet the charity test".

Perhaps the minister will outline the circumstances in which such a course of action would be inappropriate. OSCR might have to act quickly on a certain matter and use its discretion over whether time should be given to a charity to come up with other arguments. For example, informing a charity "that it may no longer meet the charity test"
might simply alert the charity in question, which could manage to salt away some of its funds while it is busy coming up with reasons for retaining its status.

Linda Fabiani: I was interested in what John Home Robertson had to say about amendment 74, which I think is worthy of support.

As far as amendment 32 is concerned, my constant concern, which was reflected in some of the questions that I raised about RSLs, is that the regulation of charities should be kept fairly tight and that OSCR should be on top of everything. I worry about giving community councils a role in regulating charities. When we discussed the RSL issue, I was quite satisfied by the minister's comments with regard to intention. Is she able to tell us whether the view that communities should be consulted can be reflected in the bill without having to set things out or name community groups such as community councils? I feel that things should be kept as tight as possible to ease OSCR’s management and operation.

On amendment 33—

Christine Grahame: You mean amendment 93.

Linda Fabiani: Did I say amendment 33?

Christine Grahame: Yes—you said “32” and “33” rather than “92” and “93”.

Linda Fabiani: I am so glad that Christine Grahame is here to keep me right this morning. She is so on the ball.

On amendment 93, I share Christine Grahame’s worry about the word “must”. I am not sure that the provision should be mandatory, but I will be interested to hear the minister’s comments on that.

Johann Lamont: I will deal with the amendments in turn.

On amendment 74, without knowing the details I cannot comment on the individual cases that John Home Robertson identified, but the experience that he mentioned is perhaps a useful reminder of why we are considering the bill in the first place. However, members who have concerns at the moment about any charity should be aware that they can refer those concerns to OSCR. Obviously, OSCR's current powers are different from those that it will acquire under the bill, but that option already exists. I recognise John Home Robertson's long-standing concern on the issue.
Amendment 74 seeks to make it clear that OSCR may make inquiries following the receipt of information or representations, which would presumably come from members of the public or others who believe that a body is not a charitable organisation and should not be entered on the register. The amendment perhaps reflects concerns that we have wrestled with about the current system, which is to be changed under the bill.

I believe that amendment 74 may not be necessary. The amendment perhaps comes from the same concern that prompted the committee to recommend in its report that the bill provide for a publicly accessible list of bodies that have applied for charitable status. As I said in my letter to the committee earlier this month, I can reassure members that the power that is given to OSCR under section 28—which provides that “OSCR may at any time make inquiries, either generally or for particular purposes”—covers the circumstance in which OSCR considers that it should make an inquiry as a result of information or representations that it has received from the public.

People will have ample opportunity to communicate to OSCR their views on whether certain types of charity should pass the charity test. Also, OSCR will be able to react to any complaints that it receives about any organisation that is said not to provide public benefits. Therefore, I think that both examples that John Home Robertson identified would be covered.

As we discussed last week, OSCR will consult on how it will determine whether a body meets the charity test. That will give everyone a chance to submit their views on how the test should operate. OSCR will also be able to conduct inquiries if anyone complains about a charity and, if necessary, that process can lead to the charity being removed from the register. Given that OSCR will have the powers to do the things that John Home Robertson wants it to do, I urge him to withdraw amendment 74.

Amendment 92, in the name of Donald Gorrie, aims to ensure that small local charities continue to provide the important benefits for which they were set up. That is commendable, but the amendment is unnecessary. It would not be appropriate to give community councils specific powers to request an inquiry or for OSCR to have different powers and duties in relation to local charities. As others have pointed out, community councils vary enormously across the country, being strong in some places but less strong in others. Before giving a power to such bodies, we would need to ensure that they were consistent across the country.

The bill already provides OSCR with a range of powers that it can use to deal with any charity—including a small local charity—that is in some way failing. In addition to its powers to direct a charity to take action to fix problems, OSCR can give advice on how a charity can ensure that it complies with the law. In any case, as I mentioned, it is open to anyone to raise concerns with OSCR at any time about any charity that operates in Scotland. By definition, that includes community councils.

OSCR’s role is not to advise the sector on best practice but to encourage, facilitate and monitor compliance with the law. As members will be aware, the Scottish Council for Voluntary Organisations has strongly stated that good practice guidance is a matter for the sector and for umbrella organisations such as the SCVO.

I am also not sure whether Donald Gorrie has in mind a specific definition of what would constitute a “local charity”, which would need to be clarified if the amendment were agreed to. I ask Donald Gorrie not to move amendment 92, as it is unnecessary.

Amendment 93 seeks to require OSCR to inform any charity that it believes is failing to meet the charity test and to listen to the charity’s response before it uses its powers under section 30 to remove the charity from the register. That is unnecessary because section 30 already provides OSCR with an alternative power to direct a charity to take such steps as it considers necessary to ensure that it meets the test. That means that OSCR can decide whether to issue a charity with such a direction before deciding whether it needs to remove the charity from the register.

In practice, if there is a straightforward way of ensuring that a charity can continue to meet the charity test, OSCR is unlikely to remove it from the register without first giving it a chance to remedy the problems and allowing it time to respond. In any case, OSCR is required to prepare a report on the subject matter of inquiries that result in the removal of a charity from the register. Of course, any decision that OSCR makes to remove a charity from the register can be reviewed or appealed if the charity disagrees with OSCR’s decision. Removal from the register does not occur until the period that is set out under the appeals mechanism has elapsed. If a review or appeal is requested, that process must run its course. That means that a charity will have time to consider OSCR’s decision and to respond to or remedy the problems that have been identified.

We do not think that amendment 93 or amendment 95—which is consequential on amendment 93—are necessary, so we ask Donald Gorrie not to move them.
Mr Home Robertson: I am grateful to the minister and to colleagues who have taken part in the discussion. I highlighted the two bad experiences that I have had in what has been rather a long career of involvement with charities. I welcome the fact that fresh legislation has been introduced; we have waited for it for a long time. The bill is necessary to avoid the sorts of problems that I have mentioned and to underpin the quality of the Scottish voluntary and charitable sector.

The minister said that amendment 74 “may not be necessary”—her choice of words was interesting—and made the point that OSCR has the power to make inquiries in any circumstances. That is what the bill says, but I am still keen that third parties should have clear opportunities to make representations. I accept the minister’s point that it would be for OSCR to act on any such representations.

I have referred to what I consider to be two bad cases. We have been waiting for a new legislative framework for charities for a long time and it is imperative that we get it right. At the moment, the bill gives OSCR an implicit right to take account of representations that it receives, but I want OSCR to have the authority to act on such representations when it sees fit to do so. The minister has heard what I have had to say on the matter and has listened to the views of committee colleagues, but has not rejected the idea out of hand. I welcome the fact that the Executive is prepared to think about that aspect of the bill.

I ask the minister to consider the possibility of the Executive lodging an amendment at a later stage. Depending on what happens, I might return to the issue; that is something that we can talk about. At this stage, the sensible thing would be for me to withdraw amendment 74 and to leave the matter open to further consideration.

Amendment 74, by agreement, withdrawn.

Section 28 agreed to.

After section 28

Amendment 92 not moved.

Section 29—Power of OSCR to obtain information for inquiries

Amendment 145 not moved.

Section 29 agreed to.

Section 30—Removal from Register of charity which no longer meets charity test

10:15

Donald Gorrie: I still have concerns about the basic issue, but in the light of what the minister has said, I will not move amendment 93.

Amendment 93 not moved.

The Convener: Amendment 94, in the name of Cathie Craigie, is grouped with amendments 96 to 102.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Members will recall that, at stage 1, concerns about the use of the term “satisfied”, especially in section 34, were raised in oral and written evidence to the committee. The Charity Law Association commented that the bill would better fall into line with other legislation if, instead of the phrase “OSCR is satisfied”, it used the phrase “it appears to OSCR”. I am not a lawyer, but I understand that the word “satisfied” implies that there is unquestionable evidence—the term is far too wide ranging. The committee was persuaded by that evidence and highlighted the issue in its stage 1 report. When the Deputy Minister for Communities gave evidence to the committee, she suggested that the Scottish Executive should tighten up the language. Amendments 94 to 102 satisfy the will of the committee and are based on the evidence that the committee received from individuals who have an interest.

I move amendment 94.

Johann Lamont: We recognise the committee’s support for Cathie Craigie’s amendments. The view of the Executive was expressed in evidence at stage 1 and continues to be that we would prefer to use the term “satisfied”. A change in wording would not change the legal effect of the provisions. The committee stated in its report that it was inappropriate to use the term “satisfied” in sections 30 and 31 because that implied a deduction from evidence. The contrary argument, in support of using the term “satisfied”, has always been that it will be appropriate for OSCR to take action only after considering evidence.

It is OSCR’s responsibility to act reasonably and proportionately and it will not remove bodies from the register or suspend trustees under the powers conferred by sections 30 and 31 without first considering all the information from its inquiries. Indeed, the powers can be used only following inquiries, so OSCR will always have evidence to back up its decisions. OSCR’s actions following inquiries are subject to review and appeal and it must publish a report on its decisions. OSCR will, therefore, wish to ensure that its actions can be fully justified.

However, given the strongly expressed concerns of the committee about the use of the term “satisfied” and its support for a change to the wording, and considering that we continue to think that that would result in no change to the effect of either section 30 or 31, we are prepared to accept the amendments.
On that basis, we are also prepared to accept the similar amendments in relation to the powers of the Court of Session under section 34. Again, the amendments make no difference to the effect of the section. The court will always have to consider the evidence that is presented to it before making a judgment.

Amendment 94 agreed to.

Amendment 95 not moved.

Section 30, as amended, agreed to.

Section 31—Powers of OSCR following inquiries

Amendments 96 to 98 moved—[Cathie Craigie]—and agreed to.

Section 31, as amended, agreed to.

Section 32 agreed to.

Section 33—Reports on inquiries

The Convener: Amendment 119, in the name of the minister, is grouped with amendments 120 to 123.

Johann Lamont: It is right that OSCR should have to produce a report on the outcome of its inquiries if a charity requests it to do so. Section 33(1)(b) already provides for that. However, there will be occasions when OSCR will undertake more general monitoring inquiries into a number of charities or in relation to every charity on the register—for example, when it seeks annual monitoring returns or information on a specific type of charity. OSCR has raised concerns that, in such instances, section 33 as currently drafted could force it to have to produce individual reports for every charity on request. Amendments 119 and 120 are therefore intended to clarify that OSCR can produce a general report following general inquiries into a number of different charities as opposed to having to produce a separate report on each charity.

Amendments 121, 122 and 123 are technical amendments. Amendment 121 clarifies that OSCR is under a duty to send a copy of reports that are produced to the person concerned only when it has taken regulatory action or when someone has requested that a report be produced. Amendments 122 and 123 make it clear that all reports or statements of results that are produced by OSCR must be published regardless of whether regulatory action is taken.

I move amendment 119.

Amendment 119 agreed to.

Amendments 120 to 123 moved—[Johann Lamont]—and agreed to.

Section 33, as amended, agreed to.

Section 34—Powers of Court of Session

Amendment 99 moved—[Cathie Craigie].

The Convener: The question is, that amendment 99 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 99 agreed to.

Amendment 100 moved—[Cathie Craigie].

The Convener: The question is, that amendment 100 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.

Amendment 100 agreed to.

Amendment 101 moved—[Cathie Craigie].

The Convener: The question is, that amendment 101 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
AGAINST
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.
Amendment 101 agreed to.
Amendment 102 moved—[Cathie Craigie].

The Convener: The question is, that amendment 102 be agreed to. Are we agreed?
Members: No.
The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

AGAINST
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 5, Against 4, Abstentions 0.
Amendment 102 agreed to.
Section 34, as amended, agreed to.

Section 35—Transfer schemes

The Convener: Amendment 146, in the name of Donald Gorrie, is in a group on its own.

Donald Gorrie: As the bill stands, the Court of Session may, on an application by OSCR, approve a scheme. The point made by amendment 146 is that the court should also hear “representations from the charities or bodies specified in the scheme” put forward by OSCR for reorganisation

“and from any other person with an interest”
in the subject. As the bill stands, the Court of Session could go ahead just on the basis of OSCR’s representations. However, I believe that the bill should specify that, in the interests of natural justice, the court—it would probably do this anyway—should hear the views of the charities, which might be unhappy about the scheme that has been prepared by OSCR for the transfer. Other people who have an interest should also be allowed to speak. The amendment is clear and it is in the interests of fairness and justice.

I move amendment 146.

Linda Fabiani: I am unsure about amendment 146. I am interested to hear what the minister says. I am concerned about the use of the phrase “from any other person with an interest”.

I have worries about how someone “with an interest” would be defined. I ask Donald Gorrie to deal with that point when he sums up.

Mary Scanlon (Highlands and Islands) (Con): That is exactly the point that I was going to make. I am not sure who “any other person with an interest” might be, so I look forward to hearing some clarification.

The Convener: The Tories and the SNP are speaking with one voice on this occasion.

Johann Lamont: Although I understand the motivation behind Donald Gorrie’s amendment, I do not believe it to be necessary. The procedures of the Court of Session are such that the charities and bodies involved would be given the opportunity to be heard without the bill conferring express permission. If amendment 146 were agreed to without a similar power being added to section 34, which sets out the powers of the Court of Session following misconduct, there could be an unintended inference that the rights of the parties in an action that involved the court’s general powers in relation to misconduct were different. I am content that, as the bill stands, the court would be able to take evidence from everyone involved, in both situations. In the light of those concerns and the reassurance that I have given, I ask Donald Gorrie to withdraw amendment 146.

10:30

Donald Gorrie: Colleagues have raised fair queries. I thought that a person with an interest would be someone who receives benefits from a charity. If OSCR changes a charity’s system, not only the charity itself but the recipients of benefits from the charity will have an interest. However, I do not wish to prejudice other sections of the bill and, in the light of what the minister said, if it is quite clear that the people to whom I referred will get a say, I will seek the leave of the committee to withdraw amendment 146. It is useful to have the matter on the record.

Amendment 146, by agreement, withdrawn.
Section 35 agreed to.
Sections 36 and 37 agreed to.

Section 38—Delegation of functions

Amendments 139 to 143 not moved.
Section 38 agreed to.
Sections 39 to 44 agreed to.
Section 45—Accounts

The Convener: Amendment 147, in the name of Cathie Craigie, is in a group on its own.

Cathie Craigie: Chapter 6 deals with charity accounts. Committee members were reasonably content with the bill’s provisions in that regard, which will increase the openness and accountability of charities. The committee took evidence from the Chartered Institute—sorry, I am thinking about the Housing (Scotland) Bill. We took evidence from the Institute of Chartered Accountants of Scotland which—although it was fairly positive in its support for the bill—expressed concerns about the duty to report. The committee thought that there was merit in the point that ICAS made about the difficulties that auditors might face in relation to client confidentiality if they reported concerns to OSCR or another party. ICAS felt that, as it stands, the bill does not give protection in law to auditors and others who disclose information that they hold in order to bring it to OSCR’s attention, so the profession might feel nervous about making such reports.

It was difficult to be sure where to insert amendment 147 into the bill, so I will be interested to hear whether the minister thinks that the amendment relates to the right section. The amendment deals with a serious concern that was brought to the committee’s attention and, as far as I recall, the committee agreed unanimously with ICAS on the issue.

I move amendment 147.

Johann Lamont: I understand what amendment 147 seeks to achieve and why it has attracted the support of the whole committee, but I do not believe that it is necessary.

Amendment 147 would provide that the manner in which accounting irregularities should be brought to OSCR’s attention would be prescribed in regulations, but the amendment would not place on auditors the additional duties that would give them the protection that Cathie Craigie seeks. We are aware of the arguments that have been made by the Institute of Chartered Accountants of Scotland and others, but we feel that it is unnecessary to place on auditors an explicit duty either on the face of the bill or in regulations. Auditors and other examiners should not sign off any accounts or statements of accounts if they have any material concerns. OSCR would be alerted to any potential problems in a charity’s accounts by the fact that the accounts had not been approved.

Section 25(2)(d) already provides that a person who carries out an audit or independent examination may disclose information to OSCR for the purpose of assisting OSCR with its functions. Therefore, auditors will be free from any secrecy restrictions that are imposed under Scots law, such as a confidentiality agreement with the auditor’s client. The provision allows wide discretion to provide information that could be used in connection with an inquiry. That could cover accounting irregularities that the auditor believes are relevant to OSCR’s functions.

I recognise the strength of feeling behind the committee’s arguments and am happy to commit to exploring further whether anything else could be done within the Scottish Parliament’s responsibilities in relation to the matter, but I ask Cathie Craigie to seek to withdraw amendment 147.

The Convener: Mrs Craigie needs to decide whether she wishes to press or withdraw amendment 147.

Cathie Craigie: I thank the minister for her comments, which have been useful. As I said, I was not sure whether amendment 147 would amend the right section. Given that difficulty, I accept the minister’s commitment to consider the issue further. Perhaps the Executive can discuss the matter with ICAS to see whether a satisfactory solution can be found.

Amendment 147, by agreement, withdrawn.

Section 45 agreed to.

Sections 46 to 55 agreed to.

Section 56—Conversion of charity which is a company or registered friendly society

The Convener: Amendment 124, in the name of the minister, is grouped with amendments 125 to 133 and 137.

Johann Lamont: The amendments in the group result from our discussions with Companies House about the interaction between the process for a charitable company converting to a Scottish charitable incorporated organisation—or SCIO—and procedures under the companies acts. In particular, difficulties were identified in connection with the process for removing bodies from the existing companies and friendly societies registers prior to their incorporation as SCIOs. The amendments attempt to resolve those difficulties.

The placing of a duty on the existing regulators to remove a converting body from the existing registers may need to be provided for by an order under the Scotland Act 1998. We are discussing the matter with relevant colleagues and if the amendment proves to be unnecessary, further amendments may be required at stage 3.

Amendment 128 will insert a new section after section 56 to deal with the determination of applications to convert. In determining whether to accept an application to convert, OSCR must
consider the same issues as it does when it considers an application to establish a new body as an SCIO. However, the new section will also place a duty on OSCR to consult with the registrar of companies or the Financial Services Authority and other such persons as it thinks fit before determining an application to convert. Other persons could include existing security holders.

The new section will further provide that although a body would meet the charity test following conversion to a SCIO, OSCR may refuse an application to convert as a result of representations it receives from consultees. OSCR may refuse such an application on that basis only if the representations that it receives satisfy it that refusal is appropriate. In that way, amendment 128 addresses the concern of Companies House that the bill gives it no opportunity to advise OSCR that a company that applied for conversion was in default under the companies acts.

Amendments 124 to 127, 130 and 132 are consequential on amendment 128.

Amendment 133 will extend the regulation-making power in relation to SCIOs in section 63. It will ensure that regulations can set out the details of other registers that OSCR can establish about SCIOs. On a body’s conversion to a SCIO, OSCR may be required to set up registers to replicate existing registers for incorporated bodies, such as a register of charges. The United Kingdom Charities Bill also provides for such a possibility.

Amendment 137 will add to the list of amendments in schedule 4. It will disapply section 380 of the Companies Act 1985 in relation to resolutions for conversion to a SCIO by a Scottish charitable company. Section 380 of that act provides for most company resolutions to be submitted to the registrar of companies within 15 days of their being passed. If that provision were not disapplied, the registrar of companies would have to record a resolution to convert before OSCR had agreed to that conversion.

I move amendment 124.

Donald Gorrie: The committee felt that the SCIO proposition was basically good, so we welcome the new section and what the minister has said. How does the Executive expect the bill to work in practice for charities that run profitable enterprises? An increasing number of community enterprises—social economy-type organisations—that are good for their communities, run profitable enterprises, the profits from which they put back into their community. Will those bodies just be charities, or will they have to be charities that establish SCIOs as arm’s-length companies?

Similarly, some bigger charities run fundraising shops and some sports clubs make money from a bar, which is used to promote their sporting activity. Will such organisations have to have two parts—a pure charity and a fundraising SCIO—or will they still be charities while parts of their activity make a profit, provided that the profit is put back into the community or an activity?

Johann Lamont: I will clarify the situation, because I do not want to put on record something that is not absolutely right. A general issue arises over co-operative and social economy organisations that generate surpluses. McFadden suggested that such bodies could not be deemed to be charities, although there is an obvious crossover. People recognise the distinction.

A SCIO must be a charity. A body that is trading might be seen to be separate from that and would not be a charity. I will respond in writing to the specific points that you made about the relationship between the two types of organisation.

Amendment 124 agreed to.

Amendments 125 to 127 moved—[Johann Lamont]—and agreed to.

Section 56, as amended, agreed to.

After section 56

10:45

Amendment 128 moved—[Johann Lamont]—and agreed to.

Section 57—Conversion: supplementary
Amendments 129 and 130 moved—[Johann Lamont]—and agreed to.

Section 57, as amended, agreed to.

Section 58—Amalgamation of SCIOs
Amendments 131 and 132 moved—[Johann Lamont]—and agreed to.

Section 58, as amended, agreed to.

Sections 59 to 62 agreed to.

Section 63—Regulations relating to SCIOs
Amendment 133 moved—[Johann Lamont]—and agreed to.

Section 63, as amended, agreed to.

Section 64—Designated religious charities
Amendment 103 not moved.

Section 64 agreed to.

Section 65—Charity trustees: general duties
The Convener: Amendment 148, in the name of Donald Gorrie, is grouped with amendments 75, 104, 76, 149 and 39.
Donald Gorrie: I have four amendments in this group, all of which are relatively small, but they aim to clarify and safeguard the position of trustees. The bill as it stands states:

“A charity trustee must ... act in the interests of the charity”.

There could be cases where, in retrospect and taking an historical view, what a trustee had done proved not to be in the interests of the charity, but that would be unfair to him or her because, at the time, he or she may have considered that their action was in the best interests of the charity. Amendment 148 would provide that a charity trustee must act in

“what the trustee considers to be the best”

interests of the charity, when that trustee makes a judgment based on the information that is available. That would be fairer on trustees. There is an element of the bill that some people see as being a discouragement to people who might come forward as trustees; we want to avoid that. Amendment 148 would help to safeguard their position. I hope that the committee and the minister will look favourably on it.

Amendment 75 is perhaps unnecessary, but it deals with an aspect of the argument that we had last week about clarifying the independence of charities. I suggest that trustees must act in the interests of the charity, or what they consider to be the best interests of the charity,

“and not in the interests of any outside body”.

Amendment 75 would reinforce the importance of that idea by indicating clearly that—for example—councillors who are on an arm’s length body looking after the sporting, cultural or other activities of the council must act in the interests of the charity rather than in the interests of the council. Amendment 75 would underline that point. I am all for stating the obvious repeatedly as often as possible, because to do so can emphasise a point that might otherwise be ignored. That is the purpose of amendment 75.

Amendment 76 seeks to safeguard the position of charity trustees. The bill says:

“The charity trustees of a charity must ensure that the charity complies with any direction”.

I am suggesting that the charity trustees must

“take all reasonable steps to”

ensure compliance. If OSCR asks a charity to produce some documents and a trustee’s secretary is idle, incompetent, ill or whatever and fails to do that, the trustee could be hung out to dry for not ensuring compliance with the instruction. I do not know what a trustee is supposed to do in such a situation. Is the bill suggesting that they should burgle the secretary’s house and send the documents off? Charity trustees cannot ensure compliance with such a direction because they do not have that sort of power. The wording of section 65(2) is unrealistic; it would be much better—and much fairer—to say that the charity trustees must

“take all reasonable steps to”

ensure compliance.

Amendment 149 relates to the provision in section 65(4) that states:

“Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct”.

I suggest that such a breach “may” be treated as being misconduct. That would leave the judgment to OSCR, which is what we pay the organisation to do. Next week we will come on to the subject of misconduct, in relation to which the committee had grave doubts about the bill’s wording. It should be left to OSCR’s judgment whether a breach of the duty is to be treated as being misconduct; we should not prescribe that OSCR will have to treat every minor breach as being misconduct.

Amendments 148, 75, 76 and 149 are all helpful. It may be that amendment 75 is considered to be unnecessary, but the other three amendments make new and important points and I hope that the minister will respond favourably.

I move amendment 148.

Patrick Harvie (Glasgow) (Green): It is useful that there are a number of amendments to section 65, which deals with charity trustees and their duties. Even if the committee decides to leave the section more or less unchanged, it will be helpful to have a discussion on some of the issues.

Amendment 104 seeks to introduce a reference to public benefit. It would add to the provision that charity trustees must

“seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes”

the phrase

“and with the provision of public benefit”.

For a number of charities, especially those that make the transition from being small-scale charities that were set up by people who were enthusiastic about a particular issue, most of whose revenue came from fundraising, to being voluntary sector service providers, most of whose income comes from grants, there is always a balance to be struck between their original intentions and the expectations of funders.

Whatever condition we leave section 65 in, that balance will still need to be struck. However, it would be helpful if, in addition to acting in a manner that is consistent with charitable purposes, trustees were also expected to act in a manner
that was consistent with the provision of public benefit. It could be argued that acting in the interests of the charity includes the idea of public benefit, because it would be in the interests of the charity to remain a charity, in which case it would have to continue to pass the public benefit test. However, I argue that including in the duties of trustees a specific reference to public benefit would increase the emphasis.

Of Donald Gorrie’s amendments, the one with which I have greatest sympathy is amendment 148, but amendments 75, 76 and 149 are also helpful.

I will wait to hear the minister’s comments on amendment 39. The amendment would leave out subsection (5), which refers to an offence. I would be interested to know whether the reference will be moved to another part of the bill. If not, what is the rationale behind removing it completely?

Johann Lamont: We understand—and the committee has expressed this clearly—that there is a deal of concern about the potential impact of trustee duties on charities. Most of the amendments in the group are aimed at addressing those concerns. However, a concern remains that, in trying to protect the recruitment and retention of charity trustees, we should not undermine the basic concept that each charity trustee has a duty to act in the interests of the charity that he or she represents. That is an important principle. The cumulative effect of the amendments to this section could lead to trustee duties being so diluted that trustees would not bear much responsibility at all for the charities that they govern. Obviously, that would not be acceptable.

Amendment 148 is an attempt to dilute the duty of charity trustees to act in the interests of the charity. Having “the interests of the charity” determined subjectively by a charity trustee would be unnecessarily obstructive to OSCR’s supervisory function. Any charity trustee who was faced with an allegation of breach would only have to argue that they believed that what they had done—or not done—was in the interests of the charity. The argument would be about their belief rather than about the actual of their act or omission.

Amendment 76 tries to alleviate concerns about the personal burden placed on trustees by attempting to soften the duty of charity trustees to comply with the law. We would be extremely concerned if the amendment was agreed to as it could be construed as allowing trustees to derogate their legal responsibilities. On Donald Gorrie’s point, I would say that we must also consider the issue of OSCR itself being reasonable in its actions.

Amendment 149, too, would undermine the value of section 65 by amending it in such a way that a breach of a trustee’s duties would no longer require to be considered to be misconduct. We are not convinced that that would have a helpful impact because, in any event, OSCR will have to exercise discretion in deciding what, if any, action will be taken once misconduct has been identified. We oppose amendment 149 because it dilutes the value of OSCR having a clear basis on which to take action if it thinks it necessary to do so.

Patrick Harvie asked about amendment 39, which proposes to address concerns about the personal burdens on trustees by removing the criminal offences under section 65. Much of the concern about section 65 may have been partly because of a mistaken belief that those offences applied to the breach of any of the trustee duties in the section. In fact, they related only to the breach of certain specific duties.

On reflection, we have concluded that it is not necessary to have specific offences for those cases. Breach of the duties will still be considered to be misconduct, and OSCR will still be able to investigate and take the necessary action under the powers in sections 30 and 31, or to apply to the Court of Session under section 34 if it believes it necessary. Removing those offences will, we believe, go a long way towards reassuring charity trustees, while maintaining OSCR’s ability to take action when charity trustees act inappropriately.

We are not discussing it today, but I see that Scott Barrie has already lodged an amendment to the definition of misconduct such that it would not include minor mismanagement.

Amendment 75 has a slightly different focus. It attempts to address concerns about the independence test by requiring that trustees act only in the interest of the charity “and not in the interests of any outside body”.

We have already discussed the question of independence of charities and, I believe, agreed amendments that provide a suitable way forward. There are three main concerns about charities’ independence. The first relates to the requirement that charities be free of third-party control. That has been dealt with in the amendment to section 7(3)(b). The second relates to the fact that a charity must have exclusively charitable purposes, as set out in section 7(1)(a). The third relates to the conduct of charity trustees, which is what amendment 75 seeks to address.

The duty of charity trustees to act in the interests of the charity is an important concept and seeks to prevent charity trustees from undermining the charity and its purposes, regardless of whether their motivation is to benefit an external body. If amendment 75 were agreed to, there is a danger that that would be taken to mean that charity trustees could not act in the interests of an outside...
body. Amendment 75 could exclude some charities that seek to achieve their charitable purposes by supporting external bodies. Examples of that would be grant-giving bodies or the friends of a gallery. The amendment would not address the problems of independence in relation to non-departmental public bodies. Therefore, we do not think that amendment 75 would achieve its aim; indeed it might create additional problems.

The last amendment that I want to talk about is amendment 104, which seeks to add the provision of public benefit to trustees’ duties. If that is intended to place greater emphasis on the provision of public benefit, we believe that it is unnecessary. A body cannot be a charity if it does not provide public benefit, as it would not pass the charity test. I fear that such a change would raise questions about how charity trustees could make judgments about what satisfies OSCR’s view of public benefit.

I ask Donald Gorrie to withdraw amendment 148 and not to move amendments 75, 76 and 149. I also ask Patrick Harvie not to move amendment 104. I seek support for the Executive’s amendment 39.

11:00

Christine Grahame: I agree with much of what the minister said about amendment 148, which is attractive superficially but is terribly subjective; if the trustee considered something to be in the best interests of the charity but nobody else thought so, that would be an example of an honest man or woman making a ghastly mistake. I support the minister on that.

Similarly, on amendment 75, I wrote down that one might be able to be both: trustees could act in the interests of the charity and in the interests of an outside body and there would be no conflict of interest, because there would be mutual goals. I thought that the amendment would handicap charities in some respects. The charity must always come first, but I can think of instances of there being no conflict of interest.

I am sympathetic to Patrick Harvie’s amendment 104. We cannot stress often enough that we must have the provision of public benefit, but I would not go to the wire on it.

At first I was attracted to Donald Gorrie’s amendment 76, which would insert the phrase “take all reasonable steps to” into section 65(2), which states:

“The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.”

However, I do not think trustees would be in a position to say whether they were taking reasonable steps. If they are directed to do something, they must do it. A reasonable step to one trustee might not be a reasonable step to another. There is no clarity.

I am attracted by Donald Gorrie’s amendment 149, which would provide that a breach of a duty under section 65 “may” be treated as misconduct. Severity is reflected in misconduct and mismanagement.

I agree with the removal of sections 65(5) and 65(6), as proposed in the minister’s amendment 39.

Linda Fabiani: I will focus on amendment 149, which is important in relation to whether trustees are mismanaging or exercising misconduct. I like the idea of “is to be treated” being altered to “may be treated”. In section 65(1)(b) there is a test of reasonableness, which would seem to counter the strictness of the phrase “is to be treated”.

The bit that worries me is section 65(4), which states:

“Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.”

If I am right—no doubt I will be corrected if I am wrong—the phrase “any duty, notice, requirement or direction imposed on it by virtue of this Act” in subsection (2) could get us into the realms of regulations further down the line. We would then be in danger of saying, for example, that if an annual return, however minor, was not submitted in time, that could be deemed to be misconduct, because the charity would not have complied with one of the directions imposed by virtue of the act.

The words “may be treated” would be much fairer and would reflect what the committee spoke about before and the spirit of the amendment that will be discussed next week.

The Convener: Minister, would you like to add anything? Do not feel obliged.

Johann Lamont: I do not feel obliged, but I want to emphasise the important matter of subjectivity, which was mentioned earlier. We do not want to end up in a position that allows somebody to say, “Well that’s what I thought.” We had a related debate last week about causing offence and deliberately causing offence, which was along the same lines.

The only other point is about amendment 149. We want to emphasise again that OSCR has discretion and must be proportionate and reasonable in its actions. That should address some of the concerns that there might be. Of course, there are some things that charities will have to do and one of those is to submit an annual report.
Donald Gorrie: That debate was interesting and, on the whole, helpful. One of the enjoyments of our position is listening to ministers justifying what their advisers tell them about why not to accept amendments. It is highly irritating, but also highly entertaining.

The difficulty with amendment 149 is that we are not discussing until next week the definition of misconduct. That is a serious point. It seems to me that, without my amendment, the text as it stands is contrary to what Scott Barrie is to propose next week, which we all support. As it stands, the bill says:

“Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct”.

Next week, we will say that minor bad administration should not count as misconduct, whereas, as Linda Fabiani said, under section 65(2), if one is late putting in a return in relation to some notice or requirement, one would be treated as being guilty of misconduct.

It is important to leave the matter open, so I will move amendment 149. We can put the matter right at stage 3 if the minister still feels that the wording is wrong, but at the moment, if I do not move the amendment, we will invalidate the amendment about misconduct that we will discuss next week.

I accept the argument that amendment 148 would open the door to subjective argument. I might lodge a further amendment with better wording. I still think that amendment 76 is reasonable because, from my knowledge of charities, many trustees might not be aware that the management of the trust is not replying to all the e-mails or whatever rubbish that it receives. I have some enthusiasm for amendment 76, but I will abandon it and stick by amendment 149. I seek leave to withdraw amendment 148.

Amendment 148, by agreement, withdrawn.

Amendment 75 not moved.

Amendment 104 moved—[Patrick Harvie].

The Convener: The question is, that amendment 104 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)

Against
Barrie, Scott (Dunfermline West) (Lab)
Craige, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

The Convener: The result of the division is: For 3, Against 6, Abstentions 0.

Amendment 104 disagreed to.

Amendment 76 not moved.

Amendment 149 moved—[Donald Gorrie]—and agreed to.

Amendment 39 moved—[Johann Lamont]—and agreed to.

Section 65, as amended, agreed to.

Section 66—Remuneration for services

The Convener: Amendment 134, in the name of the minister, is grouped with amendments 40, 105, 135, 136, 150, 151, 77, 152 and 106.

Johann Lamont: This group of amendments is important. There are strong and various views on all sides and I hope that it is recognised in the debate that we are wrestling with difficult issues. There is no black-and-white position and I commit myself to being neither irritating nor irritated during the discussion.

The amendments relate to the remuneration and employment of charity trustees. Those issues led to much interest and debate during the Executive’s consultation on the draft bill and in the committee’s evidence sessions. It is clear that some people in the charity sector strongly believe that, in order to cement their position in the voluntary sector and to avoid any conflict of interest, charity trustees should not be remunerated for any work that they carry out as charity trustees. The contrary argument is that the level of service that is required by the trustees of some charities requires payment, otherwise people may not agree to be charity trustees in the first place.

In some charities, charity trustees are paid or receive a benefit for their services as trustees—for example, in many student associations, students are paid to be charity trustees of the association to allow them to take a sabbatical from their studies for a limited period. Other issues include inclusiveness and opportunities for people from disadvantaged backgrounds to be charity trustees. Moreover, there are arguments about the payment of expenses. There is agreement that, whatever way payments are made, the process should be transparent, but which approach is the most transparent is also the subject of argument.

In other cases, employees must be charity trustees to bring adequate representation to the board. The board structure of some colleges and universities, for example, is set in statute and includes representatives of both academic and non-academic staff. We understand that it is common in smaller charities for charity trustees to provide other services to the charity that are not part of their normal duties.
I emphasise that we do not intend that there should be a wholesale move towards there being a norm in the sector that charity trustees are paid or that charity employees become charity trustees. We want to establish a regime with sufficient flexibility for the wide range of charities in the sector to operate successfully—that principle underpins our approach to the bill—and we want to encourage the sector to flourish.

Any exceptions to the norm should be clearly justified and apparent, as we believe they will be under section 66. The section lays out the conditions that are to be met when payments are made and it emphasises the need for transparency. It also recognises the need for flexibility. The conditions that are set out in the section will ensure transparency and permit payment with suitable restrictions so that charities can operate effectively.

The provisions restricting payment to only a proportion of trustees and not allowing payment for small charities with only one or two trustees are intended to avoid the risk of charities being set up mainly for the benefit of the trustees. Section 66 also permits the continuation of existing provisions in limited but appropriate circumstances. It allows employees to be trustees but sets limits on the proportion of trustees who can be paid. As we have said, trustees are charged with the responsibility of operating in the best interests of the charity.

The effect of the amendment is to make it clearer what and whom the authorising provision in section 66(5)(a) is intended to cover.

There are also several non-Executive amendments in this group. Cathie Craigie's amendment 105 would ensure that any payment of charity trustees could be made only if the conditions that are set out in subsections (2) to (4) of section 66 were satisfied. The amendment would remove the concession that is set out in subsection (5), which allows charity trustees to be paid, irrespective of those conditions, when an existing provision allows payment in the charity's constitution at the date of the introduction of the bill, or by virtue of a Court of Session order or by any enactment. We are concerned that such a change could be construed as removing the existing rights of those charity trustees and, in some cases, effectively enforcing a change to existing constitutions and contracts of employment or taking away the powers of the Court of Session and overruling existing specific legislation. I therefore ask Cathie Craigie not to move amendment 105.

Donald Gorrie's amendment 77 aims to clarify, through the interpretation section on remuneration, that services provided by charity trustees and covered by section 66 are only those that are undertaken under a contract with the charity. The amendment would bring about a similar effect to that of the Executive's amendment 134, which we think is a better way of achieving the objective. I therefore ask Donald Gorrie not to move amendment 77.

Donald Gorrie’s amendment 152 relates to the definition of a “connected” person in section 67, in relation to person who is close to a charity trustee. Section 67 provides that any person who is married to a charity trustee is “connected” in terms of section 66 and is therefore considered to be of the same status as any other trustee from the...
Amendments 150, 151 and 106 relate to whether an employee of a charity should also be allowed to be a trustee of that charity. Donald Gorrie’s amendment 150 aims to allow a charity that already includes a number of its employees as charity trustees to continue to do so. As OSCR is satisfied that that is reasonable in the charity’s circumstances and provided that only a minority of the charity’s trustees are employees. Amendment 151 adds a provision to prevent the payment of charity trustees for the provision of services in their capacity as charity trustees if they are also employees of the charity. On the other hand, amendment 106 would prevent any employee of a charity from being a charity trustee.

I agree that it is important to avoid conflicts of interest, but I want to ensure that there is sufficient flexibility in the regime to allow the wide variety of the sector to operate most effectively. Amendments 150, 151 and 106 do not quite achieve what is needed. Amendment 150 does not sit well with the rest of section 66. It refers to what charities did in practice prior to the coming into force of the bill provision as opposed to what the bill provisions allow. It also ignores the possible difference between being paid for a service under a contract of employment—or for the provision of specific services—and simply being paid for being a charity trustee.

Amendment 106 similarly ignores that distinction and could prevent many student associations, and many other charities whose charity trustees are paid, from functioning effectively. Amendment 151 proceeds on the basis that someone cannot be employed to carry out normal trustee duties as opposed to other duties provided under a contract of employment. The amendment is impractical, as it does not make it clear where the distinction between those two sets of duties lies.

I ask the committee to support amendments 134, 40, 135, 136 and 152 and I urge members not to move amendments 105, 150, 151, 77 and 106.

I move amendment 134.

Cathie Craigie: I thank the minister for the detailed information that she has given in speaking to the amendments in this group. My intention in lodging amendments 105 and 106 was to generate some debate on the issue. Those amendments are supported by the SCVO, although other organisations have grave concerns about their implications.

During the committee’s consideration of the bill, we spoke informally to people around Scotland. There was concern that a trustee might abuse their position if remuneration was involved—people making decisions might have a pecuniary interest that they might not have to declare. The Association of Scottish Colleges and Universities Scotland raised major concerns about amendment 105 in particular. The law already states that universities and colleges must ensure that there is at least one elected member of the teaching staff and one elected member of the non-teaching staff on the board. Invariably, those members are trade union representatives. The principle of the college must also be on the board. Similarly, other larger charities have trade union representatives on the board. That is a good thing, but we must find the right balance.

I am of a mind not to move amendments 105 and 106 at this stage, although we need further discussion between the minister and the committee. This is not the final stage of the bill and we have an opportunity to get the matter right at stage 3. I would welcome the opportunity for further discussions with the minister.

Donald Gorrie: I feel that the minister and her advisers are muddling up issues that should be kept separate. There are differing views on the matter and we need further, thorough discussion about it before stage 3. I cannot support amendment 134, because it alters the bill in a way that I cannot accept. If the minister withdraws amendment 134, I will not move amendments 150, 151 and 77, and if Cathie Craigie agrees not to move amendments 105 and 106, we will be able to have a more thorough discussion about the matter before stage 3.

There is a clear distinction between a trustee who is paid for their work as a trustee and a paid employee of an organisation who acts as a trustee but is not paid for doing so, which is how trusteeships should operate. Students who take a sabbatical to work in student associations are paid for their work as servants of the student union; they are not paid for being trustees. It would be damaging to the cause of the voluntary sector if we were to agree that people can be paid for their work as trustees. The essence of the voluntary sector is that people give their time freely to promote an activity.

An employee should be allowed to be a trustee of the organisation that employs them. As Cathie Craigie said, universities, colleges and many other organisations have employees on their boards.
That is quite right and should continue. Amendment 77 would allow a trustee to have a contract with the trust to provide a particular service, because the person might have particular knowledge to contribute. For example, I am involved with a trust whose information technology and website design are done under contract by a trustee. However, he is not paid for being a trustee—none of the trustees is paid.

It seems reasonable that a trustee should be allowed to provide a service to a charity under a contract, or that they can be a paid employee of the charity, but a trustee should not be paid for being a trustee. Amendment 134 would destroy that clear-cut approach. The issue goes to the heart of how we encourage the voluntary sector, so I strongly oppose amendment 134. I think that my amendments 150, 151 and 77 cover the issue intelligently, although members might think differently. I would be prepared not to move the amendments if there were general agreement to consider the issue thoroughly before stage 3.

Amendment 152 is a minor, technical amendment. Now that the Civil Partnership Act 2004 is in place, civil partners should be mentioned in the bill. I appreciate the fact that the minister supports the amendment.

Scott Barrie: I will not speak to a particular amendment. The minister made a reasonable point when she explained the purpose of some of the Executive amendments, but Donald Gorrie’s comments went to the heart of what we expect of charity trustees and the onus of responsibility that is placed on such people. Most of us understand that the vast majority of trustees take on their responsibilities willingly and would never expect to be remunerated for their work. I have a slight fear that the debate around the amendments might create the impression that the bill will somehow change that approach. It will not do so. Throughout the bill’s passage, all members and witnesses have stressed that we want to acknowledge and support voluntary endeavour and I do not want anything to detract from that. I hope that we can move away from the current debate and get back to recognising the job that people do.

11:30

Patrick Harvie: I agree with much of what Donald Gorrie said and I hope that members will be open to his arguments. He dealt clearly with the issue of sabbatical officers in a student union, but I do not think that that is enough of a concern for us to accept amendments 134, 135 and 136. The umbrella bodies for the sector have expressed their concerns to members and we should take those concerns seriously, particularly for charities that previously have not had staff but develop and grow to a point where they have to take on staff.

Staff members, as well as service users and the general public, must retain trust in the objectives of the charity as a charity. That is a vital issue, to which the voluntary status of trustees—or boards of directors, as we call them today—is fundamental. There is a risk that, when organisations grow, a gap in understanding and perception is created between the people who work for the charity and the people who are running it. If anything in the bill leads to the perception that those who run the charity as trustees are doing so in order to pay their bills rather than to benefit the public, the bill will be going down the wrong route. I urge members to resist the amendments.

Linda Fabiani: I think that I agree with everything that Donald Gorrie, Scott Barrie and Patrick Harvie have said. Fundamental governance issues are at stake, such as whether an employee can also be a trustee, and those issues require to be considered further.

There is also a huge concern about the idea of a trustee being paid for undertaking that role. That is not acceptable and I cannot support it in any way. The issue is fundamental to the bill, so I am concerned about passing the amendments today. I know that we can reconsider the matter at stage 3 and I have sympathy with Donald Gorrie’s view that we should not press the amendments at the moment. We should consider them further and try to reach an agreement that will satisfy the Executive and the committee.

Mary Scanlon: Genuine concerns have been raised and I hope that we will come back to the subject at stage 3. There are two separate issues. I absolutely agree with Linda Fabian’s point about not paying people to be trustees. The minister said that we do not want charities to be set up for the benefit of trustees—we all agree with that.

While I was listening to other members, I remembered the stage 1 evidence from the Church of Scotland, which said that a minister, who is the service provider, would automatically be officially titled a trustee. We are talking about people who are service providers, whom it would be wrong to exclude from any decision making by the charitable organisation. When that person is sitting as a trustee, he is not being paid to be a trustee; he is accountable to the board for the service that he provides and for which he receives a salary.

I saw the same thing as a lecturer in further education. Trade unions fought hard to get members of the lecturing and support staff on to the board of management. Prior to that, in my seven years at Inverness College, I never met anyone from the board of management. I used to ask them, “How do you know the problems of the college when you never talk to us?” When
someone who was paid as a lecturer or other member of the staff became a trustee, they were not paid any additional money for being a member of the board of management.

We must make that distinction. Such people are paid to provide a service and they have the experience of providing that service. They take that experience to the board of management—the charitable board—and they are not being paid for their role on the board. Boards of management in FE colleges and in churches would be far less representative if lecturers and ministers, who are the main providers of the service, were not included. We need to distinguish between people whose main employment is providing the service and people who are raking in money because they are a trustee.

I hope that I have made myself clear. I accept that the system has to be more transparent, but we have to be careful that we do not exclude representatives who have a major input into the work of the charity.

**Mr Home Robertson:** The tone of the debate so far indicates a fairly broad consensus among committee members. I will add my tuppenceworth. I was happy with section 66(1) as drafted. It states:

> “Where a charity trustee of a charity … provides services to or on behalf of the charity … the person providing the services (the ‘service provider’) is entitled to be remunerated”.

If someone is doing professional work, physical work or whatever it might be that is part of the work of the charity, it is fair enough that they should be remunerated for that. Likewise, I do not have a problem—subject to appropriate rules being in place—with the appointment of an employee of the charity as a trustee.

The Executive amendments go a lot further. They would specifically authorise the remuneration of trustees simply for being trustees. We are talking about the voluntary sector. The reputation of the voluntary sector relies heavily on public support and public respect for the commitment of volunteers. If we start to pay trustees as trustees, we will run the risk of undermining an important element of the reputation of voluntary charities. If we start to do that, where will it stop? It is invidious to pay some trustees but not others or to remunerate trustees of one charity but not trustees of another charity.

The minister said that she does not want a wholesale move towards the payment of trustees, but I am afraid that, with the amendments, she risks opening a can of worms. If we were to take the step that the Executive proposes, we would risk conveying a confusing and potentially harmful message. I do not want to be difficult, but I hope that the minister can take the amendments away and reflect on the matter. We could, in the light of the discussions that we have had, come back to the general issue at stage 3.

**Johann Lamont:** There are two distinct issues. I will deal first with the one that is perhaps more straightforward—whether employees should be on the board. Mary Scanlon makes a good point about the way in which employees can strengthen a board of trustees; over time, a lot of people have argued for that. We must be robust in managing conflicts of interests. I have sat on boards where people withdraw at certain points in the meeting, for example, which can be a comfort. I hope that the proposal can gain the support of the committee.

I recognise that, as has been reflected in the committee’s discussion, there is a debate on these issues. Different people argue different cases, but we have to make a judgment.

John Home Robertson said that he is content with section 66(1) as it stands, but in fact the committee’s report stated that there was not “sufficient clarity on the remuneration of trustees and whether staff can be trustees.”

It asked

> “that the Executive looks at ways of tightening the provisions concerned.”

That is precisely what section 66 does. Contrary to what has been suggested, section 66 does not open a can of worms; it sets out a series of conditions, which would restrict payment either for services or to trustees.

Underpinning the debate is the need for transparency and for the procedures to operate in the interest of the charity. A charity could not have an income of £100,000 and let £99,000 go back out the door to trustees. In what circumstances could it be established that it was in the interests of a charity for the vast majority of its income to be paid to trustees?

I emphasise that we do not expect payment of trustees to be the norm. I recognise the points that members have made about people being employed or contracted to undertake certain tasks and about the payment of expenses. However, such payment is no less transparent and might be more transparent than finding a different way of remunerating people who bring their expertise or views on a matter to the job. I recognise that members are concerned about the matter because it concerns the sector as a whole. However, an issue arises about how the sector is to be sustained.

Mary Scanlon asked whether a person becomes an employee if that person is contracted to do work and whether a contract of employment might
debar a person from being a trustee. However, John Home Robertson pointed out that a person can be a trustee but be contracted to do architectural drawings, for example, or other work. Such duties might define a person in a different way and debar him or her from a position on a board. The issue is difficult.

We are wrestling with the definition of what the sector is. Elements of the sector exist where people are paid to be trustees. In the example that Donald Gorrie gave, there is a fine distinction. If a person works for a student representative council, he or she is carrying out a service. However, a person might not be able to carry out that service on behalf of the council except as a trustee, unless we are saying that the service can be contracted out to anyone who might wish to apply to do it. The issue is not as simple as it was characterised as being.

It is important that we get these measures right. I recognise the difficulty that I would place on the committee by asking it to support an Executive amendment when members were not absolutely satisfied that the amendment would not open a can of worms. I accept that there are issues in regard to the management of these matters. I am happy not to press the Executive amendments at this stage, but that is without prejudice to the Executive’s position.

I recognise that members seek clarity and that there are concerns on the issue. I am more than happy to write to the committee and engage in dialogue with individual members. However, I emphasise that my not pressing the Executive amendments at this stage, but that is without prejudice to the Executive’s position.

The Convener: Most members of the committee—probably all of us—welcome your comments, minister, and your desire to try to address our concerns. In those circumstances, and if there is no objection, you may withdraw amendment 134.

Amendment 134, by agreement, withdrawn.

Amendment 40 moved—[Johann Lamont]—and agreed to.

Amendment 105 not moved.

The Convener: I ask the minister to move amendment 135.

Amendment 135 moved—[Johann Lamont].

11:45

Mr Home Robertson: The minister was going to not move that amendment.
CORRESPONDENCE FROM THE DEPUTY MINISTER FOR COMMUNITIES TO
THE CONVENER OF THE COMMUNITIES COMMITTEE, MAY 2005

I am writing to you to highlight some concerns in relation an amendment to the Charities and Trustee Investment (Scotland) Bill that was agreed by the Committee on 27 April. Amendment 149 in page 35 line 15 of section 65 (Charity Trustee Duties) replaced the word “is to” with “may”. While this seems on the face of it to be a small amendment, I now believe that its import is far greater than emerged in the debate at the Committee.

The effect of the amendment may be to cause some statutory duties imposed by the Bill or subordinate legislation made under it to be more akin to a requirement to follow guidance rather than legal requirement. A legal duty which has no sanction is not really a duty at all. At worst it negates the value of the provision completely or at best dilutes it so that the imposition of the duty has no practical effect at all. I do not think this would have been the intention of the Committee.

The amendment means that any breach of any duties set out under this Bill would no longer automatically be misconduct but would merely be capable of being considered to be misconduct. The amendment therefore implies that certain breaches of a requirement in the law are no longer to be considered misconduct. Such a breach would therefore have no sanction or censure attached to it. It strikes me that if a requirement or duty is not sufficiently important to attract censure or sanction, then it should not have the weight of law but should instead be placed in good practice guidance. We could be setting an unhelpful precedent by making a law that specifically required one to do something and then saying that in the event of a breach of this requirement, in some cases no action may be taken. This uncertainty means we could be accused of making bad law. If the Committee feels that some particular duties of charity trustees, such as the provision of accounts, should not be a requirement but merely good practice, then it might be better to consider amendments to remove the relevant duties from the Bill at stage three.

I understand, however, that the motivation for this amendment was to protect trustees who make minor mistakes from severe sanctions. I too think that it would be unreasonable if a minor administrative error attracted the full regulatory weight that OSCR has at its disposal. However, if one were to consider section 31 again, one would see that OSCR is under no obligation to use the powers available to it where it considers that the misconduct does not justify enforcement action. OSCR has complete discretion as to which of its powers, if any, it uses. It is evident that the actions of OSCR as a public body are subject to scrutiny through the courts by judicial review. OSCR has an obligation to act reasonably, proportionately and within its powers in accordance with administrative law.

In practical terms, I believe that the amendment may make OSCR’s job much more difficult. OSCR could be accused of fettering its discretion if it chose to treat every breach of a statutory duty as misconduct. Such questions are increasingly the basis of judicial reviews and raise difficult issues. The amendment may, for example, make it almost impossible for OSCR to produce guidance that gives examples of breaches of statutory duties that always constitute misconduct. Presentationally this may be regarded as unhelpful as far as OSCR is concerned. More worrying, I believe this could seriously undermine the ability of this legislation to offer the public the reassurance that was a key objective in introducing it in the first place.

The Executive will seek to revisit amendment 149 at stage 3 and hope that I can count on your support in this.
The discussion around this matter will of course also impact on two amendments due to be discussed on 4 May. I believe that it is important to be clear as to what we are seeking to achieve and what the consequences of our decisions are.

It might be worth noting at this stage that mismanagement is not entirely distinct from misconduct. As well as acting in a way that is regarded as immoral, unethical or illegal, misconduct is also defined as managing something badly. We defined misconduct in section 103 to say it includes mismanagement primarily to deal with concerns raised during consultation on the draft Bill that an artificial distinction could perhaps be drawn between the focus of supervisory action in our Bill and the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which rather redundantly uses the expression “mismanagement and misconduct”.

Amendments 5 and 159 both seem to be motivated by the belief that minor mistakes by both charity trustees and managers should be excluded from the definition of misconduct. If that is so, then these amendments are founded on the mistaken belief that mismanagement refers to mistakes or negligence – a “muddle” as one witness during stage one called it - and that misconduct refers to a deliberate breach – a “fiddle”. This belief is not borne out by the common meaning of these words. Neither term depends in any way on intent or the lack of intent.

The sanctions attracted by misconduct or mismanagement should be borne in mind when considering these amendments. The Bill gives OSCR the role of determining whether there has been any misconduct or mismanagement. If OSCR concludes there has been, it is left to OSCR to decide what sanction, if any, is to apply. There are no longer any automatic criminal sanctions imposed by the Bill. Such sanctions arise only where a charity trustee acts in a way that is contrary to a direction that OSCR may have given in dealing with the misconduct or mismanagement. OSCR must always act reasonably and proportionately and is therefore unlikely to take immediate enforcement action under section 31 in a case of minor mismanagement.

I therefore consider the main effect of the amendments to the definition of “misconduct” would be to prevent OSCR from being able to decide whether it should take action in certain circumstances. I believe that OSCR should be the judge of what action to take in all cases of misconduct or mismanagement. Distinguishing between types of mismanagement in the Bill would require OSCR to first judge how serious an act is before deciding whether it has power to take any action and then to decide what action, if any, to take. I consider this dual burden to be unnecessary given OSCR’s public law obligations.

The issues surrounding these amendments are however distinct from the problems presented by amendment 149. That amendment creates the possibility of statutory duties having no sanctions. Misconduct in the general sense relates to more than breaches of statutory duty. The amendments to the definition of misconduct do not therefore have such serious legal consequences – but they do raise real practical issues as to the ability of OSCR to exercise its regulatory functions effectively and efficiently.

I would urge the Committee to consider these points carefully before we discuss these amendments.

Johann Lamont MSP
Deputy Minister for Communities
3rd Marshalled List of Amendments for Stage 2

The Bill will be considered in the following order—

Section 1  Schedule 1
Sections 2 to 74  Schedule 2
Sections 75 to 94  Schedule 3
Sections 95 to 102  Schedule 4
Sections 103 and 104  Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 70

Patrick Harvie

107 In section 70, page 39, line 35, leave out <designated religious charity or>

Patrick Harvie

108 In section 70, page 40, line 1, leave out <designated religious charity or>

Section 71

Malcolm Chisholm

42 In section 71, page 40, line 7, at end insert <and, where the decision is made by a person to whom OSCR’s functions have been delegated by virtue of section 38, OSCR>

Malcolm Chisholm

43 In section 71, page 40, line 18, at beginning insert <where the notice is given to a person specified in subsection (2),>

Section 75

Christine Grahame

160* In section 75, page 42, line 7, leave out subsection (6)

Donald Gorrie

78 In section 75, page 42, line 7, leave out from <not> to end of line and insert <award expenses incurred as a result of participation in the appeals process to any person who appeals a decision.
The Panel may instruct OSCR to pay a compensatory amount to any charity in whose favour the Panel finds, if the charity can demonstrate that it has suffered financial loss either directly or indirectly as a result of OSCR’s actions, if the Panel considers these to have been unreasonable.

Cathie Craigie

109 In section 75, page 42, line 7, leave out <not award expenses to OSCR or> and insert <award expenses incurred as a result of participation in the appeals process>

Cathie Craigie

110 In section 75, page 42, line 7, at end insert—

< ( ) The Panel—

(a) may instruct OSCR to pay a compensatory amount to any charity in whose favour the Panel finds, if the charity can demonstrate that it has suffered financial loss either directly or indirectly as a result of OSCR’s actions, and

(b) must consult the charity concerned as to the amount of any such financial loss but, notwithstanding the results of that consultation, may set the compensatory amount as the Panel sees fit.>

Section 77

Malcolm Chisholm

44 In section 77, page 42, line 20, after <OSCR> insert <(or by a person to whom OSCR’s functions are delegated by virtue of section 38)>

Malcolm Chisholm

45 In section 77, page 42, line 24, after <OSCR> and insert <(or the person to whom OSCR’s functions are delegated by virtue of section 38, as the case may be)>

Section 82

Malcolm Chisholm

46 In section 82, page 47, line 13, after <information> insert <and identification>

Section 85

Malcolm Chisholm

47 In section 85, page 50, line 12, leave out from <badges> to end of line 13 and insert <any badges or certificates of authority which regulations made under section 82(1) require to be provided>
Section 93

Christine May

48 In section 93, page 54, line 37, at end insert <of the trust, in so far as is appropriate to the circumstances of the trust.>

Section 94

Malcolm Chisholm

153 In section 94, page 55, line 10, leave out subsections (1) and (2)

Christine Grahame

161* In section 94, page 55, line 10, after <may> insert <after consultation with such persons as they consider appropriate>

Malcolm Chisholm

154 In section 94, page 55, line 17, leave out <those sections> and insert <sections 92 and 93>

Before section 95

Malcolm Chisholm

115 Before section 95, insert—

<Power of charity to participate in certain financial schemes>

(1) Every charity has power to participate in common investment schemes and common deposit schemes.

(2) Subsection (1) does not apply where a charity’s constitution excludes such participation by referring specifically to common investment schemes or, as the case may be, common deposit schemes.

(3) In this section, “common investment scheme” and “common deposit scheme” have the meanings given to those expressions in sections 24 and 25 of the Charities Act 1993 (c.10).>

Section 97

Malcolm Chisholm

116* In section 97, page 56, line 29, leave out subsections (2) and (3) and insert—

<(2A) The Scottish Ministers may by order—

(a) disapply section 3(3) in so far as it would otherwise apply to any body entered in the Register under subsection (1) for such period ending no later than 18 months after the commencement of this section as may be specified in the order,

(b) provide—>
(i) that any unregistered charitable body (or any such body of a particular type) may, despite any contrary provision in this Act, refer to itself as a “charity” for such period ending no later than 12 months after the commencement of this section as may be so specified, and

(ii) that any provision of this Act or of any other enactment is to apply (with such modifications, if any, as may be so specified) to any such body as if it were entered in the Register for so long as it refers to itself as a “charity”.

(2B) In subsection (2A), “unregistered charitable body” means a body which—

(a) is established under the law of a country or territory other than Scotland,

(b) is entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(c) does not require to be entered in the Register under subsection (1).

Section 100

Malcolm Chisholm

117 In section 100, page 58, line 24, leave out <or consequential> and insert <, consequential, transitional, transitory or saving>

Section 101

Donald Gorrie

111 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 7(2B),>

Malcolm Chisholm

49 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 7(4A),>

Malcolm Chisholm

50 In section 101, page 58, line 34, at end insert—

<(  ) an order under section 19(8),>

Malcolm Chisholm

51 In section 101, page 58, line 35, at end insert—

<(  ) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),>

Malcolm Chisholm

155 In section 101, page 58, line 36, leave out <94 or>
Donald Gorrie
112 In section 101, page 59, line 1, at end insert—
   <( ) order under section 7(2B),>

Malcolm Chisholm
52 In section 101, page 59, line 1, at end insert—
   <( ) order under section 7(4A),>

Malcolm Chisholm
53 In section 101, page 59, line 1, at end insert—
   <( ) order under section 19(8),>

Malcolm Chisholm
54 In section 101, page 59, line 2, after <63(d),> insert—
   <( ) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),>

Malcolm Chisholm
156 In section 101, page 59, line 3, leave out <94 or>

Schedule 4

Malcolm Chisholm
55 In schedule 4, page 65, line 28, at end insert—
   <Recreational Charities Act 1958 (c.17)
   In section 6(2) of the Recreational Charities Act 1958, the words from “or”, where second occurring, to “1962” are repealed.>

Malcolm Chisholm
56 In schedule 4, page 66, line 1, at end insert—
   <Paragraph 5 of Schedule 2 to that Act of 1962 is repealed.>

Malcolm Chisholm
57 In schedule 4, page 66, line 4, leave out <IV> and insert <VI>

Malcolm Chisholm
58 In schedule 4, page 66, line 4, at end insert—
   <( ) in paragraph (a), for “that Part” substitute “Part VI”,>
Malcolm Chisholm
59 In schedule 4, page 66, line 10, after <(b)> insert—
   <( ) for “that Act” substitute “the Education (Scotland) Act 1980”,
   ( )>

Malcolm Chisholm
60 In schedule 4, page 66, line 12, at end insert—
   <At the end of section 79(5) of that Act insert “or, in the case of an endowment the
   governing body of which is entered in the Scottish Charity Register, a scheme approved
   for that endowment under section 40 or 41 of the Charities and Trustee Investment
   (Scotland) Act 2005 (asp 00)”.

Malcolm Chisholm
137 In schedule 4, page 66, line 26, at end insert—
   <Companies Act 1985 (c.6)
In section 380 of the Companies Act 1985, after subsection (4) insert—
   “(4ZA)This section does not, despite paragraphs (a) to (c) of subsection (4), apply to
   any resolution of a company which is—
   (a) registered as a company in Scotland, and
   (b) entered in the Scottish Charity Register,
   where that resolution is of either of the types mentioned in section 56(5) of the
   Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”>

Malcolm Chisholm
61 In schedule 4, page 67, line 27, leave out <The Parole Board for Scotland> and insert <Scottish
Children’s Reporter Administration>

Malcolm Chisholm
62 In schedule 4, page 67, line 28, leave out <Office of the>

Malcolm Chisholm
63 In schedule 4, page 68, line 5, leave out <Parole Board for Scotland> and insert <Scottish
Children’s Reporter Administration>

Malcolm Chisholm
64 In schedule 4, page 68, line 6, leave out <The Office of the>

Section 103

Malcolm Chisholm
157 In section 103, page 59, leave out lines 18 to 30 and insert—
<“charity trustees” means the persons having the general control and management of the administration of a charity.>

**Donald Gorrie**

113 In section 103, page 59, leave out lines 19 to 29 and insert—

<( ) in relation to a charity (other than an SCIO), means the persons having the general control and management of the administration of a charity.>

**Donald Gorrie**

79 In section 103, page 59, line 23, leave out from <a> to end of line 24 and insert <there is a governing council or body, the members of that council or body, except to the extent that the governing council or body has delegated management and control of the charity to a committee or group, in which case the members of that committee or group to the extent of that delegated power)>

**Patrick Harvie**

114 In section 103, page 60, leave out lines 7 and 8

**Scott Barrie**

5 In section 103, page 60, line 13, leave out <includes> and insert <does not include minor>

**Christine Grahame**

159 In section 103, page 60, line 13, leave out <mismanagement> and insert <gross mismanagement but not minor errors>

**Malcolm Chisholm**

65 In section 103, page 60, line 14, after <the> insert <holder of the>

**Section 104**

**Malcolm Chisholm**

118 In section 104, page 60, line 33, leave out <97,>

**Long Title**

**Christine Grahame**

158 In the long title, page 1, line 1, after <bodies> insert <with a view to promoting a flourishing charitable and voluntary sector>
Decisions made by person other than OSCR: notice and appeals
42, 43, 44, 45

Scottish Charity Appeals Panel: expenses and compensation
160, 78, 109, 110

Regulations about fundraising
46, 47, 51, 54

Exercise of power of investment
48

Investment power of trustees: power to amend enactments
153, 161, 154, 155, 156

Power of charity to participate in certain financial schemes
115

Transitional arrangements
116, 117, 118

Minor and consequential amendments and repeals
55, 56, 57, 58, 59, 60

Definition of "charity trustee"
157, 113, 79

Definition of "misconduct"
5, 159

The long title
158

Note: the following amendments have already been debated—

With 6 - 61, 62, 63, 64, 65

With 81 – 107, 108, 114

With 1 – 111, 112

With 34 – 49, 52

SP Bill 32–G3  Session 2 (2005)
With 38 – 50, 53

With 124 - 137
Present:

Scott Barrie
Donald Gorrie (Deputy Convener)
Christine Grahame
John Home Robertson
Karen Whitefield (Convener)

Cathie Craigie
Linda Fabiani
Patrick Harvie
Mary Scanlon

Also present: Johann Lamont MSP, Deputy Minister for Communities and Christine May MSP.

Charities and Trustee Investment (Scotland) Bill: The Committee considered the Bill at Stage 2 (Day 3).

The following amendments were agreed to (without division): 42, 43, 44, 45, 46, 47, 153, 154, 115, 116, 117, 49, 50, 51, 155, 52, 53, 54, 156, 55, 56, 57, 58, 59, 60, 137, 61, 62, 63, 64, 157, 65 and 118.

The following amendments were agreed to (by division)—
- 48 (For 6, Against 0, Abstentions 3)
- 5 (For 8, Against 0, Abstentions 1).

Amendments 160 and 158 were moved and, with the agreement of the Committee, withdrawn.

The remaining amendments were not moved or pre-empted.

Sections 70, 72, 73 and 74, schedule 2, sections 75, 76, 78, 79, 80, 81, 83, 84, 86, 87, 88, 89, 90, 91 and 92, schedule 3, sections 95, 96, 98, 99 and 102 and the Long Title were agreed to without amendment.

Sections 71, 77, 82, 85, 93, 94, 97, 100 and 101, schedule 4, sections 103 and 104 were agreed to as amended.

Christine Grahame declared an interest as a member of the Royal Zoological Society of Scotland. Christine May declared interests as an unremunerated member of the Board of the East Fife Football Club Supporters' Trust, a unremunerated Chair of the Scottish Libraries and Information Council and an unremunerated Board Member of Community Enterprise in Strathclyde (CEiS).

The Committee completed Stage 2 consideration of the Bill.
Scottish Parliament
Communities Committee
Wednesday 4 May 2005

[THE CONVENER opened the meeting at 09:31]

Charities and Trustee Investment (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the Communities Committee’s 14th meeting of 2005. I remind all who are present that mobile phones should be turned off.

The first and only agenda item is consideration of the Charities and Trustee Investment (Scotland) Bill at stage 2. I welcome the minister, her officials and Christine May, who has joined the committee for today. Members should have a copy of the bill, the marshalled list of amendments and the groupings list for day 3, which was issued on Friday.

Members may be aware that I received a letter from the Deputy Minister for Communities yesterday about our discussion of misconduct and mismanagement as it relates to section 103 and about related amendments. Copies of that letter were sent to all committee members yesterday.

Section 70—Decisions

Amendments 107 and 108 not moved.

Section 70 agreed to.

Section 71—Notice of decisions

The Convener: Amendment 42, in the name of the minister, is grouped with amendments 43 to 45.

The Deputy Minister for Communities (Johann Lamont): The amendments relate to the notification of decisions and the appeals process for decisions that are made by a person to whom the Office of the Scottish Charity Regulator’s functions have been delegated under section 38.

Amendment 42 will make it clear that notification of a decision that is listed in section 70 and which was made by a person to whom OSCR’s functions have been delegated must be given to OSCR as well as to the person about whom the decision was made. That will keep OSCR aware of action that is being taken and of the possibility that it will have to review a decision.

We expect any body with delegated authority to liaise closely with OSCR over regulatory action that is taken under powers in the bill. A memorandum of understanding will be drawn up about a delegated function generally. Nevertheless, amendment 42 will formalise the requirement to inform OSCR when any specific decision that is subject to review is made.

Amendment 43 is consequential on amendment 42. It will ensure that the duty to provide information on the appeals process applies only to the notice that is sent to the person who is subject to the decision and not to the notice that is sent to OSCR.

Amendments 44 and 45 will make it clear that a delegated decision to suspend a charity trustee under section 31(4) can be appealed to the Court of Session and that the court has the same power over such a decision as it has to quash OSCR’s decisions and to direct the person who took the delegated decision to take such action as the court thinks fit.

I ask the committee to support the amendments in the group and I move amendment 42.

Amendment 42 agreed to.

Amendment 43 moved—[Johann Lamont]—and agreed to.

Section 71, as amended, agreed to.

Sections 72 to 74 agreed to.

Schedule 2 agreed to.

Section 75—Appeals to Scottish Charity Appeals Panel

The Convener: Amendment 160, in the name of Christine Grahame, is grouped with amendments 78, 109 and 110. I point out that if amendment 160 is agreed to, amendments 78 and 109 will be pre-empted. If amendment 160 is not agreed to and amendment 78 is agreed to, amendment 109 will be pre-empted.

Christine Grahame (South of Scotland) (SNP): Amendment 160 seeks to delete section 75(6), which states:

“The Panel may not award expenses to OSCR or to any person who appeals a decision.”

In law, it is usually the position that success can lead to an award of expenses, although a court or tribunal can vary that award, depending on matters such as the extent of the success, what has been heard in evidence and how the parties have behaved. It is not necessary to insert in the bill an explicit statement that the panel may “award expenses incurred as a result of participation in the appeals process”, as amendment 109, in the name of Cathie Craigie, seeks to do—as does amendment 78, in the name of Donald Gorrie—because that is the usual position in law.
The idea that OSCR should pay compensation is superficially attractive, but I hope that Donald Gorrie and Cathie Craigie will forgive me for saying that the way in which they have framed their proposals is clumsy. What would happen if a charity had a partially successful appeal and, even though OSCR had operated and behaved appropriately, the charity sustained losses as a result of OSCR's actions? How much of those losses—25 per cent, 50 per cent or 100 per cent—should OSCR cover? One could argue that a charity was unable to do street collections because the fact that it was being investigated by OSCR meant that people stopped putting money in the collecting tins. How on earth could one quantify such losses? Even if one overcame those hurdles and managed to quantify the losses, would there be a subsequent compensation hearing? If so, when would it take place? I do not think that it is appropriate to put together the awarding of expenses and the payment of compensation for some of the reasons that I have outlined, which are fairly substantial.

I feel that there might be remedies elsewhere; I have no doubt that the minister will address the issue. If OSCR acted in bad faith, there might be a case for bringing a damages action in a civil court. If OSCR behaved negligently towards a charity, did not investigate properly or acted in breach of its regulations, I think that a civil action could be brought. There would have to be a separate hearing, which would take time to prepare for. One would have to plead fault, quantify the degree of fault and say what OSCR ought or ought not to have done. One would have to have pleadings and answers to those pleadings. Productions would have to be lodged and evidence heard. That might not be a minor matter. We might be talking about 100,000 quid, not 500 quid.

There are practical difficulties with what Donald Gorrie and Cathie Craigie are proposing. That is why I oppose amendments 78, 109 and 110. I ask members to support amendment 160, which seeks simply to delete the provision that says that expenses cannot be awarded, so that the rule that expenses are usually awarded when a case is successful, subject to the court's discretion, is followed.

I move amendment 160.

Donald Gorrie (Central Scotland) (LD): This is an important area and one that the committee should explore with the minister. I lodged my amendment 78 with a view to ensuring that the matter is properly discussed. Two of my colleagues also lodged amendments on the matter, so it will be discussed thoroughly.

There are two issues: expenses and compensation. What I—and, I think, my colleagues—seek to achieve is the proverbial level playing field, so that financial considerations do not prevent small charities from arguing their case as well as they can if there is an argument between them and OSCR. The process should be simplified and if a charity has a good case, it should not expect to come out badly in financial terms.

As Christine Grahame said, OSCR's well-intentioned efforts, if based on faulty information, can do great harm to charities. Charities are rather like unfortunate ladies in the Victorian era; if ladies ever lost their good name, they were in big trouble, and charities are the same. If people get the impression that there is something dubious about a charity, great harm is done, however wrong that impression might be. We want to ensure that OSCR does not enter into disputes or take action against charities unless it is sure of its grounds.

My amendment has two aims: to ensure that neither the charity nor OSCR acts unreasonably; and to ensure that the financial considerations of arguing the case are set aside. However, there is substance in the point that Christine Grahame and others have made, which is that the process that I suggest is too laborious. I do not intend to press my amendment, but it is important for the minister to tell us the Executive's views on the matter. I ask her to tell us the Executive's views and to confirm whether there will be further discussion to make the arrangements between OSCR and charities of various sizes as clear and fair as possible.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Amendments 109 and 110, in my name, have the support of the Scottish Council for Voluntary Organisations. Donald Gorrie highlighted the fact that we have been contacted by a number of organisations that have concerns about this aspect of the bill. There was unanimous agreement that the appeals process is right. It is thorough and there are checks and balances to allow organisations access to an affordable appeals process. However, if things go further than that, the exercise can be a costly one for a small organisation. As Donald Gorrie pointed out, people will go a long way to ensure that their organisation maintains its good name and the public's respect.

I have listened to the arguments that have been made by other organisations that have contacted me since I lodged my amendments, and I have listened to Christine Grahame's arguments this morning, which were well put. I remind the minister of the committee's views on this aspect of the bill. We want the Executive to consider in detail whether costs should be paid in the event of a successful appeal. Our conclusion was based on the evidence that we were given on the matter. That might not have been a huge part of our
evidence-taking during our consideration of the bill, but there are certainly concerns.

Like Donald Gorrie, I will be happy not to press my amendments if the minister can confirm that the Scottish Executive has considered all sides of the debate and is confident that the current wording is right or, otherwise, can confirm that it will lodge appropriate amendments at stage 3.

09:45

Mr John Home Robertson (East Lothian) (Lab): I am grateful to colleagues for raising a rather interesting issue. It is not altogether surprising that a lawyer should be enthusiastic about the prospect of litigation and associated expenses—

Christine Grahame: Perhaps some day, but I have not been in practice for six years.

Mr Home Robertson: Sorry. That was an unworthy thought.

Section 75(6) currently states:

“The Panel may not award expenses to OSCR or to any person who appeals a decision.”

By deleting that subsection, Christine Grahame’s amendment 160 would presumably mean that the converse would apply, so expenses could be awarded. However, if expenses were to be awarded against OSCR, who would pay those expenses and how would they be paid? Would OSCR have a budget for that? Would there be personal liability? That perhaps takes us into the group of amendments that deal with misconduct and mismanagement. If the regulator gets himself or herself into a position in which costs arise, could he or she be personally liable for those costs or will they be covered by some other money? That is a fair enough point.

If OSCR or any other regulator pursued an organisation unreasonably in a way that gave rise to costs, I suppose that the case that has been outlined could be made. That is no doubt what Christine Grahame and other colleagues have in mind. However, we need to tease out the issue to find out both the extent of OSCR’s liability and who would ultimately pay the costs. I would find out both the extent of OSCR’s liability and who would ultimately pay the costs. I would appreciate some help from the minister on the issue.

Johann Lamont: Members are right that the issue that the committee and others have flagged up is important. I am not quite sure that we have reached a conclusion yet, but the issue is certainly worth exploring further. However, I suspect that if things got to the stage of the regulator having adopted the kind of role to which John Home Robertson referred, the matter would need to be decided by courts at a level much further up the hierarchy than the Scottish charity appeals panel.

The appeals panel is designed to provide a cheap and straightforward means whereby a charity might appeal a decision that has been made by either OSCR or a body to which OSCR has delegated powers. It was envisaged that the appeals process would be simple and quick, with many cases, for example, being dealt with by correspondence alone.

The decision was taken to prevent the panel from awarding costs to parties in order to facilitate the provision of a simple, quick and inexpensive system. Requiring the panel to consider awarding expenses would considerably lengthen and complicate the process. Matters would only be exacerbated if the panel were also required to consider compensation.

If the proposed changes were made, we would also need to set out either in regulations or in the bill how the panel would decide what level of expenses or compensation to award and how any consultation that might be required would impact on decisions. In addition, any decision on expenses or compensation that was made by the panel would itself need to be subject to appeal. As I have already pointed out, the result would be a much more drawn-out, complicated and expensive process for all involved and an increasingly less flexible appeals panel.

I am concerned that amendments 78, 79 and 110 would allow the panel to award costs and compensation to the appellant but not to OSCR. Such a move would take us into the complicated issue of how financial loss and the level of compensation should be assessed. There might need to be an assessment of subjective issues, such as how charitable donations have been affected by the decision. In some cases, that could provide an opportunity for vexatious or frivolous complaints and for protracted procedures, which would impact on the panel’s workload and greatly increase administrative costs. Indeed, OSCR’s actions at earlier stages could also be inhibited.

However, I recognise that we need to wrestle with the issue of expenses and ensure that we provide the level playing field to which Donald Gorrie referred. I recognise the strength of the committee’s feelings on the matter and I undertake to consider the issue again before stage 3. In the meantime, I urge members not to support the amendments.

Christine Grahame: I hear what the minister says, but I hope that she will tease out the issues of compensation and expenses, which are completely distinct issues. Industrial tribunals operate in similar circumstances and do not generally award expenses to people other than in special circumstances.
The issue is that there should be discretion. The basic rule might be that, because of the kind of investigation that OSCR conducts and how it deals with such investigations, through paperwork and so on, expenses will not generally be paid. However, there should always be discretion in the appeals procedure for expenses to be awarded in certain circumstances if that is shown to be appropriate. As I say, the position at other tribunals is that there is that flexibility. Such flexibility even exists in the civil courts. In general, success gives one expenses, but that is not always the case—it depends on the circumstances that arise. I would like to see flexibility that would operate for OSCR and for the appellant.

Amendments 160, by agreement, withdrawn. Amendments 78, 109 and 110 not moved.

The Convener: We must now agree to section 75, but before we deal with that, I will allow Mrs Scanlon to comment as she has indicated a desire to speak.

Mary Scanlon (Highlands and Islands) (Con): I am happy to agree to section 75, and we will discuss it further at stage 3, but can the minister and her advisers give the committee some idea of the costs involved? The costs outlined in paragraphs 158 and 159 of the financial memorandum are based on a system without compensation and so on. I would like to have some indication of what the costs would be if amendments similar to the ones that we have discussed are agreed to at stage 3.

The Convener: That will obviously be a matter for stage 3. We will have to wait and see whether such amendments are lodged and the outcome of the minister’s deliberations.

Section 75 agreed to.

Section 76 agreed to.

Section 77—Appeals to Court of Session
Amendments 44 and 45 moved—[Johann Lamont]—and agreed to.

Section 77, as amended, agreed to.

Sections 78 to 81 agreed to.

Section 82—Regulations about fundraising
The Convener: Amendment 46, in the name of the minister, is grouped with amendments 47, 51 and 54.

Johann Lamont: I am pleased at the support in the committee’s stage 1 report for the provisions in the bill to regulate fundraising. Many would say that the provisions are key if we are to help to improve public confidence in giving to the sector. There is a need to make arrangements for fundraising as transparent as possible.

Amendments 46 and 47 are technical amendments that seek to ensure consistency in the provisions that deal with the information and identification that fundraisers are to provide. Provisions on all badges or certificates of authority are to be provided for in regulations under section 82, irrespective of whether they are used for general fundraising or public benevolent collections. However, under section 85(5)(d), local authorities may set conditions about the use of such means of identification for particular PBCs.

We have lodged amendments 51 and 54 in response to a suggestion from the Subordinate Legislation Committee that the reserve fundraising powers in section 82(2)(h) should be subject to the affirmative parliamentary procedure. Given that such powers would be used only if it was felt that self-regulation by the sector was not sufficient, I am happy to agree to make the power subject to affirmative parliamentary procedure to allow full consideration and approval of the provisions.

I move amendment 46 and ask the committee to support the other Executive amendments that relate to the regulation of fundraising.

Donald Gorrie: The collection system can go wrong in two areas. First, at a simple level, an unauthorised, dishonest individual can get hold of a collecting tin for some good cause or other and rattle it under people’s noses in Princes Street or Sauchiehall Street. People could put money into the tin and he could walk away and drink it in the pub. Will the regulations prevent such activity?

Another more sophisticated area is where people in the street get members of the public to authorise direct debits for somewhat dubious charities that might not be all that they say they are. I find that incredible. Does the bill deal with those two matters?

Johann Lamont: On Mr Gorrie’s first example, someone who tries to raise money by helping themselves to a collecting tin and pretending to be from a particular organisation would probably be committing a criminal act. OSCR could investigate the matter but, if such an offence were established, it would probably be a more straightforward case of fraud that the police could deal with.

OSCR would be able to investigate the second situation that Mr Gorrie highlighted, because it relates to an organisation’s claims as a charity, its charitable purposes and its intent.
Amendment 46 agreed to.
Section 82, as amended, agreed to.
Sections 83 and 84 agreed to.

Section 85—Local authority consents
Amendment 47 moved—[Johann Lamont]—and agreed to.
Section 85, as amended, agreed to.
Sections 86 to 92 agreed to.

Section 93—Exercise of power of investment

10:00

The Convener: Amendment 48, in the name of Christine May, is in a group on its own.

Christine May (Central Fife) (Lab): Good morning. I remind the committee of my registered interests as a member of East Fife Supporters Trust, a board member of Community Enterprise in Strathclyde and chair of the Scottish Library and Information Council, all of which are either trusts or companies limited by guarantee that might apply to trusts for funding.

I assure the committee that amendment 48 is not intended to be a charter for those who would wish to avoid the bill's purpose, principles or ethos. I agree that diversification of interests is wholly appropriate and to be encouraged, but it is more relevant for some trusts than it is for others. The amendment would alter the wording in regard to diversification to:

"the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust."

I circulated a briefing document to members; further copies are available for those who did not get one. To summarise, the briefing document states that it is important for trustees generally to have regard to the need for diversification. However, the appropriateness of the amendment is particularly important for one kind of trust; namely, where proprietors of a family business have handed over a controlling interest in that business to a trust with the purpose of maintaining the business as an independent entity. That objective sits alongside a possible further objective of a trust of ensuring that any dividend income is used for charitable purposes.

An example in my constituency is the Russell Trust. The trust holds a major investment in Tullis Russell Papermakers in Fife, which employs some 540 people. The purposes of the trust deed are to run the company and to make sure that it remains independent. In fact, the company has subsidiary holdings in England and South Korea. Other such examples are contained in the briefing.

On precedents for the amendment, the existing legislation that deals with trustees’ statutory investment powers is in section 6(1)(a) of the Trustee Investments Act 1961. In England and Wales, the provisions of the Trustee Investments Act 1961 were replaced by the Trustee Act 2000, which relates closely to the bill that the committee is now considering. The requirement for a trustee to have regard to the need for diversification of investments in that act applies in so far as it is appropriate to the circumstances of the trust.

I refer members to paragraph 93 of the policy memorandum. On powers of investment, the Scottish Law Commission's recommendation 172 of 1999 states at paragraph 2.31:

"in the exercise of their investment powers, trustees should have regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust."

I move amendment 48.

Scott Barrie (Dunfermline West) (Lab): I thank Christine May for lodging the amendment and for bringing this issue to the committee's attention. As one who was brought up in Glenrothes, I am well aware of the position of Tullis Russell as a major employer, although I am not as au fait with its management as is Christine May.

Amendment 48 seeks to correct an apparent anomaly in the bill. It is important for other such trusts that Christine May, as an MSP, has brought the matter to the committee's attention. I urge members to support the amendment.

Christine Grahame: I am a bit confused. Christine May's submission on amendment 48 states, with regard to Tullis Russell Papermakers:

"The Trust has been instrumental in promoting employee ownership of the company through buy-out of other family shareholders."

Does that refer to the purposes of the trust? How does that fit with the bill's section 8(2)(b) on public benefit, which states:

"where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit is unduly restrictive."

Will Christine May comment on those two points in due course?

The Convener: Christine May will get an opportunity to wind up the debate on amendment 48. At that time, she may wish to respond to all of the points that have been made. Has the minister any comment on this amendment?

Johann Lamont: I thank Christine May for bringing the issue to the committee's attention. As a result of her consistency in raising the issue elsewhere, people have been made aware of its importance.
Section 93(1)(b) will impose a duty on trustees of all trusts, not just charity trusts, to consider the need for diversification of trust assets when exercising the wider investment powers under section 92(2). That duty is not expressly qualified. In the Trustee Investments Act 1961 there is a statutory duty on trustees to consider diversification but it is qualified by the words: “in so far as is appropriate to the circumstances of the trust”.

When drafting section 93(1)(b), we favoured simple drafting and took the view that, if trustees were to be required to have regard to the need for diversification, it would be implicit that they would have to take into account the circumstances of the trust. However, concern has been expressed because the duty has not been expressly qualified. The type of situation that has given rise to concern is that in which someone wishes to set up a grant-making trust by gifting to the trust a large block of shares in a private company. It was felt that people may be deterred from doing so by the absence of an express qualification because of the possibility that the trustees might sell the shares on, which could have serious implications for the balance of control of the private companies.

The inclusion of amendment 48 will clarify the need to consider diversification of investment in the context of the trust’s circumstances. Therefore, I am happy to urge the committee to support the amendment.

Christine May: I apologise for trying to answer out of turn earlier.

I will have to put my response to Christine Grahame’s points in layman’s language. My understanding is that the purpose of the Russell Trust bequest is to enable Tullis Russell Papermakers to be run by the employees in the main and to reinvest any moneys into the company so that it continues to maintain its independence. For that reason, other major shareholdings have been acquired over time and employees operate a share-ownership scheme, through which shares are dispersed once a year.

Christine Grahame asked me to comment on whether the promotion of employee buy-out is an unduly restrictive condition. I argue that it is not, because the public good could be served by the fact that Tullis Russell Papermakers is a major employer in Glenrothes. It brings huge employment not only to Glenrothes, but to the wider area and is therefore of benefit to the Scottish public in general through being a healthy business. I do not think that there is a restriction on anyone who wishes to have shares for the purposes of the trust, but the need to preserve the holding for the primary purpose of the trust—to operate the company—would probably restrict the purchase of large blocks of shares by speculative shareholders. Therefore, amendment 48 is entirely in keeping with the bill’s purposes and would not contravene any other section of the bill or its ethos, which is to have charitable organisations that are clear, transparent, do not restrict others’ access unduly and operate for the wider public good.

I intend to press the amendment. I am grateful to the minister and her officials for the consideration that they have given to my representations and those of others.

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 48 agreed to.

Section 93, as amended, agreed to.

Section 94—Power to amend enactments

The Convener: Amendment 153, in the name of the minister, is grouped with amendments 161 and 154 to 156. I point out that, if amendment 153 is agreed to, amendment 161 will be pre-empted.

Johann Lamont: It has been suggested that the order-making power in section 94 is redundant because there is an equivalent order-making power in section 100. We have considered that suggestion and are satisfied that section 100 is sufficient for the purpose of amendments under sections 92 and 93—provisions on the extension of general powers of trustees and on the exercise of those powers.

Amendment 154 will delete the order-making power in section 94(1), which means in effect that all incidental, consequential or supplementary provisions that ministers consider necessary or expedient for the purposes of or in consequence of the bill can be introduced under section 100.

Amendments 154, 155 and 156 are consequential on amendment 153. Christine
Grahame’s amendment 161 will become redundant if amendment 153 is accepted.

I move amendment 153.

Christine Grahame: I am not sure whether amendment 153 will make amendment 161 redundant, so I will speak to my amendment. I cannot see how amendment 161 will be made redundant by leaving out subsections (1) and (2) but not subsection (3), which states:

“Schedule 3 makes amendments consequential on those sections.”

Can the minister explain how that is? In amendment 161, I am saying that amendments should be made by subordinate legislation only after consultation with such persons as are considered appropriate. It is appropriate that there be provision on the face of the bill for consultation whenever amendments are made. My point is simply about consultation.

Johann Lamont: Christine Grahame may want to clarify at stage 3 the issue that she has raised. The wording that she wants to introduce would be inserted in provisions that we want to delete. The issue that she is flagging up will have to be dealt with elsewhere.

Christine Grahame: That is fine. I will return to the matter at stage 3.

Amendment 153 agreed to.

Amendment 154 moved—[Johann Lamont]—and agreed to.

Section 94, as amended, agreed to.

Schedule 3 agreed to.

Before section 95

The Convener: Amendment 115, in the name of the minister, is in a group on its own.

Johann Lamont: Amendment 115 was lodged to allow Scottish charities in the future to join common investment or deposit funds—commonly, or not commonly, known as CIFs—that have been established in England and Wales. CIFs are schemes that allow charities access to a trust fund that is specifically for charities. They are a means by which a group of charities in England and Wales can pool funds for investment to gain the advantages of investing with a large, centrally managed fund that would not otherwise be available to them individually. CIFs allow charities to combine their investments to gain more financial power and economies of scale, with the expectation of earning more income.

Amendment 115 will give Scottish charities the power, assuming that there is nothing in their constitution that expressly prevents it, to join a CIF that has been established under a scheme by the Charity Commission in England and Wales.

In practice, however, Scottish charities will not be able to join CIFs until the legislation in England and Wales—the Charities Act 1993—has been amended so that CIFs are permitted to be available for access to Scottish charities. The Executive would therefore not expect to commence the new section until the appropriate amendments had been made to the 1993 act by the Home Office’s Charities Bill. Members will be aware that that bill has now fallen, so participation in the schemes will not be available to Scottish charities until a similar bill is passed. That is obviously a matter for the UK Government, but we hope that the bill will be revived without too much delay after the UK election.

Amendment 115 is an enabling amendment. I ask members to support it so that the provisions will be available for use at an appropriate time in the future.

I move amendment 115.

Amendment 115 agreed to.

Sections 95 and 96 agreed to.

Section 97—Transitional arrangements

10:15

The Convener: Amendment 116, in the name of the minister, is grouped with amendments 117 and 118.

Johann Lamont: During stage 1, it became apparent that there was a deal of confusion as to which bodies were to be covered by the transitional provisions in the bill. The Subordinate Legislation Committee also expressed concerns that section 97 will provide ministers with open-ended powers to exempt from the terms of the act existing charities for an unlimited period, and it recommended that the Executive consider adding a cut-off date for exercise of ministers’ powers. Amendment 116 clarifies which bodies are covered by the provisions and introduces time limits that will apply to exemptions granted.

New subsection (2A), which will be inserted by amendment 116, will allow ministers to disapply section 3(3) by order by up to a maximum of 18 months. Section 3(3) specifies the information that must be set out in the register for each charity. Disapplication of that section will allow OSCR time to gather the necessary information on each charity before it has to comply with section 3(3). The new subsection will also allow ministers to provide by order that any unregistered charity, or type of unregistered charity, may continue to refer to itself as a charity in Scotland for a period of 12 months following commencement of the section,
despite its not being entered in the register. That will allow foreign charities and non-Scottish UK charities that have a substantial presence in Scotland time to apply to OSCR to be entered in the register. It will also allow foreign charities or non-Scottish UK charities that do not intend to register time to change the way in which they refer to themselves in Scotland.

Finally, the new subsection will allow ministers flexibility to provide that, during the 12-month period in which unregistered charitable bodies are permitted to refer to themselves as charities, other legislative enactments can still apply to those bodies, subject to any specified modifications, as if they were in fact entered into the register. For example, it could allow such bodies to continue to benefit from rates relief under the Local Government (Financial Provisions etc) (Scotland) Act 1962.

As amendment 116 will remove the power of Scottish ministers to make such further transitional, transitory or savings provisions as they consider necessary or expedient as a result of the act, amendment 117 will re-insert that power into section 100.

Amendment 118 will amend section 104 so that Scottish ministers will be able to specify in a commencement order when the transitional arrangements will come into force, instead of the provisions in the section coming into force on royal assent.

I move amendment 116.

Christine Grahame: I have a couple of questions. First, why did you decide on the time periods? I appreciate that a time has to be set, but which groups did you consult in coming to your decision? Secondly, I take it that if, after a period of 12 months or 18 months, OSCR takes the view that a body is not a charity, such a decision will not be retrospective. Is that the case?

Johann Lamont: On the first point, the times were discussed with OSCR and were considered reasonable. On the second point, we are moving to the new model, so at that stage a body would either be a charity or not.

Christine Grahame: Could you clarify that a decision on a body’s charitable status will not be retrospective? If a body continues to refer to itself as a charity, and OSCR takes the view that it is not a charity, I take it that that would not be retrospective and that there would therefore be no clawback of rates relief, for example.

Johann Lamont: No. If that were the case, there would be no transitional arrangements.

Christine Grahame: There could still be transitional arrangements.

Johann Lamont: My understanding is that OSCR’s decision would not be retrospective.

Amendment 116 agreed to.

Section 97, as amended, agreed to.

Sections 98 and 99 agreed to.

Section 100—Ancillary provision

Amendment 117 moved—[Johann Lamont]—and agreed to.

Section 100, as amended, agreed to.

Section 101—Orders, regulations and rules

Amendment 111 not moved.

Amendments 49 to 51 and 155 moved—[Johann Lamont]—and agreed to.

Amendment 112 not moved.

Amendments 52 to 54 and 156 moved—[Johann Lamont]—and agreed to.

Section 101, as amended, agreed to.

Section 102 agreed to.

Schedule 4

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

The Convener: Amendment 55, in the name of the minister, is grouped with amendments 56 to 60.

Johann Lamont: The amendments in the group are technical. The bill provides that Scottish recreational charities will be covered by the purposes that are listed in section 7, rather than by reference to the Recreational Charities Act 1958. However, the 1958 act continues to extend to Scotland for certain tax purposes. Amendments 55 and 56 delete the reference in section 6(2) of the 1958 act to the Local Government (Financial Provisions etc) (Scotland) Act 1962, which is a non-income-tax-related enactment that has a devolved purpose. The bill amends the 1962 act so that that act will no longer interpret the meaning of “charity” in accordance with the law of England and Wales, but will do so in accordance with the new Scottish charity test. The references to the 1962 act in the 1958 act are therefore unnecessary.

Amendment 57 is necessary to amend an incorrect reference in paragraph 2 of schedule 4. Amendments 58 to 60 make further necessary consequential amendments to section 79 of the Sex Discrimination Act 1975, to deal appropriately with charitable educational endowments.

I move amendment 55.
Donald Gorrie: The minister will be aware of concerns about amateur sports clubs. Will she give us an assurance that the change from the approach that is used in the Recreational Charities Act 1958 and the 1962 act to the approach that is taken in the bill will not disadvantage sports clubs and will not inadvertently cause some worthy local clubs to lose their charitable status?

The Convener: As no other member has indicated a desire to speak, I invite the minister to wind up. [Interruption.] I ask that members indicate clearly whether they wish to speak about a particular group of amendments because it is very difficult for me to chair the meeting properly if they do not. All the amendments in the group were lodged and made public on Friday. Members have a responsibility to make the time to read the amendments and figure out how they affect the bill.

Johann Lamont: The amendments are technical and it is certainly not the Executive’s intention to introduce technical amendments that create disadvantages elsewhere. I recognise the broader issue that Donald Gorrie flags up and we have committed ourselves to looking at that further in relation to groups or bodies that provide recreational sporting activities. If it were to be established that these technical amendments impinged in any way, we would revisit the matter.

Amendment 55 agreed to.

Amendments 56 to 60, 137 and 61 to 64 moved—[Johann Lamont]—and agreed to.

Schedule 4, as amended, agreed to.

Section 103—General interpretation

The Convener: Amendment 157, in the name of the minister, is grouped with amendments 113 and 79. If amendment 157 is agreed to, I cannot call amendments 113 and 79. If amendment 157 is not agreed to and amendment 113 is agreed to, amendment 79 cannot be called because of pre-emption.

Johann Lamont: The Executive amendment in this group is in response to concerns that were raised with the Executive by the National Trust for Scotland regarding the difficulties that it would have in identifying its charity trustees using the definition in the bill. The NTS has an extremely complicated governance structure and it is concerned that the definition as drafted would cast too wide a net in its organisation. I understand that the amendments in the name of Donald Gorrie also attempt to deal with those concerns.

Amendment 157 uses the same definition of charity trustees that is used in England and Wales, which is those in "general control and management of the administration", and applies it to all charities whatever their legal form, including Scottish charitable incorporated organisations. Using that form of words has the advantage of being a tried and tested approach. It will provide a flexible definition that describes broadly rather than narrowly those that are trustees, so that it does not prejudice charities with complicated structures. It is therefore capable of dealing with the NTS difficulties as well as with any as yet unknown difficulties with other existing charities whose constitutions contain unusual governance arrangements. The amendment includes SCIOs so that the general definition of trustee applies throughout the bill.

10:30

Section 50(2)(b) makes it clear that any Scottish charitable incorporated organisation’s constitution must provide for the appointment of trustees who are charged with the general control of an SCIO’s administration. Application of the general definition to SCIO trustees makes it clear that, in all cases, being a trustee involves management as well as control.

Amendment 113, in the name of Donald Gorrie, also imports the English law definition of charity trustee. However, the main difficulty with that amendment is that it does not apply to charities that are SCIOs and therefore creates a less flexible definition than that set out in amendment 157. The effect of amendment 113 would be to ensure that the trustees of SCIOs would continue to be defined in terms of section 50(2)(b). It therefore artificially distinguishes between SCIO trustees and all other trustees and is in effect a halfway house between the existing provisions and amendment 157.

We also do not believe that amendment 79 deals satisfactorily with all the issues that arise from the National Trust for Scotland’s structure. It could mean that all members of any committee or group with a delegated function would be charity trustees. That could mean that the duties of charity trustees would attach to a large number of people even though many of them will have a limited remit, which would make the situation impractical from an administrative point of view. In addition, it fragments the responsibilities of trustees and thus undermines the value of this concept.

I recognise that all the amendments in this group are wrestling with the same difficulty. I move amendment 157 and ask Donald Gorrie not to move either of his amendments.

Donald Gorrie: As the minister said, my amendments address the same issue as hers does, in that they concern those organisations that have a multi-tiered structure with a large supervisory body and a smaller executive...
committee. The smaller body takes the day-to-day decisions but, in theory at least, the constitution means that the larger body has the power to overrule those decisions and, therefore, might be considered in some way to have

“general control and management of the administration”
of the charity.

If the minister has had discussions with the National Trust for Scotland and has found that it is satisfied that it—and other organisations of a similar type—would be able to operate effectively under her amendment, I will not quarrel with that position. She might have a point when she says that I should have included SCIOs in the arrangement.

It might be helpful if the regulations or some other detailed document were to indicate more clearly who has the “general control and management” of an organisation. Is it the body that has the theoretical power and meets occasionally to rubber-stamp decisions but does not get particularly involved in things or is it the body that carries out the day-to-day management of the organisation?

On the basis of the discussion, I am happy to support the Executive’s amendment.

Christine Grahame: This is the amendment that I thought that Donald Gorrie was talking about when I last spoke.

I should declare an interest, as I am a member of the Royal Zoological Society of Scotland, which has e-mailed the committee on this subject. I want to support what Donald Gorrie has said about the difficulties that organisations such as the Royal Zoological Society face. It has 30 members but has delegated powers to various committees. In its submission, it says that the drafting of the bill does not make it sufficiently clear which members of which committees would be regarded as charity trustees, who would have the

“general control and management of the administration”
of the charity. There is a need to make clear to the parties who serve on those committees what their capacity is and what their duties and obligations are.

I recognise that Donald Gorrie is not going to move the amendments in his name, but I stress that there is an important issue of clarity for large organisations that operate through committees that are involved in various designated areas. The Royal Zoological Society has an audit and investment committee, an animal welfare committee and so on. Which of the people on those committees are the people who have the

“general control and management of the administration”
of the charity?

I am obliged to Donald Gorrie for raising the issue in the way that he has done, as it is important to tease the issue out.

Johann Lamont: There has been dialogue at official level with the National Trust for Scotland and recognition of its difficulties, which is why amendment 157 was lodged. If the NTS identified further difficulties, obviously that dialogue should continue. It is important that organisations know who has general management control. That is good governance and I am sure that OSCR would expect that to happen; indeed OSCR might produce guidance on it. I am aware of the issue that Christine Grahame raised about the Royal Zoological Society and what I said in my initial remarks applies equally to it. We are trying to deal with the fact that, as we have said from the beginning, charities come in all shapes and sizes and have all sorts of structures. The general principles of the bill are about transparency, openness and regulation. There is an obligation on the charity to be able to understand and show who is taking “general control and management” of the organisation. Equally, we are trying to deal with different structures. Amendment 157 covers that.

Amendment 157 agreed to.

The Convener: Mr Harvie, do you wish to move amendment 114?

Patrick Harvie (Glasgow) (Green): You will be astonished to learn that I am not going to move amendment 114.

Amendment 114 not moved.

The Convener: You never fail to astonish, and not just the convener.

Amendment 5, in the name of Scott Barrie, is grouped with amendment 159.

Scott Barrie: We are returning to a debate that we touched on last week when we agreed to amendment 149, in the name of Donald Gorrie, on misconduct and mismanagement. A number of us raised the issue in the stage 1 debate and it was highlighted in the stage 1 report. The committee supported the view expressed by a number of witnesses that it would be unfortunate if trustees who might be responsible for some form of minor management of a charity found themselves subject to misconduct proceedings. I am aware that we previously got into a debate about semantics and I apologise to the minister because she rightly identified Humpty Dumpty in “Alice in Wonderland”; it was not the Mad Hatter, as I asserted.

Most if not all of us on the committee believe that the terms mismanagement and misconduct are understood to mean different things, at least in layman’s terms. Mismanagement indicates more of a guddle or muddle, whereas committee
I am sympathetic to mismanagement going on for a long time and the mismanagement can be remedied, example that someone has not kept the cash box up to date. Something like that can be remedied, when it is something really quite light, for instance, I would support Scott Barrie. People introduces the words, “minor error”. On the matter of degree, which is why amendment 159 introduces the phrase “minor error”. There are distinctions between “minor errors”, “gross mismanagement” and “misconduct”. That is why it is important to add the words “gross mismanagement but not minor errors”.

I would agree. It is a matter of degree, which is why amendment 159 introduces the term “gross mismanagement”. There is a grey line between them. A matter of misconduct would be carried out knowingly, but there are degrees of negligence that are so bad that they verge on misconduct.

The minister goes on to say that amendments 5 and 159 are founded on the mistaken belief that mismanagement refers to mistakes or negligence—a “muddle”.

Mismanagement can be a muddle. Again, it is a matter of degree, which is why amendment 159 introduces the words, “minor error”. On the minister’s assertion about the common meaning of the words, I would support Scott Barrie. People might say, “There is a bit of mismanagement going on here”, when it is something really quite light, for example that someone has not kept the cash box up to date. Something like that can be remedied, but it is completely different when something has gone on for a long time and the mismanagement has been pointed out; that gets us to the point of gross mismanagement. That is the stage at which no one knows what money is coming in or out—of the charity shop for example—despite their having been told that mismanagement is occurring. It is a matter of degree.

Further on in your letter, minister, you say:

“OSCR must always act reasonably and proportionately and is therefore unlikely to take immediate enforcement action under section 31 in a case of minor mismanagement.”

Rather than saying “it is unlikely”, you could just say “will not”. In the next paragraph you say something more telling:

“Distinguishing between types of mismanagement in the Bill would require OSCR to first judge how serious an act is before deciding whether it has power to take any action and then to decide what action, if any, to take.”

I would say yes, exactly. I would expect OSCR to judge how serious an act is before deciding whether to take any action. That is the point of lodging amendment 159. If a minor error is reported, for example that for one day the cash list was not filled in for the till, I would expect OSCR, rather than going in with big, thundering feet, just to say, “We’ve had a look at this and it is fairly minor. It can be remedied.” That is not misconduct. That is why it is important to add the words “gross mismanagement but not minor errors”.

During the current debate and at stage 3, anyone who has an interest in charities will understand what I—and perhaps others here—mean by “minor errors”, “gross mismanagement” and “misconduct”. There are distinctions between them.

Donald Gorrie: I did not find the arguments in the minister’s letter convincing but, rather than go another three rounds on the subject, we could start again from scratch. Amendment 5 is helpful and the committee should agree to it. We could have a thorough discussion of the issue at the peace conference that the minister has agreed to have before stage 3. I am sure that we are all aiming at the same thing, but the wording of sections 65 and 103 does not help to achieve that result. In my view, and that of most people outside this whole hoo-ha—is hoo-ha a parliamentary word?

Christine Grahame: We will find out in the Official Report.

10:45

Donald Gorrie: People outside the discussion think that there is a moral stigma attached to misconduct that is not attached to
mismanagement. Other people dispute that, but it is a widely held perception.

There are therefore two issues. One is the motive and whether the trustee was culpable in his or her conduct, so that it becomes misconduct. The second is the issue of mismanagement, which can be very serious even if it is not intended, and it can also be relatively minor. We have to distinguish between those two. My objective and that of the committee is that OSCR should be given flexibility so that it can respond appropriately. For example, if a small charity is a bit incompetent about its accounts, OSCR could write to the trustees and say, “You really have to get a grip on this or you will be in trouble next time”. The trustees could then sort themselves out. There could be a full range of penalties, from that slap on the wrist to disbarring trustees. Whether we call it mismanagement or misconduct, there has to be a clear-cut rule so that trustees and OSCR know where they stand.

So we should go along with amendment 5, which represents the views of the committee at stage 1. If the minister has problems with that and with the amendment on the same subject that we passed last week, we should have further discussion and try to sort the whole thing out. It might be that another totally new amendment is necessary.

Linda Fabiani (Central Scotland) (SNP): I will be brief. The first part of the minister’s letter is about amendment 149, which we have already passed and which replaced the words “is to” with “may”. I understand the logic of that part of the letter.

However, I disagree completely with the latter part of the letter, which tries to justify the idea that misconduct and mismanagement are one and the same thing. It is obvious that the common perception is that those two things are not the same. I fail to understand why that is not recognised. I suggest that if whoever is responsible for the wording was to go out into the street and ask a dozen people whether misconduct and mismanagement are different, the vast majority would say yes.

I also fail to see why this cannot be sorted fairly easily with all the wonderful brains that we have in the Scottish Executive. It seems very simple and straightforward. Christine Grahame is not the only lawyer that I have discussed this with. The majority of people would not have a problem with clear definitions and the lawyers with whom I have spoken would also not have a problem with seeing it as good law. The problem has to be sorted and entrenched positions are not helpful. We should agree an amendment today to reflect what the committee believes and look for a way of agreeing on the issue by the time we get to stage 3.

Mary Scanlon: The more that we discuss the issue, the more complex it becomes. I have listened to my colleagues Christine Grahame and Scott Barrie and my concern is that misconduct could potentially be passed off as mismanagement. People could plead ignorance and say that they had just made an administrative error. As has been pointed out, there are genuine administrative errors and, like Linda Fabiani, I think that we have to be very clear.

As I was listening to Scott Barrie I remembered the words, “a muddle, not a fiddle”. We have to be clear about justification. When Scott Barrie talked about deceit with intent, he made a very important point. We could have mismanagement with intent or mismanagement by default. We cannot say that something is mismanagement and that therefore it is not misconduct. Mismanagement can be misconduct; that is why I am finding this quite difficult.

I ask the minister whether either of the amendments addresses those problems. That brings me to my other point. What constitutes minor mismanagement and what is major mismanagement? Who decides what is minor and what is major? Is there an acceptable level of normal, everyday mismanagement? Is there a legal definition of what is minor and what is unacceptable? That is my problem with Scott Barrie’s amendment 5.

I have a similar problem with Christine Grahame’s amendment 159. At industrial tribunals, gross misconduct is difficult to define; it is difficult to decide at what point misconduct becomes gross misconduct. Is there an acceptable level of mismanagement? Christine Grahame’s amendment refers to gross mismanagement. How bad is gross mismanagement? Is normal mismanagement okay? It is a question of degree. This is an important point. We are putting the words in legislation, so we need to know whether “minor” means something in law and whether minor mismanagement is okay, while major mismanagement is unacceptable. We need to know whether ordinary mismanagement is okay but gross mismanagement is unacceptable. I ask the minister to confirm whether those are acceptable legal definitions.

I take Linda Fabiani’s point—she has been excellent on the subject of mismanagement and misconduct this morning and she has highlighted it from the beginning. However, I fear that misconduct could be passed off by unscrupulous people as mismanagement, and the wording will give them a good excuse.

Mr Home Robertson: We are all wrestling with the same problem. Mary Scanlon expressed very well the distinction between bad people and good
people and all the grey areas in between. We have thousands of decent, public-spirited people manning the charitable sector in Scotland and we want them to go on doing that well. We do not want to frighten them off. It seems that the terms that are available to us are misconduct and minor mismanagement, but it is not as straightforward as that—that is Mary Scanlon’s point.

At one end of the scale is malice, which is obviously serious and needs to be dealt with severely. In the middle of the scale is negligence at various levels. We are all human beings and negligence happens, although it is not to be condoned. OSCR needs to try to steer individuals and organisations in the right direction. At the other end of the scale are minor administrative and procedural mistakes. It is only human to make such mistakes and we do not want to come down too heavily on them. We need to find a way to strike a balance and give due discretion to OSCR in its approach to the matter. It seems to me that Scott Barrie’s amendment 5 is the best way to achieve that at this stage, although we may well need to return to the matter at stage 3.

Johann Lamont: I hope that Linda Fabiani does not think that I am pursuing an entrenched position. The discussion is interesting because there is not a hard position on either side. We are all wrestling with the same difficulties. For what it is worth, my preferred position is for neither of the amendments to be agreed to, but I recognise the strength of feeling of the movers of the amendments to be agreed to, but I recognise the strength of feeling of the movers of the amendments and I recognise that there is some gathering of support around Scott Barrie’s amendment. I will go through some of the issues that have been highlighted in the debate.

It is important to recognise the issue about deterring volunteers. We do not want to inhibit or dissuade people from becoming charity trustees. Doing anything that would result in that would be contrary to our position of having a flourishing charitable sector. However, people must understand that responsibilities accompany being a charity trustee and that people who do not take those responsibilities seriously face consequences. We are trying to strike a balance.

Some of the discussion is about the meanings of mismanagement and misconduct. Linda Fabiani argues that a layperson’s view is that mismanagement is different from misconduct, but I am not sure how generally accepted that distinction is, because I do not make that distinction. I do not know how out of step I am with the rest of the world on that.

Even if that were the layperson’s view of those words’ meanings, we are dealing with legislation, so we must consider the legal interpretation of the bill. As we have said, the definition of misconduct has been discussed from the beginning. We touched on it again last week when we debated amendment 149 and I wrote to the committee about the matter. I hope that the letter was helpful, but I suspect that for some it was not.

Amendments 5 and 159 would limit the definition of misconduct to exclude the possibility of OSCR taking action when charity trustees or managers have made a minor mistake. That position is well motivated, but neither amendment would achieve the intended result.

The dictionary definition of misconduct—I know that it might not help—includes conduct that is illegal, unethical, immoral and bad management. The definition in section 103 merely confirms the understanding that mismanagement can also be misconduct. However, more important for the purpose of the discussion is the fact that neither expression conveys any sense of whether conduct or management was deliberate or in error, or of whether a problem was a one-off or was persistent, which members tried to get at. Intent was the concern. One act can look the same as another but what motivated a person’s behaviour and whether the conduct lasted for a period can change our perception.

The amendments would exclude minor mismanagement from the meaning of misconduct or limit the meaning of misconduct to gross mismanagement, but that would not exclude all minor errors from the definition of misconduct. For example, if a charity failed to lodge its accounts on time, that would still be misconduct, whatever the reason for the failure. Neither amendment would change that.

However, the amendments could undermine the effective regulatory regime for charities that the bill tries to establish. I know that nobody on the committee wants to do that. That is especially the case when the amendments are read with amendment 149, which was agreed to last week. As the independent regulator, OSCR must have appropriate powers to take action in cases of misconduct and the discretion to decide when to use them. Equally, a penalty must be able to be imposed for breach of duties by charities and trustees, or the regulatory regime will lack bite and OSCR’s role will be devalued to being advisory rather than directive. For that reason, a breach of any duty should also be a breach of the law.

Most existing charities and their trustees are expected to continue to act responsibly and in accordance with the new provisions. However, the unscrupulous might use the dilution of a strict duty as an avenue to excuse their misconduct. That may be the point that Mary Scanlon suggested. Such an outcome would be unfortunate, and neither existing charities nor the general public would be likely to view that as a welcome development.
OSCR and the court must be able to take appropriate action under sections 31, 32 and 34 in the event of apparent misconduct. After investigation, OSCR should be able to decide whether regulatory action needs to be taken. That will depend on the seriousness and impact of a case. I expect OSCR to consider several ways of dealing with misconduct. According to the circumstances, OSCR may consider a simple reminder of the threat of regulatory action to be a more appropriate course of action.

However, amendments 5 and 159, together with amendment 149, would require OSCR to take a three-step decision before proceeding. First, OSCR would have to establish whether non-compliance or a breach had taken place. Then, as a result of amendment 149, OSCR would have to consider whether non-compliance by a charity or charity trustee was misconduct. Following from amendments 5 or 159, it would have to judge whether mismanagement was minor. Only then would OSCR be able to take regulatory action. That process is complex and could cause unnecessary delay. It would also import uncertainty into the regulatory regime for OSCR, charities and charity trustees. The amendments could obscure the standards that are expected and make the provision of guidance unduly complicated. Transparency would be lost and OSCR’s efficiency could be compromised. As a result, the public could fail to find the reassurance that they seek in the system. None of us would view such an outcome as satisfactory.

11:00

The motive behind amendments 149, 5 and 159—which I understand and support—appears to be to ensure that minor breaches of trustee duties do not automatically attract the full weight of OSCR’s regulatory power. In previous meetings, we have spoken about the need for OSCR to act reasonably, but there might be merit in saying again that, although its powers will be far reaching, as a public body it must act in a way that is both proportionate and justifiable. In addition, all OSCR’s decisions will be subject to review and appeal. It will not be able to take any action without the need to be proportionate coming into play. Perhaps we should consider making that clearer. OSCR’s reasonableness and its responsibility to be reasonable is a key issue, and that addresses concerns about people who have made mistakes triggering the full weight of OSCR. That is not the intention of the framework.

I have looked back at the discussions on the concerns that motivated the amendments and am aware of the part that has been played by the fact that section 65 provided that breaches of some charity trustee duties were offences. Therefore, I remind members that we have amended the relevant section and removed those offences. In doing so, we envisaged an approach whereby the consequence of breaching a section 65 duty would not automatically result in an offence, but such a breach would instead be considered to be misconduct and, if necessary, it would be open to OSCR to take one or more of the actions that are set out in section 31 of the bill.

As I said in my letter, we will need to revisit the full implications of amendment 149 at stage 3. In doing so, we will seek to find a way of addressing the committee’s concerns without compromising the efficiency of the regulatory regime. Far from there being entrenched positions, we are all seeking an ultimate position on which to agree. We are balancing interests in wanting to involve charity trustees but not wanting to be over heavy on them in managing a regulatory regime.

On what Christine Grahame said, my letter states that it would be unlikely that OSCR would take action, but it will be independent of the Executive. Equally, its actions must be proportionate and reasonable.

I have said that I recognise the commitment of Scott Barrie and others on the issue and I have indicated the Executive’s preferred position. Whatever the outcome of the debate, I commit the Executive to further discussions on how we can reach at stage 3 a satisfactory conclusion with respect to amendment 149 that maintains the regulatory regime and does nothing to harm the strength of the charitable sector.

Scott Barrie: When people take broadly the same position on matters, there is sometimes more debate than there is when people take opposing positions, which is interesting. When people take opposing positions, at least the dividing lines are clear. The minister is absolutely right to say that we are all—including the Executive—seeking to do exactly the same thing, and that should be noted.

Mary Scanlon asked what level of mismanagement is acceptable. In an ideal world, no mismanagement should be acceptable, but we live in the real world rather than an ideal world and minor mismanagement is sometimes understandable. That is where the difference lies. I am not talking about an absolute position, and that strikes at the very heart of the debate on misconduct, mismanagement and issues relating to intent and to when people have simply got themselves into a bit of a guddle, which I mentioned previously.

The minister talked about charities not lodging accounts on time being construed as misconduct. In an absolute sense, what she said was true, but there might be understandable circumstances that
led to that happening. However, the non-lodging of accounts on numerous occasions and people not correcting previous management failures would not be permissible—Christine Grahame made that point in speaking to her amendment. That is why I was seeking to use the word “minor”, which would differentiate between minor infringements that led to mismanagement and absolute mismanagement. I am not sure whether amendment 5 has got it right or whether the committee got it right last week. Perhaps we need to return to the matter. The minister has indicated a willingness to address the issue before stage 3. I, for one, will take up that invitation, as I am sure will all other committee members. It is important that we get it right. As members have all acknowledged, the concern is not to put people off—either people who are currently trustees or people who might become trustees. Perhaps it would have been better if the word “mismanagement” had not been included among the definitions in the first place, but it is there and we must deal with the bill as it stands. Now that the word is in the public domain we cannot pretend that it is not there.

Although we will return to the matter in some form, I want to emphasise the point and so I will press the amendment.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

For
Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Fabiani, Linda (Central Scotland) (SNP)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS
Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 5 agreed to.

The Convener: Amendment 159, in the name of Christine Grahame, has already been debated with amendment 5. Does Ms Grahame wish to move the amendment?

Christine Grahame: Am I allowed to say something or can I just move or not move the amendment?

The Convener: Move or not move.

Amendment 159 not moved.

Christine Grahame: I am so obedient.

The Convener: Obedient is not a term that I would usually think of in relation to you, Ms Grahame.

Christine Grahame: I have been that way since I was three.

Mr Home Robertson: Obsequious?

Amendment 65 moved—[Johann Lamont]—and agreed to.

Section 103, as amended, agreed to.

Section 104—Short title and commencement
Amendment 118 moved—[Johann Lamont]—and agreed to.

Section 104, as amended, agreed to.

Long Title

The Convener: Amendment 158, in the name of Christine Grahame, is in a group on its own.

Christine Grahame: As the debate on the bill has unfolded, we have seen that it is not just a case of regulation, registration and so on, but that the prime policy is, as has always been the case, to ensure that we have an honest, accountable, flourishing and reliable voluntary and charitable sector. I noted that in the minister’s remarks in the debate on misconduct and mismanagement she referred to a flourishing charitable sector. That was also the committee’s view. I refer to paragraph 49 of the committee’s stage 1 report:

“Nevertheless, the Committee does see a value in including a wider and more general reference to promoting a flourishing charitable and voluntary sector in Scotland and suggests that the Executive should give consideration to whether this would be most appropriate in the long title or in the body of the Bill.”

Amendment 158 seeks to put such a reference in the long title, which we understand is not enforceable—in that sense—in litigation. It is a purpose behind the bill, so I think that such a reference would reflect our discussions. The long title refers to

“provision about fundraising in connection with charities and other benevolent bodies”.

My amendment would insert

“with a view to promoting a flourishing charitable and voluntary sector”

before the long title concludes

“to amend the law in relation to the investment powers of trustees; and for connected purposes.”

I think that we have gone along that route. By its very presence, OSCR’s role is not just to be a policeman and enforcer but to encourage the kind of sector that we all want. Such an approach is as much of a carrot as a stick. Given that the
committee recommended this unanimously, I move amendment 158.

Donald Gorrie: I have great sympathy for Christine Grahame’s aim in amendment 158, and will be interested to hear the minister’s response. We might well be able to include the positive comments highlighted in the amendment somewhere else in the bill, but it is important to highlight the Parliament’s desire to promote the charitable and voluntary sector. After all, any such legislation is almost entirely concerned with keeping people on the straight and narrow and dealing with those who stray from it.

We should also indicate our sense that the majority of trustees and charities are very helpful to the whole community and that most people do a good job and put in a lot of unpaid time and effort. It would help if the bill said somewhere that its objective was to produce a flourishing charitable and voluntary sector. Otherwise, people who study it might get the wrong impression that we are policing the sector, not promoting it. I would very much like the bill to contain wording such as that suggested by Christine Grahame but, as I have said, I will be interested to hear the minister’s response before I decide what to do.

Mary Scanlon: I agree with the sentiments that Christine Grahame and Donald Gorrie have expressed and should point out that I signed up to the stage 1 report’s recommendation that the bill should say something more in that respect.

However, I am not sure about the phrase “with a view to promoting a flourishing charitable and voluntary sector”. As the bill itself moves towards that aim, I do not think that such an amendment is totally necessary. Perhaps I will return to the matter at stage 3; however, although I agree with some of the sentiments, I would like the wording to be more concise.

Johann Lamont: In our previous discussion we wrestled with issues of real substance; in contrast, I am not sure whether this issue has any real substance. It is perhaps more to do with sentiment than anything else.

I am aware that amendment 158 follows the recommendation in the committee’s stage 1 report that the Executive should consider making a wider reference either in the bill or in the long title to the promotion of a flourishing charitable and voluntary sector in Scotland. As I have said, I support the sentiment. However, I will set out the technical argument—which I have been saving for Donald Gorrie, who I know will love it—after which I will give the committee our view on the merits of adding this wording to the bill.

Putting the proposed reference in the bill or in the long title goes against the Presiding Officer’s guidance on the style and content of bills, which states:

“The text of a Bill—including both the short and long titles—should be in neutral terms and should not contain material intended to promote or justify the policy behind the Bill, or to explain its effect.”

If nothing else, we are at least in line with the Presiding Officer’s guidance.

I am very pleased to provide a robust, transparent and proportionate regulatory framework for charities in Scotland that will reassure the public and in turn help the sector to grow and flourish. This policy has been set out in the consultation paper accompanying the draft bill, in my oral evidence to the committee in February and in the policy memorandum. Moreover, my comments today will again ensure that this issue is part of the parliamentary record. Because legislation should give effect to policy, not make policy statements, and because the wording in amendment 158 would go against the Presiding Officer’s guidance, I ask Christine Grahame to withdraw her amendment.

I should also add that OSCR by itself will not create a flourishing voluntary sector. It is a regulatory body and is therefore, to a large extent, the police officer. Indeed, the charitable and voluntary sector is to be commended for arguing hard for OSCR, because it saw its establishment not as a substitute for the sector but as a way of underpinning and supporting it. We must highlight that distinction. The proposed legislation is about supporting the sector’s desire to flourish and to contribute to Scottish society; it is not meant to be the be-all and end-all of the life and work of charities, charity trustees and the voluntary sector.

I have set out the technical and policy arguments. This bill—indeed, any legislation—does not cover the sum total of the sector’s activity. We believe that it will enhance the sector and will enable it to continue its very important work throughout Scotland. Again, I ask Christine Grahame to withdraw amendment 158.

Christine Grahame: I lost my previous tussle with the Presiding Officer over the long title of the Abolition of Poindings and Warrant Sales Bill when I argued that that bill was simply renaming, not abolishing, those activities. As a result, I am very aware of my prospects in trying to get this wording into the long title of this bill.

In the circumstances, I seek leave to withdraw amendment 158, because I feel that the Presiding Officer will impose the same ruling on me again. However, I shall return with it in another form at
stage 3 and will seek to circumvent his previous ruling by putting the wording elsewhere in the bill. He can read that if he likes—I do not care.

Amendment 158, by agreement, withdrawn.

Long title agreed to.

The Convener: With that, we end our stage 2 consideration of the bill.

Meeting closed at 11:16.
Charities and Trustee Investment (Scotland) Bill
[AS AMENDED AT STAGE 2]

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PART 1
CHARITIES
CHAPTER 1
OFFICE OF THE SCOTTISH CHARITY REGULATOR

1 Office of the Scottish Charity Regulator

(1A) There is to be an office to be known as the Office of the Scottish Charity Regulator.

(1B) There is established a body corporate, to be known as the Scottish Charity Regulator, which is to be the holder of that office.

(1C) That office-holder is referred to in this Act as “OSCR”.

(1D) OSCR has the functions conferred on it by or under this Act and any other enactment.

(2) OSCR’s general functions are—

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act,

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and

(e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR’s functions.

(3) OSCR may do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.
(4) Subsection (3) does not enable OSCR to do anything in contravention of any express
prohibition, restriction or limitation on its powers which is contained in any enactment
(including this Act).

(5) OSCR must perform its functions in a manner that encourages equal opportunities and
in particular the observance of the equal opportunity requirements.

(6) Schedule 1 makes further provision about the Scottish Charity Regulator.

2 Annual reports

(1) As soon as practicable after the end of each financial year, OSCR must—
   (a) prepare and publish a general report on the exercise of its functions during that
       year,
   (b) send a copy of the report to the Scottish Ministers, and
   (c) lay a copy of the report before the Scottish Parliament.

(2) A general report may include, in particular, any general recommendations which OSCR
may have arising from the exercise of its functions during that year and any previous
financial year.

(3) It is for OSCR to determine the form and content of a general report and by what means
it is to be published.

CHAPTER 2

SCOTTISH CHARITY REGISTER

The Register

3 Scottish Charity Register

(1) OSCR must keep a register of charities to be known as the “Scottish Charity Register”
(and referred to in this Act as “the Register”).

(2) The Register is to be kept in such manner as OSCR thinks fit.

(3) The Register must contain a separate entry for each charity entered in it setting out—
   (a) the name of the charity,
   (b) the principal office of the charity or, where it does not have such an office, the
       name and address of one of its charity trustees,
   (c) the purposes of the charity,
   (d) where the charity is a designated religious charity or a designated national
       collector, that fact,
   (e) where—
       (i) a direction is given under section 11(3), 12(2) or (3), 16(6), 28(2), 30(1) or
           31(5) to (9), or
       (ii) a notice is given under section 31(4),
       in relation to the charity, the fact that the direction or notice has been given and
       the date on which it was given,
(f) any other information in relation to the charity which the Scottish Ministers by regulations require to be set out in the Register, and

(g) any other information in relation to the charity which OSCR considers appropriate.

(4) OSCR must, despite subsection (3)(b), exclude the information specified in that provision from a charity’s entry in the Register if, on the application of the charity (whether together with its application for entry in the Register or separately), OSCR is satisfied that including that information is likely to jeopardise the safety or security of any person or premises.

(5) OSCR must, if it is satisfied that a direction or notice of a type described in subsection (3)(e) has been complied with or no longer has effect, remove reference to the direction or notice from the charity’s entry.

(6) OSCR must—

(a) from time to time, review each entry in the Register, and

(b) if it considers any information set out in a charity’s entry to be inaccurate—

(i) amend the entry accordingly, and

(ii) notify the charity of the amendment made.

Applications

4 Application for entry in Register

An application for entry in the Register must—

(a) state the name of the body making the application (the “applicant”),

(b) state the principal office of the applicant or, where it does not have such an office, the name and address of one of the persons who, if the applicant is entered in the Register, will be its charity trustees,

(c) be accompanied by—

(i) a statement of the applicant’s purposes,

(ii) a copy of the applicant’s constitution, and

(iii) the applicant’s most recent statement of account (if any), and

(d) contain such other information, and be accompanied by such other documents, as may be—

(i) required by regulations under section 6(1), or

(ii) otherwise requested by OSCR.

5 Determination of applications

(1) OSCR may enter an applicant in the Register only if it considers that the applicant meets the charity test.

(2) OSCR must refuse to enter an applicant if—

(a) it considers that the applicant’s name falls within section 10, or
(b) the application must, by virtue of regulations under section 6(1), be refused, but must not otherwise refuse to enter an applicant which it considers meets the charity test.

6 Applications: further procedure

(1) The Scottish Ministers may by regulations make such further provision in relation to the procedure for applying and determining applications for entry in the Register (including applications under section 54(1), 56(1) and 58(1)) as they think fit.

(2) Such regulations may in particular make provision about—

(a) information and documents which must be specified in or accompany an application,
(b) the form and manner in which applications must be made,
(c) the period within which OSCR must make a decision on an application, and
(d) circumstances in which OSCR must refuse to enter a body in the Register.

The charity test

(1) A body meets the charity test if—

(a) its purposes consist only of one or more of the charitable purposes, and
(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

(a) the prevention or relief of poverty,
(b) the advancement of education,
(c) the advancement of religion,
(d) the advancement of health,
(da) the saving of lives,
(e) the advancement of citizenship or community development,
(f) the advancement of the arts, heritage, culture or science,
(g) the advancement of amateur sport,
(ga) the provision of recreational facilities with the object of improving the conditions of life for the persons for whom the facilities are primarily intended,
(h) the advancement of human rights, conflict resolution or reconciliation,
(ha) the promotion of religious or racial harmony,
(hb) the promotion of equality and diversity,
(i) the advancement of environmental protection or improvement,
(ia) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,
(l) the advancement of animal welfare,
(m) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(2A) In subsection (2)—

(a) in paragraph (d), “the advancement of health” includes the prevention or relief of sickness, disease or human suffering,

(aa) paragraph (e) includes—
(i) rural or urban regeneration, and
(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,

(b) in paragraph (g), “sport” means sport which involves physical skill and exertion,

(c) paragraph (ga) applies only in relation to recreational facilities which are—
(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or
(ii) available to members of the public at large or to male or female members of the public at large,

(d) paragraph (ia) includes relief given by the provision of accommodation or care, and

(e) for the purposes of paragraph (m), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).

(3) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if—

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

(4A) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order.

8 Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—
(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and
(ii) disbenefit incurred or likely to be incurred by the public,
in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

9 Guidance on charity test
OSCR must, after consulting representatives of the charitable sector and such other persons as it thinks fit, issue guidance on how it determines whether a body meets the charity test.

10 Charity names

(1) A body’s name falls within this section if it is—
(a) the same as, or too like, the name of a charity,
(b) likely to mislead the public as to the true nature of the purposes of the body or of the activities which it carries on, or intends to carry on, in pursuit of those purposes,
(c) likely to give the impression that the body is connected in some way to the Scottish Administration, Her Majesty’s Government in the United Kingdom or any local authority, or with any other person, when it is not so connected, or
(d) offensive.

(2) The reference in subsection (1)(b) to a body’s purposes are—
(a) in the case of an applicant, the purposes set out in the statement accompanying its application,
(b) in the case of a charity, the purposes set out in its entry in the Register, and
(c) in the case of an SCIO proposed in an application under section 54(1), 56(1) or 58(1), the purposes set out in the SCIO’s proposed constitution accompanying the application.

11 Change of name

(1) A charity may change its name only with OSCR’s consent.

(2) A charity which proposes to change its name must, not less than 42 days before doing so, give notice to OSCR specifying its proposed new name.

(3) Unless OSCR, within 28 days of the date on which a notice is given under subsection (2), directs the charity not to change its name, OSCR is to be taken as having given its consent.

(4) OSCR may refuse to consent to a charity changing its name only where it considers that the proposed new name falls within section 10.
12 **Power of OSCR to require charity to change name**

(1) A charity may, if it considers that the name of another charity is too like its name, request OSCR to review the names.

(2) OSCR must, if satisfied following such a review that the names of two charities are too alike, direct either one or both of the charities to change its name.

(3) OSCR must, where at any other time it considers that a charity’s name falls within section 10, direct the charity to change its name.

(4) Section 11 applies in relation to a change of name in compliance with a direction under this section (and the charity directed must give notice of its proposed new name under subsection (2) of that section within such period as may be specified in the direction).

(5) OSCR must remove from the Register any charity which fails to comply with a direction under this section.

References to charitable status

13 **References to charitable status**

(1) A body entered in the Register may refer to itself as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”.

(2) If such a body is established under the law of Scotland, or is managed or controlled wholly or mainly in or from Scotland, it may also refer to itself as a “Scottish charity” or a “registered Scottish charity”.

(3) A body which refers to itself in any of the ways described in subsection (1) is to be treated as representing itself as a body entered in the Register.

(4) A body which refers to itself in any of the ways described in subsection (2) is to be treated as representing itself—

(a) as a body entered in the Register, and

(b) as being managed or controlled wholly or mainly in or from Scotland.

14 **Exception for certain bodies not in Register**

A body which is not entered in the Register may, despite section 13, refer to itself as a “charity” without being treated as representing itself as a charity if, and only if—

(a) it is—

(i) established under the law of a country or territory other than Scotland,

(ii) entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(iii) managed or controlled wholly or mainly outwith Scotland,

(b) it does not—

(i) occupy any land or premises in Scotland, or

(ii) carry out activities in any office, shop or similar premises in Scotland, and

(c) in making that reference, it also refers to being established under the law of a country or territory other than Scotland.
15 References in documents

(1) The Scottish Ministers may by regulations require each body entered in the Register to state, in legible characters—
   (a) that it is a charity,
   (b) such other information as may be specified in the regulations,
   on such documents issued or signed on behalf of the charity as may be so specified.

(2) Such regulations may—
   (a) exempt charities, or charities of a particular type, from any of the requirements imposed by the regulations,
   (b) provide that any statement required by them may, in the case of documents which are otherwise wholly or mainly in a language other than English, be made in that other language.

Changes

16 Changes which require OSCR’s consent

(1) A charity may take any action set out in subsection (2) only with OSCR’s consent and in accordance with any conditions attached to any such consent.

(2) Those actions are—
   (a) amending its constitution so far as it relates to its purposes,
   (b) amalgamating with another body,
   (c) winding itself up or dissolving itself,
   (d) applying to the court in relation to any action set out in paragraphs (a) to (c).

(3) Subsection (1) does not apply in relation to any action—
   (a) in pursuance of an approved reorganisation scheme, or
   (b) for which OSCR’s consent is required by virtue of any other enactment.

(4) Where a charity proposes to take any action set out in subsection (2) it must, not less than 42 days before the date on which the action is to be taken, give notice to OSCR of the proposal specifying that date.

(5) In the case of an action set out in subsection (2)(a), the charity must not proceed unless and until OSCR has given its consent.

(6) In any other case, unless OSCR, within 28 days of the date on which notice is given under subsection (4)—
   (a) refuses its consent, or
   (b) directs the charity not to take the action for a period of not more than 6 months specified in the direction,

OSCR is to be taken as having consented to it.

(7) A direction under subsection (6)(b)—
   (a) may be revoked at any time,
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(b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(8) Where OSCR gives such a direction it must, after making such inquiries as it thinks fit—

(a) give its consent, whether or not subject to conditions, or

(b) refuse its consent.

17 Notification of other changes

(1) A charity must give OSCR notice of—

(a) any change in—

(i) the principal office of the charity, or

(ii) where it does not have such an office, the name or address of the charity trustee specified in the Register (or which would, but for section 3(4), be so specified),

(b) any change in any other details set out in its entry in the Register,

(c) any change to its constitution,

(d) any action set out in section 16(2)(b) to (d) which the charity has taken,

(e) any administration order or an order for winding up made by the court in respect of the charity,

(f) the appointment of a receiver in respect of any of the charity’s property, setting out the date on which the change, action, order or appointment took effect.

(2) Subsection (1) does not apply in relation to any action which requires OSCR’s consent under section 16.

(3) A notice under any of paragraphs (a) to (d) of subsection (1) must be given within 3 months of the date of the change or action to which it relates.

(4) A notice under paragraph (e) or (f) of subsection (1) must be given within 1 month of the date of the order or appointment to which it relates.

Removal from Register

18 Removal from Register

OSCR must, within 28 days of the date on which it receives an application from a charity for removal from the Register—

(a) remove the charity from the Register, and

(b) give it notice of the date on which it is removed.

19 Removal from Register: protection of assets

(1) A body removed from the Register (under section 18 or otherwise) continues to be under a duty to apply—
(a) any property previously acquired, or any property representing property previously acquired,
(b) any property representing income which has previously accrued, and
(c) the income from any such property,
in accordance with its purposes as set out in its entry in the Register immediately before its removal.

(2) Despite the removal of a body from the Register, the provisions of this Part set out in subsection (3) continue to apply to the body, but only so far as they relate to property and income referred to in subsection (1).

(3) Those provisions are—
(a) in Chapter 4—
sections 28 and 29,
section 31(1) to (3) and (5) to (9),
section 32,
section 33(2) to (4),
section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b), and
section 37, and
(b) in Chapter 6, sections 45 and 46.

(4) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any property or income which a body removed from the Register is required to apply in accordance with subsection (1).

(5) The court may approve such a scheme only if it is satisfied—
(a) that it is necessary or desirable to act for the purpose of protecting the property or income to which the scheme relates or securing a proper application of such property or income for the purposes which were set out in the body’s entry in the Register immediately before its removal, and
(b) that those purposes would be better achieved by transferring the property and income to a charity.

(6) The court may approve a scheme under subsection (5) subject to modifications.

(7) A charity receiving property or income in pursuance of a scheme approved under subsection (5) may apply that property or income for its purposes as it thinks fit.

(8) The Scottish Ministers may by order disapply subsections (1) to (7) in relation to any property specified in the order.

(9) An order under subsection (8) may make provision in relation to particular items or types of property or in relation to property owned by particular persons.

(10) It is not competent for such order to make provision in relation to property which is not owned by a charity on the day the order takes effect.
CHAPTER 3
CO-OPERATION AND INFORMATION

Co-operation

20 Co-operation

(1) OSCR must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators.

(2) A “relevant regulator” is a public body or office-holder with functions (whether exercisable in the United Kingdom or elsewhere) which are—

(a) similar to those of OSCR, or

(b) conferred by any enactment and designed to allow the body or office-holder to regulate persons for other purposes.

(3) OSCR and any person authorised by virtue of section 38(1) or (2) to exercise functions under this Act must, so far as consistent with the proper exercise of their respective functions, co-operate with each other for the purpose of enabling or assisting the person to exercise those functions under this Act.

(4) Co-operation does not include the sharing of information which OSCR or any person with whom it is co-operating is prevented by law from disclosing.

Information about charities

21 Public access to Register

(1) OSCR must make the Register available for public inspection—

(a) at all reasonable times at its principal office,

(b) at such other places as it thinks fit, and

(c) otherwise as it thinks fit.

(2) It is for OSCR to determine the form and manner in which the Register is made available; but in doing so OSCR must ensure that the information in the Register is made reasonably obtainable.

(3) OSCR must publicise the arrangements which it makes in pursuance of subsection (1).

(4) OSCR may charge such fee (not exceeding the cost of supply) as it thinks fit for providing information under any arrangements it makes under subsection (1)(b) and (c).

22 Power of OSCR to obtain information from charities

(1) OSCR may by notice require any charity to provide to it—

(a) any document, or a copy of or extract from any document,

(b) documents of any type, or copies of or extracts from such documents,

(c) other information or explanation,

which OSCR requires in relation to the charity’s entry in the Register.

(2) The notice must specify—
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(a) the documents, type of documents, copies, extracts, information or explanation which the charity is to provide to OSCR, and

(b) the date (which must be at least 14 days after the date on which the notice is given) by which the charity must do so.

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a charity would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

23 Entitlement to information about charities

(1) A person who requests a charity to provide a copy of its—

(a) constitution,

(b) latest statement of account prepared under section 45,

is, if the request is reasonable, entitled to be given that copy constitution or copy statement of account (if any) by the charity in such form as the person may reasonably request.

(2) A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe.

(3) The Scottish Ministers may by order exempt from the duty set out in subsection (1) any charities which meet such criteria as may be specified in the order.

24 Disclosure of information by and to OSCR

(1) OSCR may disclose any information to any public body or office-holder (in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom)—

(a) for any purpose connected with the exercise of OSCR’s functions, or

(b) for the purpose of enabling or assisting the public body or office-holder to exercise any functions.

(2) Any person to whom this subsection applies may disclose any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions.

(3) Subsection (2) applies to—

(a) any office-holder in the Scottish Administration,

(b) the Scottish Parliamentary Corporate Body,

(c) any local authority,

(d) any constable, and

(e) any other Scottish public authority with mixed functions or no reserved functions.
25 Removal of restrictions on disclosure of certain information

(1) The power to make a disclosure under section 24 is, unless subsection (2) otherwise provides, subject to any obligation as to secrecy or other restriction on disclosure of information however imposed.

(2) No such obligation or restriction prevents—

(a) OSCR from disclosing any information to a designated body for—

(i) any purpose connected with the exercise of OSCR’s functions,

(ii) the purpose of enabling or assisting that body to exercise any functions,

(b) a designated body from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(c) a charity trustee of a charity from disclosing any information about that charity to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(d) any person appointed to carry out an independent examination or audit of a charity’s statement of account from disclosing any information about that charity which the person appointed becomes aware of in carrying out that examination or audit to OSCR for the purpose of enabling or assisting OSCR to exercise any functions, or

(e) a relevant financial institution from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions under section 47.

(3) The Scottish Ministers may, by order, designate—

(a) for the purposes of paragraph (a) of subsection (2), any public body or office-holder in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom,

(b) for the purposes of paragraph (b) of that subsection, any Scottish public authority with mixed functions or no reserved functions,

and references in that subsection to a “designated body” are to be construed accordingly.

Supplemental

26 False or misleading information etc.

(1) It is an offence for a person to provide any information or explanation to OSCR or any other person if—

(a) the person providing the information or explanation knows it to be, or is reckless as to whether it is, false or misleading in a material respect, and

(b) the information or explanation is provided—

(i) in purported compliance with a requirement by or under this Act, or

(ii) in other circumstances in which the person providing it knows, or could reasonably be expected to know, that it would be used by OSCR, or provided to OSCR for use, in connection with the exercise of its functions.

(2) It is an offence for a person deliberately to alter, suppress, conceal or destroy any document (or any part of a document) which the person is, or which that person knows any other person is, required by or under this Act to provide to OSCR.
(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

27 Disclosure of information: entitlement under other enactments etc.

Sections 21 to 25 are without prejudice to any entitlement to receive or disclose information under any enactment or otherwise.

CHAPTER 4

SUPERVISION OF CHARITIES ETC.

Inquiries

28 Inquiries about charities etc.

(1) OSCR may at any time make inquiries, either generally or for particular purposes, with regard to—

(a) a charity,

(b) a body controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),

(d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of—

(i) a charity, or

(ii) a body falling within paragraph (b) or (c),

(e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,

(f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).

(2) OSCR may direct any charity, body or person with regard to which it is making inquiries under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.

(3) A direction under subsection (2) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body to which the inquiries relate.

(4) A direction under subsection (2)—

(a) may be revoked at any time,

(b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(5) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (2) is guilty of an offence.

(6) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.
29 **Power of OSCR to obtain information for inquiries**

(1) OSCR may by notice require any person to provide to it—
   (a) any document, or a copy of or extract from any document,
   (b) documents of any type, or copies of or extracts from such documents,
   (c) any information or explanation,

which OSCR considers necessary for the purposes of inquiries under section 28.

(2) The notice must specify—
   (a) the documents, type of documents, copies, extracts, information or explanation
       which the person is to provide to OSCR,
   (b) the date (which must be at least 14 days after the date on which the notice is
       given) by which the person must do so, and
   (c) the effect of subsection (6).

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a

   person would be entitled to refuse to disclose on grounds of confidentiality in
   proceedings in the Court of Session.

(4) OSCR must not disclose any document, information or explanation provided in response

   to a requirement under subsection (1) except for the purposes of the inquiries in
   connection with which the requirement was made.

(5) OSCR may pay to any person a sum in respect of expenses reasonably incurred by the

   person in complying with a requirement under subsection (1).

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement

   under subsection (1) is guilty of an offence and liable on summary conviction to a fine
   not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3
   months, or to both.

30 **Removal from Register of charity which no longer meets charity test**

(1) Where it appears to OSCR, as a result of inquiries under section 28, that a charity no

   longer meets the charity test it must—
   (a) direct the charity to take, within such period as may be specified in the direction,
       such steps as OSCR considers necessary for the purposes of meeting the charity
       test, or
   (b) remove the charity from the Register.

(2) Steps specified in a direction under subsection (1)(a) may include applying to OSCR for

   approval under section 40 of a reorganisation scheme in relation to the charity’s
   constitution.

(3) OSCR must, if a charity fails to comply with a direction under subsection (1)(a), remove

   the charity from the Register.
31 Powers of OSCR following inquiries

(1) Subsections (4), (6) and (7) apply where it appears to OSCR, as a result of inquiries under section 28—
   (a) that there has been misconduct in the administration of—
      (i) a charity, or
      (ii) a body controlled by a charity, or
   (b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes.

(2) Subsections (5) to (7) apply where it appears to OSCR, as a result of inquiries under section 28, that a body which is not a charity is being or has been represented as a charity.

(3) Subsections (8) and (9) apply where it appears to OSCR, as a result of inquiries under section 28, that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body who appears to it to—
   (a) have been responsible for or privy to the misconduct,
   (b) have contributed to, or facilitated, the misconduct, or
   (c) be unable or unfit to perform that person’s functions in relation to the property of the charity or body.

(5) OSCR may direct—
   (a) the body representing itself as a charity,
   (b) the person representing the body as a charity,
   to stop doing so.

(6) OSCR may give a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without OSCR’s consent.

(7) OSCR may direct any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without OSCR’s consent.

(8) OSCR may direct the person—
   (a) to cease acting, or representing itself as acting, for or on behalf of the charity or body in any activity specified in the direction,
   (b) to pay to the charity or body, within such period as the direction may specify, any sums which it has collected for the charity or body and which are held by it or by any relevant financial institution or other person on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body.
Charities and Trustee Investment (Scotland) Bill
Part 1—Charities
Chapter 4—Supervision of charities etc.

(9) OSCR may direct any relevant financial institution or other person holding property which OSCR considers to be, or to represent, sums collected for the charity or body not to part with the property without OSCR’s consent.

32 Suspensions and directions: procedure

(1) A suspension under subsection (4) and a direction under any of subsections (5) to (9) of section 31—

(a) has effect for such period of not more than 6 months as is specified in the suspension or direction,

(b) may be revoked at any time,

(c) may be varied, but not so as to have effect for a period of more than 6 months from the date on which the suspension or direction first has effect.

(2) Where such a suspension has been made or direction has been given, a further suspension or direction may be made or given under section 31 but the further suspension or direction ceases to have effect on the same date as the original suspension or direction (unless stated to cease to have effect earlier).

(3) A copy of the notice given under section 71 in respect of a—

(a) suspension under subsection (4) of section 31, or

(b) direction under subsection (5)(b) or (8) of that section, must be given to the charity or body in question.

(4) A copy of the notice given under section 71 in respect of a direction under subsection (7) or (9) of that section must be given to the person directed.

(5) A person who, without reasonable excuse—

(a) contravenes a suspension under subsection (4) of section 31, or

(b) refuses or fails to comply with a direction under any of subsections (5) to (9) of that section, is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

33 Reports on inquiries

(1) OSCR must prepare a report of the subject matter of inquiries made under section 28 if—

(a) as a result of the inquiries it—

(i) gives a direction, or removes a charity from the Register, under section 30,

(ii) suspends a person under subsection (4) of section 31, or

(iii) gives a direction under any of subsections (5) to (9) of that section, or

(b) in any other case, it is requested to do so by the person in respect of whom the inquiries were made and it has not previously prepared a report of the subject matter of those inquiries under this subsection or subsection (2).

(2) OSCR may prepare a report of the subject matter of any other inquiries under section 28.
(2A) A report prepared under this section may relate to two or more inquiries.

(3) Apart from identifying the person in respect of whom inquiries were made, a report under this section must not—

(a) mention the name of any person, or

(b) contain any particulars which, in OSCR’s opinion—

(i) are likely to identify any person, and

(ii) can be omitted without impairing the effectiveness of the report,

unless OSCR considers it is necessary to do so.

(4) OSCR must—

(a) send a copy of a report prepared under subsection (1) to the person in respect of whom the inquiries were made, and

(b) publish a report prepared under this section or such other statement of the result of inquiries made under section 28 as OSCR thinks fit in such manner as OSCR thinks fit.

Powers of Court of Session

34 Powers of Court of Session

(1) Where, on an application by OSCR, it appears to the Court of Session—

(a) that there is or has been misconduct in the administration of—

(i) a charity, or

(ii) a body controlled by a charity (or by two or more charities, when taken together), or

(b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes,

the court may exercise any of the powers set out in subsection (4)(a) and (c) to (g).

(2) Where, on an application by OSCR, it appears to the Court ofSession that a body which is not a charity is or has been representing itself as a charity, the court may exercise any of the powers set out in subsection (4)(b) to (g).

(3) Where, on an application by OSCR, it appears to the Court of Session that a person is or has been representing a body which is not a charity as a charity, the court may exercise any of the powers set out in subsection (4)(f) to (h).

(4) Those powers are power to—

(a) interdict (whether temporarily or permanently) the charity or body from such action as the court thinks fit,

(b) interdict (whether temporarily or permanently) the body from representing itself as a charity or from such other action as the court thinks fit,

(c) appoint a judicial factor (whether temporarily or permanently) to manage the affairs of the charity or body,

(d) where the charity or body is a trust, appoint a trustee,
(e) suspend or remove any person concerned in the management or control of the charity or body,

(f) order any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without the court’s consent,

(g) make an order restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without the court’s consent,

(h) interdict (whether temporarily or permanently) the person from representing the body as a charity or from such other action as the court thinks fit.

(5) Where the court appoints a trustee in pursuance of subsection (4)(d), section 22 of the Trusts (Scotland) Act 1921 (c.58) applies as if the trustee had been appointed under that section.

(6) The power in subsection (4)(g) applies despite anything in the constitution of the charity or body.

(7) Subsection (8) applies where, on an application by OSCR, it appears to the Court of Session that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(8) The court may—

(a) interdict (whether temporarily or permanently) the person from acting, or representing itself as acting, on behalf of the charity or body,

(b) order the person to pay to the charity or body any sums which it has collected for the charity or body and which are held by it, any relevant financial institution or other person holding money on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body,

(c) order any relevant financial institution or other person holding property which the court considers to be, or to represent, sums collected for the charity or body not to part with the property without the court’s consent.

(9) The court may—

(a) recall the suspension of a person in pursuance of subsection (4)(e),

(b) vary or recall an order in pursuance of subsection (4)(f) or (g) or under subsection (8)(b) or (c).

35 Transfer schemes

(1) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any assets of—

(a) another charity,

(b) a body which is controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not a charity but which is or has been representing itself as a charity.
(2) The court may approve a scheme in relation to a charity only if it is satisfied—
(a) that there is or has been misconduct in the administration of the charity,
(b) that 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) that the charity’s purposes would be better achieved by transferring its assets to
another charity.

(3) The court may approve a scheme in relation to a body falling with paragraph (b) of
subsection (1) only if it is satisfied—
(a) that there is or has been misconduct in the administration of the body or any of the
charities which control it,
(b) that it is necessary or desirable to act for the purpose of protecting the property of
the body or any such charity, and
(c) that the transfer provided for by the scheme is reasonable.

(4) The court may approve a scheme in relation to a body falling within paragraph (c) of
subsection (1) only if it is satisfied—
(a) that the body falls within that paragraph, and
(b) that the transfer provided for by the scheme is reasonable.

(5) The court may approve a scheme under this section subject to modifications.

(6) A charity receiving property in pursuance of a scheme approved under this section may
apply that property for its purposes as it thinks fit.

36 Powers in relation to English and Welsh charities

(1) Subsection (2) applies where the Charity Commissioners for England and Wales inform
OSCR that a relevant financial institution or other person in Scotland holds moveable
property on behalf of a body—
(a) which is registered as a charity in England and Wales under section 3 of the
Charities Act 1993 (c.10), or
(b) which, by virtue of section 3(5) of that Act, is not required to register as a charity
under that section.

(2) The Court of Session may, on an application by OSCR, make an order requiring the
relevant financial institution or other person not to part with the property without the
court’s consent.

(3) An order under subsection (2) may be made subject to conditions and may be varied or
recalled.

(4) Where the court has made an order under subsection (2) and, on an application by
OSCR, it is satisfied as to the matters set out in subsection (5) it may transfer the
property to a charity specified in the application—
(a) which has purposes which are the same as or which resemble closely the purposes
of the body whose property is transferred, and
(b) which has intimated that it is prepared to receive the property.

(5) Those matters are—
(a) that there has been misconduct in the administration of the body, and
(b) that it is necessary or desirable to transfer the property for the purpose of protecting it or securing a proper application of it for the purposes of the body from which it is to be transferred.

37 Expenses
In proceedings before it under sections 34 to 36 in relation to a charity, the Court of Session may, instead of awarding expenses against the charity, award expenses against a charity trustee of the charity or against any two or more of its charity trustees jointly and severally.

Supplemental

38 Delegation of functions
(1) It is for the Scottish Ministers to exercise OSCR’s functions under sections 28 to 35 (other than section 30), and any of its general functions relating to those provisions, in so far as they are exercisable in relation to—
(a) charities which are registered social landlords,
(b) bodies controlled by any such charity (or by two or more such charities, when taken together), and
(c) persons acting for or on behalf of any such charity or body.
(2) OSCR may authorise any Scottish public authority with mixed functions or no reserved functions to exercise any of the functions referred to in subsection (1) in so far as they are exercisable in relation to—
(a) such charities or bodies, or types of charity or body, as OSCR may specify in the authorisation, and
(b) persons acting for or on behalf of those charities or bodies.
(3) Such an authorisation may be made only if the authorised person has other regulatory functions conferred on it by an enactment in relation to the charities or types of charity in respect of which the authorisation is made.
(4) OSCR must send a copy of such an authorisation to each charity to which it relates.
(5) OSCR must, before making such an authorisation, consult such persons (including the person it proposes to authorise) as it thinks fit.
(6) OSCR may, at any time, withdraw an authorisation under subsection (2) (and subsections (4) and (5) apply in relation to such a withdrawal as they apply in relation to an authorisation).
(7) Subsection (1) does not prevent OSCR from authorising, under subsection (2), the Scottish Ministers to exercise functions in relation to a person other than a registered social landlord.
(8) It is not competent for OSCR to exercise any of its functions which are, by virtue of subsection (1) or (2), delegated to another public body or office-holder (unless it considers it necessary or expedient to do so in relation to its functions under section 30).
(9) In this section “registered social landlord” means a body registered in the register maintained under section 57(1) of the Housing (Scotland) Act 2001 (asp 10).

39 Bodies controlled by a charity
A charity which is able (whether directly or through one or more nominees) to secure that the affairs of a body are conducted in accordance with the charity’s wishes is, for the purposes of sections 28 to 35, to be treated as being in control of that body.

CHAPTER 5
REORGANISATION OF CHARITIES

40 Reorganisation of charities: applications by charity
(1) OSCR may, on the application of a charity, approve a reorganisation scheme proposed by the charity if it considers—
   (a) that any of the reorganisation conditions is satisfied in relation to the charity, and
   (b) that the proposed reorganisation scheme will—
      (i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or
      (ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.
(2) The Scottish Ministers may by regulations make such provision as they think fit in relation to the procedure for applying for and determining applications under this section.
(3) Such regulations may in particular make provision about—
   (a) the form and manner in which applications must be made,
   (b) the period within which OSCR must make a decision on an application,
   (c) publication of proposed reorganisation schemes,
and may make different provision in relation to different types of charity.

41 Reorganisation of charities: applications by OSCR
(1) Where OSCR considers—
   (a) that any of the reorganisation conditions is satisfied in relation to a charity, and
   (b) that a reorganisation scheme proposed by it or by the charity trustees of the charity will—
      (i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or
(ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.

OSCR may, of its own accord or on the application of the charity trustees of the charity, apply to the Court of Session for approval of the scheme.

(2) The Court of Session may, on an application under subsection (1), approve the proposed reorganisation scheme if it considers that the matters set out in paragraphs (a) and (b) of that subsection are satisfied in relation to the charity to which the application relates.

(3) The charity trustees of a charity may enter appearance as a party in proceedings on an application under subsection (1) in relation to the charity.

(4) OSCR must, not less than 28 days before making an application under subsection (1), notify the charity in question of its intention to do so.

42 Approved schemes

A charity may, despite any provision of its constitution having contrary effect, proceed with any variation, transfer or amalgamation for which an approved reorganisation scheme makes provision.

43 Reorganisation: supplementary

(1) This section applies for the interpretation of Chapter 5.

(2) The “reorganisation conditions” are—

(a) that some or all of the purposes of the charity—

(i) have been fulfilled as far as possible or adequately provided for by other means,

(ii) can no longer be given effect to (whether or not in accordance with the directions or spirit of its constitution),

(iii) have ceased to be charitable purposes, or

(iv) have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution,

(b) that the purposes of the charity provide a use for only part of its property, and

(c) that a provision of the charity’s constitution (other than a provision setting out the charity’s purposes) can no longer be given effect to or is otherwise no longer desirable.

(3) A “reorganisation scheme” is a scheme for—

(a) variation of the constitution of the charity (whether or not in relation to its purposes),

(b) transfer of the property of the charity (after satisfaction of any liabilities) to another charity (whether or not involving a change to the purposes of the other charity), or

(c) amalgamation of the charity with another charity.

(4) Nothing in section 41 affects the power of the Court of Session to approve a cy près scheme in relation to a charity.
(5) Sections 40 and 41 do not apply to any charity—
   (a) constituted under a Royal charter or warrant or under any enactment,
   (b) which is a trust to which section 16 (property held on trust by local authorities) of
       the Local Government etc. (Scotland) Act 1994 (c.39) applies.

(6) But, despite subsection (5), those sections do apply to an endowment if its governing
5 body is a charity.

(7) In subsection (6), “endowment” and “governing body” have the same meaning as in Part
6 (reorganisation of endowments) of the Education (Scotland) Act 1980 (c.44).

44 Endowments

In section 122 (interpretation of Part 6) of the Education (Scotland) Act 1980 (c.44), after
10 subsection (3) insert—
“(4) This Part, apart from section 104, does not apply in relation to any endowment
the governing body of which is a charity within the meaning of section 103 of
the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

CHAPTER 6

CHARITY ACCOUNTS

Duty to keep accounts etc.

45 Accounts

(1) A charity must—
   (a) keep proper accounting records,
   (b) prepare for each financial year of the charity a statement of account, including a
       report on its activities in the financial year,
   (c) have the statement of account independently examined or audited, and
   (d) after such examination or audit, send a copy of the statement of account to OSCR,
15 in accordance with regulations under subsection (4).

(2) Accounting records kept in pursuance of subsection (1)(a) must be preserved by the
20 charity for 6 years from the end of the financial year in which they are made.

(3) Subsection (2) is without prejudice to any other enactment or rule of law.

(4) The Scottish Ministers may by regulations make provision about the matters referred to
25 in subsection (1) including—
   (a) the meaning of “financial year”,
   (b) the information to be contained in the accounting records and statement of
       account,
   (c) the manner in which that information is to be presented,
   (d) the keeping and preservation of the accounting records,
30 (e) the methods and principles according to which, and the time by which, the
       statement of account is to be prepared,
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(f) the time by which the copy statement of account is to be sent to OSCR,

(g) examination or audit of the statement of account,

(h) such other matters in relation to the accounts of a charity as the Scottish Ministers think necessary or expedient.

5 (5) Regulations under subsection (4) may make different provision in relation to different types of charity, including provision exempting charities of a particular type from some or all of the requirements of this section.

46 Failure to provide statement of account

(1) This section applies where a charity fails, within such period as is specified in regulations under section 45(4), to send a copy of a statement of account to OSCR in pursuance of subsection (1)(d) of that section.

(2) OSCR may, after notifying the charity of its intention to do so, appoint a suitably qualified person (an “appointed person”) to prepare such a statement of account.

(3) An appointed person is entitled—

(a) on giving reasonable notice, to enter premises occupied by the charity at all reasonable times,

(b) to have access to, and take possession of, any document appearing to the appointed person to relate to the financial affairs of the charity, and

(c) to require any charity trustee, or agent or employee, of the charity to give the person such assistance, information or explanation as the appointed person may reasonably require.

(4) The charity trustees of the charity are personally liable jointly and severally for—

(a) any costs incurred by OSCR in relation to the appointment of the appointed person, and

(b) the expenses of the appointed person in performing that person’s functions under this section.

(5) The appointed person must—

(a) send to OSCR the statement of account prepared in pursuance of subsection (2),

(b) submit to OSCR a report on the affairs and accounting records of the charity, and

(c) send a copy of the statement of account and report to each person appearing to the appointed person to be a charity trustee of the charity.

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement of an appointed person under subsection (3) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

35 Dormant charity accounts

47 Dormant accounts of charities

(1) Subsection (3) applies where—
(a) a relevant financial institution (whether or not in response to a request from OSCR) informs OSCR that every account held by the institution in the name of or on behalf of a body appearing to the institution to be a relevant body is dormant,

(b) OSCR is satisfied that the body is a relevant body, and

(c) OSCR is unable, after making reasonable inquiries, to locate any person concerned in the management or control of the body.

(2) A relevant body is one which is, has at any time been or, in the case of a body which has ceased to exist, was prior to such cessation—

(a) a charity, or

(b) entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

(3) OSCR must transfer the amount standing to the credit of the relevant body in the dormant accounts (less any amount which it is authorised by regulations under section 48(1) to retain) to—

(a) such charity as OSCR may determine, having regard to the purposes of the relevant body and the purposes of the charity, or

(b) where OSCR is unable to ascertain the purposes of the relevant body, to such charity as OSCR considers appropriate.

(4) For the purposes of subsection (3), OSCR may effect any transaction in relation to the dormant accounts (including a transaction closing any such account).

(5) Where under subsection (3) OSCR transfers an amount to 2 or more charities, it may divide the amount among those charities as it thinks fit.

(6) A charity to which an amount is transferred under this section may apply the amount for its purposes as it thinks fit.

(7) The receipt by—

(a) OSCR of an amount withdrawn or transferred from an account by virtue of this section is a complete discharge of the relevant financial institution, or

(b) a charity of an amount received from OSCR by virtue of this section is a complete discharge of OSCR,

in respect of the amount.

(8) OSCR’s power under subsection (3) ceases—

(a) if the relevant financial institution by which the accounts are held informs OSCR that the accounts (or any of them) are no longer dormant, or

(b) if OSCR becomes aware of the identity of a person concerned in the management or control of the relevant body and informs the relevant financial institution of that fact.

48 Dormant accounts of charities: procedure and interpretation

(1) The Scottish Ministers may, by regulations, make provision as to—

(a) the procedure to be followed by OSCR under section 47,
(b) the extent to which OSCR, in transferring an amount under subsection (3) of that section, may retain a sum in respect of its expenses in exercising its functions under that section.

(2) An account is dormant for the purposes of section 47 if no transaction other than—

(a) a payment into the account, or

(b) a transaction effected by the relevant financial institution holding the account, has been effected in relation to the account within the period of 5 years immediately preceding the dormancy date.

(3) An account is no longer dormant for the purposes of that section if a transaction other than—

(a) a payment into the account,

(b) a transaction effected by the relevant financial institution holding the account, or

(c) a transaction effected by OSCR in pursuance of subsection (3) of that section, is effected after the dormancy date.

(4) The dormancy date is the date on which the institution informs OSCR as mentioned in section 47(1)(a).

CHAPTER 7

SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS

Nature and constitution

49 Scottish charitable incorporated organisations

(1) A charity may be constituted as a Scottish charitable incorporated organisation (a “SCIO”).

(2) A SCIO is a body corporate having—

(a) a constitution,

(b) a principal office in Scotland,

(c) 2 or more members.

(3) Its membership may, but need not, consist of or include some or all of its charity trustees.

(4) The members are not liable to contribute to the assets of the SCIO if it is wound up.

50 Constitution and powers

(1) A SCIO’s constitution must state its name and its purposes.

(2) A SCIO’s constitution must make provision—

(a) about who is eligible for membership, and how a person becomes a member, and

(b) for the appointment of 3 or more persons (“charity trustees”) who are to be charged with the general control of the SCIO’s administration, and about any conditions of eligibility for becoming a charity trustee.
A SCIO’s constitution must also provide for such other matters, and comply with such requirements, as are specified in regulations made by the Scottish Ministers.

A SCIO must use and apply its property in furtherance of its purposes and in accordance with its constitution.

Subject to anything in its constitution, a SCIO has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so.

For the purposes of managing the affairs of a SCIO, its charity trustees may exercise all the SCIO's powers.

General duty of members of SCIO

Subsections (1)(a), (3) and (4) of section 65 apply to the members of a SCIO who are not charity trustees as they apply to its charity trustees.

Name and status

The name of a SCIO must appear in legible characters on—

(a) such documents issued by or on behalf of the SCIO,

(b) such documents signed by or on behalf of the SCIO,

as may be specified in regulations made by the Scottish Ministers.

Subsection (3) applies where the name of a SCIO does not include—

(a) “Scottish charitable incorporated organisation”, or

(b) “SCIO” (with or without a full stop after each letter),

whether or not capital letters are used.

Where this subsection applies, the fact that a SCIO is a SCIO must be stated in legible characters in all the documents referred to in subsection (1).

Section 15 does not apply in relation to a SCIO.

Offences etc.

A charity trustee of a SCIO or a person on the SCIO’s behalf who—

(a) issues, or authorises the issue of, any document referred to in subsection (1)(a) of section 52, or

(b) signs, or authorises the signature on behalf of the SCIO of, any document referred to in subsection (1)(b) of that section,

which does not comply with subsections (1) and (3) of that section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

OSCR may direct—

(a) any body which is not a SCIO and which is representing itself as being a SCIO,

(b) any person who is representing that any such body is a SCIO,

to stop doing so by such date as OSCR may direct.
(3) The Court of Session may, on an application by OSCR, interdict—
   (a) any body which is not a SCIO from representing itself as a SCIO,
   (b) a person who is representing that such a body is a SCIO from doing so.

(4) OSCR may not apply for such an interdict against a body or person unless the body or person has failed to comply with a direction under subsection (2).

Creation of SCIO and entry in Register

54 Application for creation of SCIO

(1) Any 2 or more individuals may apply to OSCR for a SCIO to be constituted and for its entry in the Register.

(2) The application must—
   (a) state the name of the SCIO,
   (b) state the proposed principal office of the SCIO,
   (c) be accompanied by a copy of the SCIO’s proposed constitution,
   (d) contain such other information, and be accompanied by such other documents, as may be—
      (i) required by regulations under section 6(1), or
      (ii) otherwise required by OSCR.

(3) OSCR may grant the application only if it considers that the SCIO, if constituted, would meet the charity test.

(4) OSCR must refuse the application if—
   (a) it considers that the SCIO’s proposed name falls within section 10,
   (b) the SCIO’s proposed constitution does not comply with one or more of the requirements of section 50 and any regulations made under that section, or
   (c) the application must, by virtue of regulations under section 6(1), be refused, but must not otherwise refuse an application if it considers that the SCIO, if constituted, would meet the charity test.

(5) Sections 4 and 5 do not apply in relation to an application under subsection (1).

55 Entry in Register

(1) If OSCR grants an application under section 54(1) it must enter the SCIO to which the application relates in the Register.

(2) On the entry in the Register being made in accordance with subsection (5), subsections (3) and (4) apply.

(3) The SCIO becomes by virtue of this subsection a body corporate—
   (a) whose constitution is that proposed in the application,
   (b) whose name is that specified in the constitution, and
   (c) whose first members are the individuals who made the application.
(4) All property for the time being vested in those individuals (or any of them) on trust for the charitable purposes of the SCIO (when constituted) vests by virtue of this subsection in the SCIO.

(5) The entry for the SCIO in the Register must (in addition to the matters required by section 3(3)) include—

(a) the date when the entry was made, and

(b) a note stating that the charity is constituted as a SCIO.

(6) OSCR must send a copy of the entry in the Register to the SCIO at its principal office.

(7) If a SCIO ceases to be a charity, it ceases to be a SCIO.

Conversion, amalgamation and transfer

56 Conversion of charity which is a company or registered friendly society: applications

(1) The following may apply to OSCR to be converted into a SCIO, and for the SCIO’s entry in the Register—

(a) a charity which is a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,

(b) a charity which is a registered society within the meaning of the Industrial and Provident Societies Act 1965 (c.12).

(2) But such an application may not be made—

(a) by a company or registered society having a share capital if any of the shares are not fully paid up,

(b) by a company having only a single member.

(3) Such an application is referred to in this section and sections 56A and 57 as an “application for conversion”.

(4) Section 54(2) applies in relation to an application for conversion as it applies to an application for a SCIO to be constituted (but sections 4 and 5 do not apply in relation to an application for conversion).

(5) In addition to the documents referred to in section 54(2), the application for conversion must be accompanied by—

(a) a copy of the resolution of the company or registered society that it be converted into a SCIO, and

(b) a copy of the resolution of the company or registered society adopting the proposed constitution of the SCIO.

(6) The resolution referred to in subsection (5)(a) must be—

(a) a special resolution of the company or registered society, or

(b) a unanimous written resolution signed by or on behalf of all the members of the company or registered society who would be entitled to vote on a special resolution.

(7) In the case of a registered society, “special resolution” has the meaning given in section 52(3) of the Industrial and Provident Societies Act 1965 (c.12).
56A Determination of application for conversion

(1) Before determining an application for conversion, OSCR must consult—
(a) the appropriate registrar, and
(b) such other persons as it thinks fit,
about whether the application should be granted.

(2) OSCR may grant an application for conversion only if it considers that the charity, if converted into a SCIO as proposed, would continue to meet the charity test.

(3) OSCR must refuse an application for conversion if—
(a) it considers that the SCIO’s proposed name falls within section 10,
(b) the SCIO’s proposed constitution does not comply with one or more of the requirements of section 50 and any regulations made under that section, or
(c) the application must, by virtue of regulations under section 6(1), be refused.

(4) If OSCR considers that a charity, if converted into a SCIO as proposed in an application for conversion, would continue to meet the charity test, OSCR may refuse the application on grounds other than those set out in subsection (3) only if it is satisfied by any representations received from those whom it consulted under subsection (1) that such a refusal would be appropriate.

57 Conversion: supplementary

(1) If OSCR grants an application for conversion, it must—
(a) enter the SCIO in the Register,
(b) send to the appropriate registrar a copy of each of the resolutions of the converting company or registered society referred to in section 56(5) and a copy of the entry in the Register relating to the SCIO, and
(c) once the SCIO’s constitution as a SCIO has taken effect, remove from the Register the entry for the converting company or registered society.

(2) The entry for the SCIO in the Register must, for so long as its constitution as a SCIO has not yet taken effect, include a note stating that fact.

(3) If the appropriate registrar—
(a) registers the documents sent under subsection (1)(b), and
(b) cancels the registration of the company under the Companies Act 1985 (c.6), or of the society under the Industrial and Provident Societies Act 1965 (c.12), subsections (4) and (5) apply.

(4) The company or registered society is by virtue of this subsection converted into a SCIO, being a body corporate—
(a) whose constitution is that proposed in the application for conversion,
(b) whose name is that specified in the constitution, and
(c) whose first members are the members of the converting company or society immediately before the moment of conversion.
(5) All property, rights and liabilities of the converting company or registered society become by virtue of this subsection the property, rights and liabilities of the SCIO.

(6) The entry for the SCIO in the Register must include—

(a) a note stating that the charity is constituted as a SCIO,

(b) the date on which it became so constituted, and

(c) a note of the name of the company or society which was converted into the SCIO.

(7) In section 56A and in this section, the “appropriate registrar” means—

(a) in the case of an application for conversion by a company, the registrar of companies (within the meaning of the Companies Act 1985 (c.6)),

(b) in the case of an application for conversion by a registered society, the Financial Services Authority.

58 Amalgamation of SCIOs

(1) Any 2 or more SCIOs (“the old SCIOs”) may, in accordance with this section, apply to OSCR to be amalgamated, and for a new SCIO (“the new SCIO”) to be constituted and entered in the Register as their successor.

(2) Such an application is referred to in this section and section 59 as an “application for amalgamation”.

(3) Subsections (2) to (4) of section 54 apply in relation to an application for amalgamation as they apply to an application for a SCIO to be constituted, but with references to the SCIO being read as references to the new SCIO (but sections 4 and 5 do not apply in relation to an application for amalgamation).

(4) In addition to the documents and information referred to in section 54(2), the application for amalgamation must be accompanied by—

(a) a copy of a resolution of each of the old SCIOs approving the proposed amalgamation, and

(b) a copy of a resolution of each of the old SCIOs adopting the proposed constitution of the new SCIO.

(5) The resolutions must be passed—

(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or

(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

59 Amalgamation: supplementary

(1) If OSCR grants an application for amalgamation, it must—

(a) enter the new SCIO in the Register, and

(b) remove from the Register the entries for the old SCIOs.

(2) On the new SCIO being entered in the Register it becomes by virtue of this section a body corporate—

(a) whose constitution is that proposed in the application for amalgamation,
(b) whose name is that specified in the constitution, and
(c) whose first members are the members of the old SCIOs immediately before the new SCIO was entered in the Register.

(3) On the removal of the old SCIOs from the Register—
(a) all the property, rights and liabilities of each of the old SCIOs become by virtue of this subsection the property, rights and liabilities of the new SCIO, and
(b) each of the old SCIOs is dissolved.

(4) The entry for the new SCIO in the Register must include—
(a) a note stating that it is constituted as a SCIO,
(b) the date on which it became so constituted, and
(c) a note that it was constituted following amalgamation, and of the name of each of the old SCIOs.

(5) OSCR must send a copy of the entry in the Register to the new SCIO at its principal office.

60 Transfer of SCIO’s undertaking

(1) A SCIO may resolve that all its property, rights and liabilities should be transferred to another SCIO specified in the resolution.

(2) Where a SCIO has passed such a resolution, it must send to OSCR—
(a) a copy of the resolution, and
(b) a copy of a resolution of the transferee SCIO agreeing to the transfer to it.

(3) A resolution referred to in subsections (1) and (2)(b) must be passed—
(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or
(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

(4) The resolution referred to in subsection (1) does not take effect until confirmed by OSCR.

(5) If OSCR confirms the resolution—
(a) all the property, rights and liabilities of the transferor SCIO become by virtue of this subsection the property, rights and liabilities of the transferee SCIO in accordance with the resolution,
(b) the transferor SCIO is dissolved, and
(c) OSCR must remove from the Register the entry for the transferor SCIO.

General

61 Third parties

(1) A person dealing with a SCIO in good faith and for value is not concerned to inquire whether—
(a) anything in the SCIO’s constitution prevents it acting in the way that it is, or
(b) any constitutional limitations on the powers of the SCIO’s charity trustees prevent
them from binding the SCIO or authorising others to do so.

(2) Nothing in subsection (1) prevents a person from bringing proceedings for interdict in
respect of the doing of an act which—

(a) the SCIO, because of anything in its constitution, does not have power to do, or

(b) the SCIO’s charity trustees, because of any constitutional limitations on their
powers, do not have power to do.

(3) But no such proceedings may be brought in respect of an act to be done in fulfilment of
a legal obligation arising from a previous act of the SCIO.

(4) Subsection (3) does not prevent OSCR from exercising any of its powers.

(5) Nothing in subsection (1)(b) affects any liability incurred by the SCIO’s charity trustees
(or any of them) for doing anything which, because of any constitutional limitations on
their powers, the trustees (or that trustee) do not have power to do.

(6) Nothing in subsection (1) absolves the SCIO’s charity trustees from their duty to act
within the SCIO’s constitution and in accordance with any constitutional limitations on
their powers.

(7) In this section “constitutional limitations” on the powers of a SCIO’s charity trustees are
limitations on their powers under its constitution, including limitations deriving from a
resolution of the SCIO in general meeting, or from an agreement between the SCIO’s
members.

62 Amendment of constitution

(1) A SCIO may by resolution of its members amend its constitution (and a single
resolution may provide for more than one amendment).

(2) Such a resolution must be passed—

(a) by a two-thirds majority of those voting at a general meeting of the SCIO
   (including those voting by proxy or by post, if voting that way is permitted), or

(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

(3) The date of passing of such a resolution is—

(a) the date of the general meeting at which it was passed, or

(b) if it was passed otherwise than at a general meeting, the date on which the last
   member agreed to it.

63 Regulations relating to SCIOs

The Scottish Ministers may by regulations make further provision in relation to SCIOs
including, in particular, provision about—

(a) applications for constitution as, or conversion into, a SCIO, the determination of
   applications, entry in the Register and the effect of such entry,

(b) the administration of a SCIO,

(c) amalgamation of SCIOs and transfer of a SCIO’s property, rights and liabilities to
   another SCIO,
(d) the winding up, insolvency or dissolution of a SCIO,
(da) the maintenance of registers of information about SCIOs (for example, registers of members, of charity trustees or of charges over the SCIO’s assets),
(e) such other matters in connection with the provision made by this Chapter as they think fit.

CHAPTER 8

RELIGIOUS CHARITIES

64 Designated religious charities

(1) OSCR may designate as a designated religious charity a charity which appears to it to have—
(a) the advancement of religion as its principal purpose,
(b) the regular holding of public worship as its principal activity,
(c) been established in Scotland for at least 10 years,
(d) a membership of at least 3,000 persons who are—
(i) resident in Scotland, and
(ii) at least 16 years of age, and
(e) an internal organisation such that—
(i) one or more authorities in Scotland exercise supervisory and disciplinary functions in respect of the component elements of the charity, and
(ii) those elements are subject to requirements as to keeping accounting records and audit of accounts which appear to OSCR to correspond to those required by section 45.

(2) OSCR may determine that subsection (1)(c) need not be satisfied in the case of a charity—
(a) created by the amalgamation of 2 or more charities each of which, immediately before the amalgamation—
(i) was a designated religious charity, or
(ii) was, in OSCR’s opinion, eligible for designation as such, or
(b) constituted by persons who have removed themselves from membership of a charity which, immediately before the removal—
(i) was a designated religious charity, or
(ii) was, in OSCR’s opinion, eligible for designation as such.

(3) The provisions set out in subsection (4) do not apply to—
(a) a designated religious charity,
(b) any component element of a designated religious charity which is itself a charity (whether or not having as its principal purpose the advancement of religion).

(4) Those provisions are—
subsections (1) and (6) of 16 (in so far as those subsections relate to any action set out in subsection (2)(b) to (d) of that section),
section 28(2),
section 31(4) and (6),
section 34(4)(c) to (e),
section 68.

(5) OSCR may, by notice served on a designated religious charity, withdraw the designation of the charity as such where—

(a) it appears to OSCR that one or more of paragraphs (a) to (e) of subsection (1) is no longer satisfied in relation to the charity, or
(b) in consequence of an investigation of any component element of the charity under section 28, OSCR has given a direction under section 31(5) in relation to the component element and considers that it is no longer appropriate for the charity to be a designated religious charity.

CHAPTER 9

CHARITY TRUSTEES

General duties

65 Charity trustees: general duties
(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—
(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes, and
(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) or (2) may be treated as being misconduct in the administration of the charity.

Remuneration

66 Remuneration for services
(1) Where a charity trustee of a charity—
(a) provides services to or on behalf of the charity, or
(b) might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected,
the person providing the services (the “service provider”) is entitled to be remunerated from the charity’s funds for doing so only if the conditions set out in subsection (2) are met.

(2) Those conditions are—

(a) that the maximum amount of the remuneration—

(i) is set out in a written agreement between the service provider and the charity (or, as the case may be, its charity trustees) under which the service provider is to provide the services in question, and

(ii) is reasonable in the circumstances,

(b) that, before entering into the agreement, the charity trustees were satisfied that it would be in the interests of the charity for those services to be provided by the service provider for that maximum amount,

(c) that, immediately after entering into the agreement, less than half of the total number of charity trustees of the charity fall within subsection (4), and

(d) that the charity’s constitution does not contain any provision which expressly prohibits the service provider from receiving the remuneration.

(4) A charity trustee falls within this subsection if the trustee is—

(a) party (in the capacity of a service provider) to a written agreement of the type described in subsection (2)(a)(i) under which any obligation is still to be fully discharged,

(b) entitled to receive remuneration from the charity’s funds otherwise than by virtue of such an agreement, or

(c) connected with any other charity trustee who falls within sub-paragraph (a) or (b).

(5) Subsection (1) does not prevent a charity trustee or other service provider from receiving any remuneration from a charity’s funds which that service provider is entitled to receive by virtue of—

(a) any provision of the charity’s constitution which was in force on the day on which the Bill for this Act was introduced in the Scottish Parliament,

(b) an order made by the Court of Session, or

(c) any enactment.

(6) Where a charity trustee or other service provider is remunerated in contravention of this section, the charity may recover the amount of remuneration; and proceedings for its recovery must be taken if OSCR so directs.

67 Remuneration: supplementary

(1) In section 66—

“benefit” means any direct or indirect benefit,

“maximum amount”, in relation to remuneration, means the maximum amount of the remuneration whether specified in or ascertainable under the terms of the agreement in question,
“remuneration” includes any benefit in kind (and “remunerated” is to be construed accordingly),
“services” includes goods that are supplied in connection with the provision of services.

(2) For the purposes of that section, the following persons are “connected” with a charity trustee—

(a) any person—
   (i) to whom the trustee is married,
   (ia) who is the civil partner of the trustee, or
   (ii) with whom the trustee is living as husband and wife or, where the trustee
        and the other person are of the same sex, in an equivalent relationship,
(b) any child, parent, grandchild, grandparent, brother or sister of the trustee (and any
    spouse of any such person),
(c) any institution which is controlled (whether directly or through one or more
    nominees) by—
    (i) the charity trustee,
    (ii) any person with whom the charity trustee is connected by virtue of
        paragraph (a), (b), (d) or (e), or
    (iii) two or more persons falling within sub-paragraph (i) or (ii), when taken
        together,
(d) a body corporate in which—
    (i) the charity trustee has a substantial interest,
    (ii) any person with whom the charity trustee is connected by virtue of
        paragraph (a), (b), (c) or (e) has a substantial interest, or
    (iii) two or more persons falling within sub-paragraph (i) or (ii), when taken
        together, have a substantial interest,
(e) a Scottish partnership in which one or more of the partners is—
    (i) the charity trustee, or
    (ii) a person with whom the charity trustee is, by virtue of paragraph (a) or (b),
        connected.

(3) For the purposes of subsection (2)—

(a) a person who is—
    (i) another person’s stepchild, or
    (ii) brought up or treated by another person as if the person were a child of the
         other person,
    is to be treated as that other person’s child,
(b) a person who is able to secure that the affairs of an institution are conducted in
    accordance with the person’s wishes is to be treated as being in control of the
    institution,
(c) a person who—
(i) is interested in shares comprised in the equity share capital of a body corporate of a nominal value of more than one-fifth of that share capital, or

(ii) is entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, more than one-fifth of the voting power at any general meeting of a body corporate,

is to be treated as having a substantial interest in the body corporate.

(4) The rules set out in Part 1 of Schedule 13 to the Companies Act 1985 (c.6) apply for the purposes of this section as they apply for the purposes of section 346(4) (connected persons etc.) of that Act (and “equity share capital” and “share” have the same meanings in this section as they have in that Act).

Disqualification

68 Disqualification from being charity trustee

(1) The persons specified in subsection (2) are disqualified from being charity trustees.

(2) Those persons are any person who—

(a) has been convicted of—

(i) an offence involving dishonesty,

(ii) an offence under this Act,

(b) is an undischarged bankrupt,

(c) has been removed, under section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) or section 34 of this Act, from being concerned in the management or control of any body,

(d) has been removed from the office of charity trustee or trustee for a charity by an order made—

(i) by the Charity Commissioners for England and Wales under section 18(2)(i) of the Charities Act 1993 (c.10), section 20(1A)(i) of the Charities Act 1960 (c.58) or section 20(1) of that Act (as in force before the commencement of section 8 of the Charities Act 1992 (c.41)), or

(ii) by Her Majesty’s High Court of Justice in England, on the grounds of any misconduct in the administration of the charity for which the person was responsible or to which the person was privy, or which the person’s conduct contributed to or facilitated,

(e) is subject to a disqualification order or disqualification undertaking under the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

(3) A person referred to in subsection (2)(a) is not disqualified under subsection (1) if the conviction is spent by virtue of the Rehabilitation of Offenders Act 1974 (c.53).

(4) OSCR may, on the application of a person disqualified under subsection (1), waive the disqualification either generally or in relation to a particular charity or type of charity.

(5) OSCR must notify a waiver under subsection (4) to the person concerned.
OSCR must not grant a waiver under subsection (4) if to do so would prejudice the operation of the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

69 Disqualification: supplementary

(1) A person who acts as a charity trustee while disqualified by virtue of section 68 is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a period not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 2 years or a fine or both.

(2) Any acts done as a charity trustee by a person disqualified by virtue of section 68 from being a charity trustee are not invalid by reason only of the disqualification.

(3) In section 68(2)(b), “undischarged bankrupt” means a person—

(a) whose estate has been sequestrated, who has been adjudged bankrupt or who has granted a trust deed for or entered into an arrangement with creditors, and

(b) who has not been discharged under or by virtue of—

(i) section 54 or 75(4) of the Bankruptcy (Scotland) Act 1985 (c.66),

(ii) an order under paragraph 11 of Schedule 4 to that Act,

(iii) section 279 or 280 of the Insolvency Act 1986 (c.45), or

(iv) any other enactment or rule of law subsisting at the time of the person’s discharge.

CHAPTER 10
DECISIONS: NOTICES, REVIEWS AND APPEALS

Preliminary

70 Decisions

This Chapter applies to any decision by OSCR (or by a person to whom OSCR’s functions are delegated by virtue of section 38) to—

(a) refuse an application for entry in the Register, including entry as a SCIO under section 55, 57 or 59,

(b) refuse to disapply section 3(3)(b) in relation to a charity,

(c) give a direction under section 11(3),

(d) give a direction under section 12(2) or (3),

(e) refuse to give a direction under section 12(2),

(f) refuse to consent to a charity taking any action set out in section 16(2),

(g) give a direction under section 28(2),

(h) make a requirement under section 29(1),

(i) remove a charity from the Register under section 30(1) or (3),
(j) suspend a person under section 31(4),
(k) give a direction under section 31(5) or (8),
(l) give a direction under section 31(6), (7) or (9),
(m) refuse an application made for the purposes of section 40(1),
(n) give a direction under section 53(2),
(o) give a direction under section 66(6),
p) refuse to grant a waiver under section 68(4),
(q) refuse to designate a charity as a designated religious charity or designated national collector, or
(r) withdraw the designation of a charity as a designated religious charity or designated national collector.

Notice and effect of decisions

71 Notice of decisions

(1) Any person who makes a decision to which this Chapter applies must, as soon as reasonably practicable after doing so, give notice of it to the person specified in subsection (2) and, where the decision is made by a person to whom OSCR’s functions have been delegated by virtue of section 38, OSCR.

(2) That person is—

(a) in the case of a decision referred to in paragraph (a), (g), (j), (k), (n) or (p) of section 70, the person in respect of whom the decision was made,

(b) in the case of a decision referred to in paragraph (e) of that section, the charity which requested OSCR to conduct a review under section 12, and

(c) in the case of any other decision referred to in that section, the charity in respect of which the decision was made.

(3) A notice given under this section must—

(a) set out the decision,

(b) give the reasons for the decision, and

(c) where the notice is given to a person specified in subsection (2), advise the recipient of—

(i) the right to request OSCR to review the decision, and

(ii) the period within which such a request must be made.

72 Effect of decisions

(1) Unless subsection (2) or (3) provides otherwise, a decision to which this Chapter applies (and any direction, requirement, suspension or other act in pursuance of such a decision) has effect from the day on which the notice required by section 71 is given.
(2) A decision referred to in section 70(d), (i), (o) or (r) (and any direction, requirement, suspension or other act in pursuance of such a decision) is of no effect unless and until the notice required by section 71 is given and—

(a) the period within which OSCR must, on request, review the decision expires without a request being made, or

(b) where OSCR, on a request made within that period, confirms the decision (with or without variations)—

(i) the period within which that decision by OSCR may be appealed under section 75 to the Panel expires without an appeal being made, or

(ii) where such an appeal is made, it is abandoned or finally determined (by the Panel or, as the case may be, the Court of Session).

(3) A decision referred to in section 70(h) (and any corresponding requirement) is of no effect unless and until the notice required by section 71 is given and—

(a) the period within which OSCR must, on request, review the decision expires without a request being made, or

(b) where such a request is made, the date on which OSCR confirms the decision (with or without variations).

Reviews

73 Review of decisions

(1) OSCR must, within 21 days of being requested to do so by a person given notice under section 71 of a decision to which this Chapter applies—

(a) review the decision,

(b) confirm, vary, reverse or revoke it, and

(c) give notice of its decision under paragraph (b) to the person who requested the review.

(2) A notice under paragraph (c) of subsection (1) must set out OSCR’s reasons for its decision under paragraph (b) of that section.

(3) The duty in subsection (1) applies only if the request is made within 21 days of the notice under section 71 being given to the person making the request.

(4) OSCR must publish any further procedures in accordance with which reviews are to be conducted.

Appeals

74 Scottish Charity Appeals Panel

(1) The Scottish Ministers must, from time to time, constitute a panel to be known as the Scottish Charity Appeals Panel (in this Act referred to as “the Panel”) to exercise functions conferred on it by section 75.

(2) Schedule 2 makes further provision about the Panel.
75 Appeals to Scottish Charity Appeals Panel

(1) Where OSCR—
   (a) confirms a decision under section 73(1), or
   (b) reconfirms a decision under section 76(1),

the decision (or, where OSCR varies the decision on confirming or reconfirming it, the
decision as varied) may be appealed to the Panel.

(2) A decision referred to in paragraph (g) or (h) of section 70 (whether or not confirmed
   with variations) may not, despite subsection (1)(a), be appealed to the Panel.

(3) It is for the person whose request or, as the case may be, earlier appeal under this section
   caused OSCR to confirm or reconfirm the decision to make an appeal under subsection
   (1).

(4) Such an appeal must be made within 28 days of the person entitled to appeal it being
   given notice of the confirmation or reconfirmation.

(5) The Panel may—
   (a) confirm a decision appealed to it,
   (b) quash such a decision and direct OSCR to take such other action, if any, as the
       Panel thinks fit by such time as may be specified in the direction, or
   (c) remit such a decision back to OSCR, together with the Panel’s reasons for doing
       so, for reconsideration.

(6) The Panel may not award expenses to OSCR or to any person who appeals a decision.

76 Reconsideration of decision remitted to OSCR

(1) OSCR must, within 14 days of a decision being remitted to it under section 75(5)(c)—
   (a) reconsider the decision,
   (b) confirm, vary, reverse or revoke it, and
   (c) give notice of its decision under paragraph (b) to the person who appealed its
       earlier decision to the Panel.

(2) That notice must set out OSCR’s reasons for its decision under subsection (1)(b).

77 Appeals to Court of Session

(1) Any decision of the Panel under section 75(5) may be appealed by—
   (a) the person who appealed to the Panel, or
   (b) OSCR,

   to the Court of Session.

(2) Any decision of OSCR (or by a person to whom OSCR’s functions are delegated by
    virtue of section 38) to suspend a person by notice under section 31(4) may be appealed
    by the person suspended to the Court of Session.

(3) The Court of Session may—
   (a) confirm the decision appealed to it, or
(b) quash the decision and direct OSCR (or the person to whom OSCR’s functions are delegated by virtue of section 38, as the case may be) to take such action, if any, as the Court thinks fit by such time as may be specified in the direction.

### PART 2

**FUNDRAISING FOR BENEVOLENT BODIES**

**Preliminary**

### 78 Interpretation of Part 2

(1) In this Part—

“benevolent body” means a body (including a charity) which is established for charitable, benevolent or philanthropic purposes,

“benevolent contributions”, in relation to a representation made by a commercial participator or other person, means—

(a) the whole or part of—

(i) the consideration given for goods or services sold or supplied by that person,

(ii) any proceeds (other than such consideration) of a promotional venture undertaken by that person,

(b) sums given by that person by way of donation in connection with the sale or supply of such goods or services,

“commercial participator” means a person who—

(a) carries on for profit a business other than a fundraising business, but

(b) in the course of that business, engages in a promotional venture in the course of which it is represented that benevolent contributions are to be—

(i) given to or applied for the benefit of one or more particular benevolent bodies, or

(ii) applied for charitable, benevolent or philanthropic purposes,

“company” means a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,

“fundraising business” means a business carried on for profit and wholly or primarily engaged in soliciting or otherwise procuring money or promises of money for one or more particular benevolent bodies or for charitable, benevolent or philanthropic purposes,

“goods” includes all corporeal moveables except money,

“professional fundraiser” means—

(a) a person (other than a benevolent body or a company connected with it) who carries on a fundraising business,

(b) any other person who for reward solicits money or other property for the benefit of a benevolent body or for charitable, benevolent or philanthropic purposes otherwise than in the course of a fundraising venture undertaken by a person falling within paragraph (a),
“promises of money” includes standing orders, direct debits and similar instructions and authorisations for the payment of money,

“promotional venture” means an advertising or sales campaign or any other venture undertaken for promotional purposes,

“radio or television programme” includes any item included in a programme service within the meaning of the Broadcasting Act 1990 (c.42),

“services” includes facilities, and in particular—

(a) access to any premises or event,

(b) membership of any organisation,

(c) a ticket or other entitlement to participate in a lottery or game of chance,

(d) the provision of advertising space, and

(e) the provision of any financial facilities,

and references to the supply of services are to be construed accordingly.

(2) In subsection (1), the definition of “commercial participator”, in relation to a benevolent body, does not include a company connected with the body.

(3) The following persons are excluded from paragraph (b) of the definition of “professional fundraiser” in subsection (1)—

(a) a benevolent body or a company connected with it,

(b) a person concerned in the management or control, or an employee, of any such body or company,

(c) a person who in the course of a radio or television programme during which a fundraising venture is undertaken by a benevolent body, or by a company connected with it, makes any solicitation at the instance of the body or company,

(d) a commercial participator,

(e) a person who receives no more than—

(i) such sum as may be specified by regulations under section 82 by way of remuneration in connection with soliciting money or other property for the benefit of the benevolent body, or

(ii) such sum as may be so specified by way of remuneration in connection with any fundraising venture in the course of which the person solicits money or other property for the benefit of that body.

(4) For the purposes of this Part a company is connected with a benevolent body if—

(a) the body, or

(b) the body and one or more other benevolent bodies, when taken together,

is or are entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, the whole of the voting power at a general meeting of the company.
79 Representation and solicitation

(1) In this Part, references to representing and soliciting are to representing and soliciting in any manner, whether expressly or impliedly and however the representation or solicitation is communicated, and include representations and solicitations made—

(a) orally (whether or not in the presence of the person being spoken to),

(b) in writing (whether or not by means of electronic communication), or

(c) by means of a statement published in any newspaper, film or radio or television programme.

(2) In construing references to soliciting or otherwise procuring money or promises of money, it is immaterial whether any consideration by way of goods or services is, or is to be, given in return for the money or promises of money.

(3) Where—

(a) a solicitation of money or a promise of money for the benefit of a benevolent body is made in accordance with arrangements between a person and the body, and

(b) under those arrangements the person will be responsible for receiving on behalf of the body money or a promise of money given in response to the solicitation,

then (if the person would not be so regarded apart from this subsection) that person is to be regarded for the purposes of this Part as soliciting money or promises of money for the benefit of the body.

(4) Where a fundraising venture is undertaken by a professional fundraiser in the course of a radio or television programme, a solicitation which is made by a person in the course of the programme at the instance of the fundraiser is to be treated for the purposes of this Part as made by the fundraiser and not by the person (whether or not the solicitation is made by the person for any reward).

Control of fundraising

80 Prohibition on professional fundraising without formal agreement

(1) It is unlawful—

(a) for a professional fundraiser to solicit money or promises of money for the benefit of a benevolent body, or

(b) for a commercial participator to represent that benevolent contributions are to be given to, or applied for the benefit of, a benevolent body,

except in accordance with an agreement between the professional fundraiser or commercial participator and the body which satisfies the prescribed requirements.

(2) Where on the application of a benevolent body (whether or not a charity), or of OSCR in relation to a benevolent body which is a charity, the sheriff is satisfied—

(a) that a person has contravened or is contravening subsection (1) in relation to the body, and

(b) that the contravention is likely to continue or be repeated,

the sheriff may grant an interdict.

(3) Compliance with subsection (1) is enforceable only under subsection (2).
(4) Subsections (5) and (6) apply where a benevolent body makes an agreement with a professional fundraiser or a commercial participator authorising—
   (a) the professional fundraiser to solicit money or promises of money, or
   (b) the commercial participator to represent that benevolent contributions are to be given to or applied, for the benefit of the body.

(5) If the agreement does not satisfy the prescribed requirements, it is not enforceable against the benevolent body except to such extent (if any) as may be provided by an order of the sheriff.

(6) The professional fundraiser or commercial participator is not entitled to receive remuneration or expenses in respect of anything done in pursuance of the agreement unless the agreement provides for such remuneration or expenses and—
   (a) the agreement satisfies the prescribed requirements, or
   (b) any such provision has effect by virtue of an order under subsection (5).

(7) In this section “the prescribed requirements” means such requirements as are prescribed by regulations made under section 82.

81 Prevention of unauthorised fundraising

(1) Where on the application of a benevolent body, the sheriff is satisfied—
   (a) that the body has complied with subsection (3),
   (b) that any person is or has been—
      (i) soliciting money or promises of money for the benefit of the body, or
      (ii) representing that benevolent contributions are to be given to or applied for the benefit of the body,
   (c) that the person is likely to continue to do so or do so again, and
   (d) as to one or more of the matters specified in subsection (2),

   the sheriff may grant an interdict.

(2) Those matters are—
   (a) that the person in question is using methods of fundraising to which the body objects,
   (b) that that person is not a fit and proper person to raise funds for the body,
   (c) where the conduct complained of is the making of such representations as are mentioned in subsection (1)(b)(ii), that the body does not wish to be associated with the particular promotional or other fundraising venture in which that person is engaged.

(3) Not less than 28 days before making an application under subsection (1) the benevolent body must serve on the person in question a notice—
   (a) requesting the person immediately to cease—
      (i) soliciting money or promises of money for the benefit of the body, or
      (ii) representing that benevolent contributions are to be given to or applied for the benefit of the body,
as the case may be, and
  (b) stating that, if the person does not comply with the notice, the body will apply for
      an interdict under this section.

(4) Where a person to whom a benevolent body gives such a notice—
  (a) complies with the notice, but
  (b) subsequently begins to carry on activities which are the same, or substantially the
      same, as those in respect of which the notice was given,

the body need not, for the purposes of an application under subsection (1) made by it,
serve a further notice on the person in respect of any such activities carried on within 12
months of giving the notice.

(5) No application may be made under subsection (1) by a benevolent body in respect of
anything done by a professional fundraiser or commercial participator in relation to the
body.

82 Regulations about fundraising

(1) The Scottish Ministers may, after consulting such persons as they think fit, make
regulations—
  (a) about the solicitation by professional fundraisers of money or promises of money
      for the benefit of benevolent bodies or for charitable, benevolent or philanthropic
      purposes,
  (b) about representations made by commercial participators in relation to benevolent
      contributions,
  (c) generally for or in connection with regulating benevolent fundraising by
      benevolent fundraisers.

(2) Such regulations may, in particular, make provision—
  (a) specifying sums for the purposes of section 78(3)(e),
  (b) about the form and content of—
      (i) agreements for the purposes of section 80,
      (ii) notices under section 81(3),
  (c) about the information and identification to be provided by professional fundraisers
      or commercial participators in soliciting money or promises of money or making
      representations in relation to benevolent contributions,
  (d) about the information and identification to be provided by benevolent fundraisers
      in carrying on benevolent fundraising,
  (e) about circumstances in which payments or agreements made in response to—
      (i) solicitations or representations of the type described in paragraph (c), or
      (ii) benevolent fundraising,
      may be refunded or, as the case may be, cancelled,
  (f) requiring professional fundraisers or commercial participators to make available
      to benevolent bodies with whom they have agreements for the purposes of section
      80 books, documents or other records (however kept) which relate to the bodies,
(g) about the manner in which money or promises of money acquired by professional fundraisers or commercial participators for the benefit of, or otherwise falling to be given to or applied by them for the benefit of, benevolent bodies is or are to be transmitted to the bodies,

5  (h) requiring benevolent fundraisers, in carrying on benevolent fundraising, to take all reasonable steps to ensure that it is carried on in such a way that it does not—

(i) unreasonably intrude on the privacy of those from whom funds are being solicited or procured,

(ii) involve the making of unreasonably persistent approaches to persons to donate funds,

(iii) result in undue pressure being placed on persons to donate funds,

(iv) involve the making of any false or misleading representation about any of the matters mentioned in subsection (3).

(3) Those matters are—

(a) the extent or urgency of any need for funds on the part of any benevolent body or company connected with such a body,

(b) any use to which funds donated in response to the fundraising are to be put by such a body or company, and

(c) the activities, achievements or finances of such a body or company.

(4) In subsection (2)(g) the reference to money or promises of money includes a reference to money or promises of money which, in the case of a professional fundraiser or commercial participator—

(a) has or have been acquired by the fundraiser or commercial participator otherwise than in accordance with an agreement with a benevolent body, but

(b) by reason of any solicitation or representation in consequence of which it has or they have been acquired, is or are held by the fundraiser or commercial participator on trust for such a body.

(5) Regulations under this section may provide that a person who, without reasonable excuse, fails to comply with a specified requirement of the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6) In this section—

“benevolent fundraising” means soliciting or otherwise procuring money or promises of money for—

(a) the benefit of benevolent bodies or companies connected with them, or

(b) charitable, benevolent or philanthropic purposes,

“benevolent fundraisers” are—

(a) benevolent bodies and companies connected with them,

(b) persons concerned in the management or control of such bodies or companies,

(c) employees or agents of—

(i) such bodies or companies,
(ii) persons concerned in the management or control of such bodies or companies, and

(d) volunteers acting for or on behalf of such bodies or companies.

Public benevolent collections

83 Meaning of “public benevolent collection”

(1) This section applies for the interpretation of sections 84 to 91.

(2) “Public benevolent collection” means a collection from the public of money or promises of money (whether or not given by them for a consideration by way of goods or services) for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes taken—

(a) in a public place, or

(b) by means of visits to two or more houses or business premises.

(3) “Public place”, in relation to a public benevolent collection, means—

(a) any road (within the meaning of the Roads (Scotland) Act 1984 (c.54)), and

(b) any other place to which, at any time when the collection is taken, members of the public have access as of right or by virtue of express or implied permission and which—

(i) is not within a building, or

(ii) if within a building, is a public area within any station, airport or shopping precinct or is any other similar public area.

(4) But subsection (3)(b) does not apply to any place to which members of the public have access—

(a) only on payment or by ticket,

(b) only by virtue of permission given for the purpose of the collection in question.

(5) In relation to a public benevolent collection—

“business premises” means any premises used for business or other commercial purposes,

“house” includes any part of a building constituting a separate dwelling.

84 Regulation of public benevolent collections

(1) Where a public benevolent collection is held in the area of a local authority without the consent of the authority under section 85, the organiser of the collection is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

(2) Subsection (1) does not apply to a collection—

(a) by a designated national collector,

(b) which takes place in the course of a public meeting,

(c) which—
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(i) takes place on land to which members of the public have access only by virtue of the express or implied permission of the occupier of the land (or, in relation to unoccupied land, the person entitled to occupy it), and

(ii) is organised by that person, or

(d) which takes place by means of an unattended receptacle in a public place.

85 Local authority consents

(1) An application for the consent of a local authority to the holding of a public benevolent collection must be made to the authority, in such form as the authority may determine, by the organiser of the collection—

(a) no earlier than 18 months, and

(b) no later than 2 months (or such shorter period as the organiser and the authority may agree),

before the proposed date of the collection.

(2) Before determining such an application, the local authority must consult the chief constable of the police force for the area and may make other inquiries.

(3) On such an application the local authority may—

(a) grant its consent (whether or not subject to conditions), or

(b) refuse its consent on any of the grounds set out in subsection (6).

(4) Where the application has been made not later than 2 months before the proposed date of the collection, the local authority must give the organiser notice of its decision on the application not later than 14 days before that date.

(5) The conditions which may be imposed in pursuance of subsection (3)(a) are such conditions as the local authority thinks fit having regard to the local circumstances in which the collection is to be held, including conditions—

(a) specifying the date, time or frequency of the collection,

(b) specifying where it may take place,

(c) regulating its conduct,

(d) as to the use by collectors of any badges or certificates of authority which regulations made under section 82(1) require to be provided,

(e) specifying the form of collection boxes, other containers and any other articles which may be used for the purposes of the collection,

(f) as to any other matter relating to the local circumstances of the collection.

(6) The grounds of refusal referred to in subsection (3)(b) are—

(a) that the date, time or frequency of the collection, or that holding it at the proposed place, would cause undue public inconvenience,

(b) that another collection in respect of which consent under this section has been given by the authority or which is organised by a designated national collector is due to take place in the area of the authority on the same day or the day before or after that day,
(c) that it appears to the local authority that the amount likely to be applied for the
benefit of benevolent bodies or for charitable, benevolent or philanthropic
purposes in consequence of the collection is inadequate having regard to the likely
amount of the proceeds of the collection,

(d) where the local authority has requested the organiser of the collection to provide it
with any supplementary information which it considers necessary for the purposes
of determining the application, that the organiser has failed to comply with the
request, and

(e) that the organiser of the collection has been convicted of—

(i) an offence under section 84(1), 89(3) or 90(3) of this Act, or

(ii) any other offence which involves dishonesty or the commission of which
would be likely to be facilitated by the grant of consent under this section.

(7) Where a local authority has reason to believe that, since its consent was granted under
this section, there has been a change in circumstances such that one or more of the
grounds of refusal set out in subsection (6) applies in relation to the public benevolent
collection, the authority may, not later than the day before the date of the collection—

(a) withdraw the consent, or

(b) vary the consent by making it subject to conditions or further conditions or
varying any condition to which it is subject.

(8) Where a local authority has reason to believe that there has been, or is likely to be, a
breach of any condition imposed on a consent under this section, it may, not later than
the day before the date of the collection, withdraw the consent.

(9) A local authority must give the organiser of a public benevolent collection notice of a
decision under this section—

(a) to grant consent subject to conditions,

(b) to refuse consent,

(c) to withdraw or vary a consent,

including the reasons for the authority’s decision and information about the organiser’s
right of appeal under section 87.

(10) The Scottish Ministers may, by regulations, disapply the duty to consult under
subsection (2) in relation to applications of such type as they may describe in the
regulations.

86 Designated national collectors

(1) OSCR may specify criteria to be satisfied for the purposes of—

(a) obtaining, and

(b) retaining,

designation as a designated national collector under this section.

(2) Before specifying such criteria, OSCR must consult—

(a) such associations representing local authorities,

(b) such persons representing the interests of charities, and

(c) such other persons,
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as it thinks fit.

(3) OSCR must publish any criteria specified under subsection (1).

(4) OSCR may designate as a designated national collector a charity which appears to it to satisfy such criteria as are for the time being specified under subsection (1)(a).

(5) OSCR may withdraw a designation under subsection (4) from a charity which appears to it not to satisfy such criteria as are for the time being specified under subsection (1)(b).

(6) Regulations under section 89 may make provision about the effect of the withdrawal of a designation in relation to public benevolent collections notice of which was, prior to the withdrawal, given under subsection (7).

(7) A designated national collector which proposes to hold a public benevolent collection in the area of a local authority must—

(a) no earlier than 18 months, and

(b) no later than 3 months,

before the proposed date of the collection, notify the authority of the proposal.

(8) The local authority may prohibit the public benevolent collection if it considers that the public benevolent collection would be likely to cause undue public inconvenience (by reason of it being held on the same date and at the same time and place as any other public benevolent collection or for any other reason).

(9) A decision under subsection (8) must be made not later than one month after the date of the notification under subsection (7).

(10) A local authority must give the designated national collector notice of a decision under subsection (8) including the reasons for the authority’s decision and information about the designated national collector’s rights of appeal under section 87.

87 Appeals

(1) The organiser of a public benevolent collection may, by summary application, appeal to the sheriff against a decision of a local authority under section 85—

(a) granting consent subject to conditions,

(b) refusing consent, or

(c) withdrawing or varying a consent.

(2) But no appeal is competent under subsection (1) against the decision of the local authority so far as the decision, or the reasons for it, relate to the date of the proposed collection.

(3) A designated national collector may, by summary application, appeal to the sheriff against a decision of a local authority under section 86(8).

(4) An appeal under this section must be lodged within 14 days of the date of receipt of the notice under section 85(9) or, as the case may be, 86(10).

(5) In upholding an appeal under this section the sheriff may quash the decision of the local authority and remit the case, together with reasons for the sheriff’s decision, to the authority for further consideration.
88 Application of funds

(1) This section applies where the court, on an application by OSCR, is satisfied that sums collected in a public benevolent collection by or on behalf of any person other than a charity cannot for any reason be applied for the purposes for which they were collected.

(2) The court may—

(a) order any person holding such sums not to part with them without the court’s consent,

(b) approve a scheme prepared by OSCR for the transfer of those sums to a charity specified in the scheme.

(3) The court may approve a scheme under subsection (2)(b) subject to modifications.

(4) In this section, “the court” means the sheriff.

89 Regulations relating to public benevolent collections

(1) The Scottish Ministers may, by regulations, make further provision for the purpose of regulating public benevolent collections.

(2) Such regulations may, in particular, include provision—

(a) about keeping and publishing accounts,

(b) for preventing public inconvenience,

(c) specifying particular provisions of the regulations breach of which is an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

90 Collection of goods

(1) The Scottish Ministers may, by regulations, make provision about the collection from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

(2) Those regulations may, in particular, include provision—

(a) requiring the organiser of such a collection to notify the local authority for the area in which it is proposed that the collection be carried out,

(b) allowing or requiring the local authority, in such circumstances as may be specified in the regulations, to prohibit the carrying out of such a collection,

(c) about the dates, times and places at which, and the frequency with which, such collections may be carried out,

(d) about keeping and publishing reports on those collections,

(e) for preventing public inconvenience,

(f) specifying particular provisions of the regulations breach of which is to be an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.
91 **Guidance on collections**

Local authorities must have regard to any guidance issued by OSCR about the exercise of their functions in relation to—

(a) public benevolent collections, or

(b) collections from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

**PART 3**

**INVESTMENT POWERS OF TRUSTEES**

92 **Extension of general powers of trustees**

(1) Section 4 (general powers of trustees) of the Trusts (Scotland) Act 1921 (c.58) is amended as follows.

(2) In subsection (1)—

(a) after paragraph (e) insert—

“(ea) To make any kind of investment of the trust estate (including an investment in heritable property).

(eb) To acquire heritable property for any other reason.”,

(b) paragraph (ee) is repealed.

(3) After subsection (1) insert—

“(1A) The power to act under subsection (1)(ea) or (eb) above is subject to any restriction or exclusion imposed by or under any enactment.

(1B) The power to act under subsection (1)(ea) or (eb) above is not conferred on any trustees who are—

(a) the trustees of a pension scheme,

(b) the trustees of an authorised unit trust, or

(c) trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate.

(1C) No term relating to the powers of a trustee contained in a trust deed executed before 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1D) No term restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 (c.62) contained in a trust deed executed on or after 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1E) The reference in subsection (1D) above to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and “trust deed” shall be construed accordingly.

(1F) In this section—
“authorised unit trust” means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 (c.8) is in force,

“enactment” has the same meaning as in the Scotland Act 1998 (c.46),

“pension scheme” means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust and subject to the law of Scotland.”

### 93 Exercise of power of investment

After section 4 of the Trusts (Scotland) Act 1921 (c.58) insert—

“4A Exercise of power of investment: duties of trustee

(1) Before exercising the power of investment under section 4(1)(ea) of this Act, a trustee shall have regard to—

(a) the suitability to the trust of the proposed investment, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

(2) Before exercising that power of investment, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about the way in which the power should be exercised.

(3) When reviewing the investments of the trust, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about whether the investments should be varied.

(4) If a trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to obtain such advice, the trustee need not obtain it.

(5) In this section, “proper advice” means the advice of a person who is reasonably believed by the trustee to be qualified by the person’s ability and practical experience of financial and other matters relating to the proposed investment.”

### 94 Amendments consequential on Part 3

(3) Schedule 3 makes amendments consequential on sections 92 and 93.

### PART 4

#### GENERAL AND SUPPLEMENTARY

### 94A Power of charity to participate in certain financial schemes

(1) Every charity has power to participate in common investment schemes and common deposit schemes.

(2) Subsection (1) does not apply where a charity’s constitution excludes such participation by referring specifically to common investment schemes or, as the case may be, common deposit schemes.

(3) In this section, “common investment scheme” and “common deposit scheme” have the meanings given to those expressions in sections 24 and 25 of the Charities Act 1993 (c.10).
95  **Financial assistance for benevolent bodies**

(1) The Scottish Ministers may make such payments as they think fit to—

(a) any benevolent body, in connection with its activities,

(b) any person, in connection with anything done by that person with a view to enabling one or more benevolent bodies, benevolent bodies of a particular type or benevolent bodies generally to implement their purposes to better effect.

(2) Such payments may include payments in relation to the costs of establishing, dissolving or winding up a benevolent body.

(3) A payment under subsection (1) may be made by way of grant, loan or otherwise.

(4) A payment under subsection (1) may be made subject to conditions, including conditions requiring repayment in specified circumstances.

(5) No payment may be made under subsection (1) to a local authority or any other public body or office-holder.

(6) The power to make a payment under subsection (1) may be exercised whether or not there is power to make the payment under any other enactment.

96  **Rate relief for registered community amateur sports clubs**

(1) Section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9) is amended as follows.

(2) In subsection (2)—

(a) for the word “or” which follows paragraph (a) substitute—

“(aa) are occupied by a registered community amateur sports club and are wholly or mainly used for the purposes of that club (or for the purposes of that and of other clubs which are, or are entitled to be registered as, such clubs);”,

(b) for “either paragraph (a) or paragraph (b)” substitute “any of paragraphs (a), (aa) and (b)”.

(3) In subsection (5), for “paragraph (a), (b) or (c)” substitute “any of paragraphs (a) to (c)”.

(4) In subsection (10), after paragraph (b) insert—

“(c) “registered community amateur sports club” means a registered club for the purposes of Schedule 18 to the Finance Act 2002 (c.23); and the period during which a club is a registered club for those purposes is to be taken to begin with the date on which its registration takes effect and end on the date with effect from which its registration is terminated (whether or not it is registered, or its registration is terminated, with retrospective effect).”

(5) After subsection (12) insert—
“(13) The amendments to this section made by section 96 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00) (which extend mandatory relief to, and allow discretionary relief to be given to, registered community amateur sports clubs) have effect only as respects the year 2006-7 and subsequent years.”

97 Population of Register etc.

(1) OSCR must enter in the Register each body which was, immediately prior to the commencement of paragraph 5(a)(ii) of Schedule 4 to this Act, entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

(2A) The Scottish Ministers may by order —

(a) disapply section 3(3) in so far as it would otherwise apply to any body entered in the Register under subsection (1) for such period ending no later than 18 months after the commencement of this section as may be specified in the order,

(b) provide —

(i) that any unregistered charitable body (or any such body of a particular type) may, despite any contrary provision in this Act, refer to itself as a “charity” for such period ending no later than 12 months after the commencement of this section as may be so specified, and

(ii) that any provision of this Act or of any other enactment is to apply (with such modifications, if any, as may be so specified) to any such body as if it were entered in the Register for so long as it refers to itself as a “charity”.

(2B) In subsection (2A), “unregistered charitable body” means a body which—

(a) is established under the law of a country or territory other than Scotland,

(b) is entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(c) does not require to be entered in the Register under subsection (1).

98 Notices, applications etc.

(1) In this section, “formal communication” means—

(a) any notice, notification, direction or consent given, or

(b) any request for review, proposal, application (other than an application to a court) or decision made,

under or for the purposes of this Act.

(2) A formal communication must be made in writing.

(3) A formal communication which is sent by electronic means is to be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.

(4) A formal communication is given to or made to a person if it is—

(a) delivered to the person,
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(b) sent by post in a prepaid registered letter, or by the recorded delivery service, addressed—

(i) where the person is a charity, to the charity at the principal office set out in its entry in the Register or to the charity trustee whose name is so set out at the address so set out,

(ii) where the person is an incorporated company or body (other than a charity), to the secretary, chief clerk or chief executive of the company or body at its registered or principal office,

(iii) where the person is a public office-holder, to the office-holder at the office-holder’s principal office,

(iv) in any other case, to the person at that person’s usual or last known place of abode, or

(c) sent to the person in some other manner (including by electronic means) which the sender considers likely to cause it to be delivered on the same or next day.

5 Where a charity’s entry in the Register does not, because of subsection (4) of section 3, include the information specified in subsection (3)(b) of that section, a formal communication may also be given to or made to the charity if it is sent by post in a prepaid registered letter, or by the recorded delivery service, addressed—

(a) to the charity care of OSCR, or

(b) where OSCR is the sender—

(i) to the charity at its principal office, or

(ii) to the charity trustee whose name is, because of section 3(4), excluded from the Register at the address which is so excluded.

15 A formal communication sent under subsection (4)(c) is, unless the contrary is proved, to be deemed to be delivered on the next working day which follows the day on which it is sent.

20 In subsection (6), “working day” means any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday in Scotland.

99 Offences by bodies corporate etc.

(1) Where an offence under this Act committed—

(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a director, manager or secretary of the body corporate, or

(ii) purports to act in any such capacity,

(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a partner, or

(ii) purports to act in that capacity,
(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is concerned in the management or control of the association, or

(ii) purports to act in the capacity of a person so concerned,

the individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body corporate.

100 Ancillary provision

The Scottish Ministers may by order—

(a) modify any enactment for the purposes of preventing a body established by enactment from failing the charity test by reason of section 7(3)(b),

(b) make such other incidental, supplemental, consequential, transitional, transitory or saving provision as they consider necessary or expedient for the purposes or in consequence of this Act.

101 Orders, regulations and rules

(1) Any power of the Scottish Ministers under this Act to make orders, regulations or rules is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes.

(3) An order under section 100 may modify any enactment, instrument or document.

(4) A statutory instrument containing an order, regulations or rules under this Act except—

(a) regulations under section 63(d),

(aa) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),

(b) where subsection (5) applies, an order under section 100,

(c) an order under section 104(2),

is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(5) No—

(a) an order under section 7(4A),

(b) order under section 19(8),
(a) regulations made by virtue of section 63(d),

(aa) regulations under section 82(1) containing provisions of the type described in section 82(2)(h), or

(b) order under section 100 containing provisions which add to, replace or omit any part of the text of an Act,

may be made unless a draft of the statutory instrument containing the regulations or, as the case may be, order has been laid before, and approved by resolution of, the Parliament.

102 Minor and consequential amendments and repeals

Schedule 4 sets out minor amendments and amendments and repeals consequential on the provisions of this Act.

103 General interpretation

In this Act, unless the context otherwise requires—

“applicant” has the meaning given in section 4(a),

“benevolent body” has the meaning given in section 78,

“charitable purposes” means the purposes set out in section 7(2),

“charity” means a body entered in the Register,

“charity test” is to be construed in accordance with section 7,

“charity trustees” means the persons having the general control and management of the administration of a charity,

“constitution”—

(a) in relation to a charity or other body established under the Companies Acts, means its memorandum and articles of association,

(b) in relation to a charity or other body which is a body of trustees, means the trust deed,

(c) in relation to a SCIO, has the meaning given in section 50,

(d) in relation to a charity or other body established by enactment, means the enactment which establishes it and states its purposes,

(e) in relation to charity or other body established by a Royal charter or warrant, means the Royal charter or warrant, and

(f) in the case of any other charity or body, means the instrument which establishes it and states its purposes,

“designated national collector” means a charity designated as such under section 86(4),

“designated religious charity” means a charity designated as such under section 64(1),

“equal opportunities” and “equal opportunity requirements” have the meaning given in Section L2 of Part 2 of Schedule 5 to the Scotland Act 1998 (c.46),
“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),
“misconduct” does not include minor mismanagement,
“OSCR” means the holder of the Office of the Scottish Charity Regulator,
“the Panel” mean a Scottish Charity Appeals Panel constituted in accordance with section 74(1) of this Act,
“the Register” means the Scottish Charity Register,
“relevant financial institution” means—
(a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 (c.8) to accept deposits,
(b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits,
and this definition must be read with section 22 of and Schedule 2 to that Act and any relevant order under that section,
“reorganisation scheme” has the meaning given in section 43(3) and references to “approved reorganisation schemes” are references to schemes approved under section 40 or 41,
“SCIO” has the meaning given in section 49.

104 Short title and commencement
(1) This Act may be cited as the Charities and Trustee Investment (Scotland) Act 2005.
(2) This Act (except sections 100 and 101 and this section) comes into force on such day as the Scottish Ministers may by order appoint.
SCHEDULE 1  
(introduced by section 1)  

THE SCOTTISH CHARITY REGULATOR

Membership

1 (1) The Scottish Charity Regulator (in this schedule referred to as “the Regulator”) is to consist of such number of members (but not fewer than 4) as the Scottish Ministers think fit.

(2) It is for the Scottish Ministers to appoint those members from amongst those persons appearing to them to have knowledge and skills relevant to the functions of OSCR.

(3) An individual is disqualified from appointment as, and from being, a member of the Regulator if the individual is—

   (a) a member of the Scottish Parliament,
   (b) a member of the House of Commons,
   (c) a member of the European Parliament,
   (d) an office-holder in the Scottish Administration,
   (e) an individual of such other description as may be prescribed by order by the Scottish Ministers.

Tenure and removal from office

2 (1) Each member of the Regulator—

   (a) is to be appointed for such period as is specified in the appointment,
   (b) may, by notice to the Scottish Ministers, resign as a member,
   (c) in other respects, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
   (d) after ceasing to hold office, may be reappointed as a member.

(2) The Scottish Ministers may remove a member from office if satisfied—

   (a) that the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract,
   (b) that the member—

      (i) has been absent from meetings of the Regulator for a period longer than 6 consecutive months without the permission of the Regulator, or
      (ii) is unable to discharge the member’s functions as a member or is unsuitable to continue as a member, or
   (c) that it is necessary or expedient to do so in connection with the management of the affairs of the Regulator.

Chairing

3 (1) The Scottish Ministers must appoint—
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(a) one of the members of the Regulator to chair the Regulator, and
(b) another of those members to act as deputy to that member.

(2) A member appointed to chair the Regulator or to act as deputy to that member holds and vacates office as such in accordance with the terms of the appointment to that office.

(3) A member so appointed may, by notice to the Scottish Ministers, resign from office as such.

(4) A member so appointed vacates office as such on ceasing to be a member of the Regulator.

(5) Where a member—

(a) is appointed to chair the Regulator or to act as deputy to that member, or
(b) ceases to hold office as such,

the Scottish Ministers may vary the terms of the member’s appointment as a member of the Regulator so as to alter the date on which office as a member is to be vacated.

Chief executive and other staff

4 (1) The Regulator—

(a) must appoint a chief executive, and
(b) may appoint such other employees as it considers appropriate.

(2) The terms and conditions of the chief executive and any other employees, and the number of any other employees, require the approval of the Scottish Ministers.

Proceedings

5 The quorum of the Regulator and the arrangements for its meetings are for the Regulator to determine.

Delegation of powers

6 (1) Anything authorised or required under any enactment to be done by the Regulator, whether or not as the holder of the Office of the Scottish Charity Regulator, may be done by any member or employee of the Regulator who is authorised (whether generally or specifically) for the purpose by it.

(2) Nothing in sub-paragraph (1) prevents the Regulator from doing anything that any of its members or employees has been authorised or required to do.

Validity of proceedings and acts

7 The validity of any proceedings or acts of the Regulator is not affected by any—

(a) vacancy in its membership, or
(b) defect in the appointment of a member.
SCHEDULE 2
(introduced by section 74)

SCOTTISH CHARITY APPEALS PANEL

Panel members

1 (1) The Scottish Ministers must appoint such number of persons as they think fit to be eligible (for such period, not exceeding 5 years, as the Scottish Ministers may specify) to serve as members of a Panel constituted under section 74(1).

(2) At least one of the persons so appointed must be, and have been for at least 5 years—
   (a) a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46), or
   (b) an advocate.

(3) An individual is disqualified from being so appointed, and from being appointed as or being a Panel member, if the individual is—
   (a) a Lord of Appeal in Ordinary or holds any of the judicial offices specified in Part 1 of schedule 1 to the House of Commons Disqualification Act 1975 (c.24),
   (b) a member of the Scottish Parliament,
   (c) an office-holder in the Scottish Administration,
   (d) an individual of such other description as may be prescribed by order by the Scottish Ministers.

(4) Each Panel is to consist of 3 of the persons appointed under paragraph 1(1) (one of whom is to be appointed by the Scottish Ministers to chair the Panel).

(5) A person appointed to chair a Panel must fall within paragraph 1(2).

Tenure and removal from office

2 (1) Each person appointed under paragraph 1(1)—

   (a) is to be appointed for such period as is specified in the appointment,
   (b) if appointed to serve as a Panel member, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
   (c) may, by notice to the Scottish Ministers, resign from being eligible to be, or from being, a Panel member,
   (d) after ceasing to be eligible to serve as a Panel member, may be reappointed as a person eligible to serve as a Panel member.

(2) A person appointed under paragraph 1(1) ceases to be eligible to serve as, and may not be, a Panel member if the Scottish Ministers are satisfied that the person is unable to discharge the functions of a Panel member or is unsuitable to serve, or to continue to serve, as a Panel member.
Staff, property and services

3 The Scottish Ministers may provide the Panel, or ensure that it is provided, with such property, staff and services as they consider necessary or expedient in connection with the exercise of its functions.

Rules of procedure

4 (1) The Scottish Ministers may make rules as to the practice and procedure of the Panel.

(2) Such rules may, in particular, include provision for or in connection with—

(a) the form and manner in which appeals to the Panel are to be made,

(b) the time within which such appeals are to be made,

(c) the lodging of documents before the Panel,

(d) the notification of matters specified in the rules to OSCR and any appellant,

(e) the periods within which proceedings must be held and decided on,

(f) the notification of the Panel’s decisions to OSCR and appellants,

(g) the time within which a decision of the Panel may be appealed to the Court of Session.

SCHEDULE 3
(introduced by section 94)

POWERS OF TRUSTEES: CONSEQUENTIAL AMENDMENTS

Judicial Factors Act 1849 (c.51)

1 In section 5 (judicial factor’s duty to lodge in bank money held by factor etc.) of the Judicial Factors Act 1849, subsection (4) is repealed.

Trusts (Scotland) Act 1921 (c.58)

2 In the Trusts (Scotland) Act 1921, sections 12 and 14 are repealed.

Trusts (Scotland) Act 1961 (c.57)

3 In section 2(1) (validity of certain transactions by trustees etc.) of the Trusts (Scotland) Act 1961—

(a) for “(ee)” substitute “(eb)”,

(b) in the proviso, after “transaction” where it first occurs insert “(other than a transaction such as is specified in paragraph (ea) of that subsection)”.

Trustee Investments Act 1961 (c.62)

4 (1) The Trustee Investments Act 1961 is amended as follows.

(2) Sections 1, 2, 5, 6, 12, 13 and 15 are repealed except in so far as they are applied by or under any other enactment.
(3) Section 3 and Schedules 2 and 3 are repealed, except in so far as they relate to a trustee having a power of investment conferred under an enactment—
   (a) which was passed before the passing of the Trustee Investments Act 1961, and
   (b) which is not amended by this schedule.

(4) Section 8 and paragraph 1(2) of Schedule 4 are repealed.

National Health Service (Scotland) Act 1978 (c.29)

5 In Schedule 7 (the Research Trust) to the National Health Service (Scotland) Act 1978, paragraph 4 is repealed.

Education (Scotland) Act 1980 (c.44)

6 In section 105 (schemes for reorganisation of educational endowments) of the Education (Scotland) Act 1980, subsection (4D) is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73)

7 Section 54 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

8 In Schedule 8 (amendments of enactments) to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in paragraph 21, sub-paragraph (1)(b) and the preceding “and” are repealed.

Charities Act 1993 (c.10)

9 In the Charities Act 1993, the following provisions are repealed—
   sections 70 and 71,
   in section 86(2), the word “70” in paragraph (a), and paragraph (b),
   section 100(5).

SCHEDULE 4
(introduced by section 102)

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

PART 1

ACTS

Recreational Charities Act 1958 (c.17)

A1 In section 6(2) of the Recreational Charities Act 1958, the words from “or”, where second occurring, to “1962” are repealed.
Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9)

1 (1) In section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962, for paragraph (a) of subsection (10) substitute—

“(a) “charity” means a body entered in the Scottish Charity Register,”.

(2) Paragraph 5 of Schedule 2 to that Act of 1962 is repealed.

Sex Discrimination Act 1975 (c.65)

2 (1) In section 79(1) of the Sex Discrimination Act 1975—

(a) for “Part VI” substitute “section 104”,

(aa) in paragraph (a), for “that Part” substitute “Part VI”,

(b) after paragraph (a), insert—

“(aa) in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00),”

(c) in paragraph (b)—

(i) for “that Act” substitute “the Education (Scotland) Act 1980”,

(ii) after “endowment”, where second occurring, insert “(or which would, but for the disapplication of that section by section 122(4) of that Act, be so dealt with)”.

(2) At the end of section 79(5) of that Act insert “or, in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

Education (Scotland) Act 1980 (c.44)

3 In section 122(1) of the Education (Scotland) Act 1980, for the definition of “charitable purposes” substitute—

““charitable purposes” has the same meaning as in the Charities and Trustee Investment (Scotland) Act 2005 (asp 00);”

Civic Government (Scotland) Act 1982 (c.45)

4 In the Civic Government (Scotland) Act 1982—

(a) in section 24(3), for paragraph (c) substitute—

“(c) the business of a charity (that is to say, a body which is entered in the Scottish Charity Register);”,

(b) in section 39(3)(f), for the words from “charitable” to the end of that paragraph substitute “benevolent collection (within the meaning of section 83 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)).”.
(c) section 119 (regulation of charitable collections) is repealed.

**Companies Act 1985 (c.6)**

4A In section 380 of the Companies Act 1985, after subsection (4) insert—

“(4ZA) This section does not, despite paragraphs (a) to (c) of subsection (4), apply to any resolution of a company which is—

(a) registered as a company in Scotland, and
(b) entered in the Scottish Charity Register,

where that resolution is of either of the types mentioned in section 56(5) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

**Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)**

5 In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990—

(a) in section 1—

(i) subsections (4) to (6), and
(ii) the words which follow paragraph (b) in subsection (7),

are repealed,

(b) sections 2 to 8, 12 to 14 and 15(1) to (8) are repealed,

(c) in section 9(1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

(d) in section 10—

(i) in subsection (1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

(ii) subsections (6), (9)(b) and (11)(b) are repealed,

(e) in section 15(9)—

(i) after “affect” insert “—

(a),

(ii) at the end insert “; or

(b) any body entered in the Scottish Charity Register.”

**Charities Act 1992 (c.41)**

6 In Schedule 6 to the Charities Act 1992, paragraph 10 is repealed.

**Further and Higher Education (Scotland) Act 1992 (c.37)**

7 In section 19(3) of the Further and Higher Education (Scotland) Act 1992, for “within the meaning of the Income Tax Acts” substitute “(within the meaning of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00))”. 
8  In Part 2 of Schedule 1 to the Tribunals and Inquiries Act 1992, after paragraph 47 insert—

“Charities

47A Any Scottish Charity Appeals Panel constituted in accordance with section 74(1) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

9  In Schedule 13 to the Local Government etc. (Scotland) Act 1994, paragraph 129(16) is repealed.

10  In schedule 3 to the Ethical Standards in Public Life etc. (Scotland) Act 2000, before the entry relating to “Scottish Children’s Reporter Administration” insert—

“The Scottish Charity Regulator”.

11  In the Land Reform (Scotland) Act 2003—

(a) in section 34(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”,

(b) in section 71(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”.

12  In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, before the entry relating to the “Scottish Children’s Reporter Administration” insert—

“Scottish Charity Regulator”.

13  In paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003, for the definition of “charity” substitute—

““charity” means a body entered in the Scottish Charity Register;”.

PART 2

SUBORDINATE LEGISLATION

30  Arable Area Payments Regulations 1996 (S.I. 1996/3142)

14  In regulation 9(3)(h) of the Arable Area Payments Regulations 1996, for the words from “a”, where it second occurs, to the end of the paragraph substitute “, in relation to Scotland, a body entered in the Scottish Charity Register”.

Local Government etc. (Scotland) Act 1994 (c.39)

Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

Protection of Children (Scotland) Act 2003 (asp 5)
Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002 (S.S.I 2002/167)

15 In regulation 2(1) of the Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002, in paragraph (i) of the definition of “net annual income”, for the words from “Scottish” to “1990” substitute “body entered in the Scottish Charity Register”.

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004 (S.S.I. 2004/115)

16 In the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 5(2)(k)(i), and

(b) paragraph 101(2)(m)(i) of schedule 5,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 (S.S.I. 2004/116)

17 In the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 3(2)(k)(i),

(b) paragraph 66(3)(l)(i) of schedule 1,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

Charities and Trustee Investment (Scotland) Bill 71
Schedule 4—Minor and consequential amendments and repeals
Part 2—Subordinate legislation
Charities and Trustee Investment (Scotland) Bill
[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about charities and other benevolent bodies; to make provision about fundraising in connection with charities and other benevolent bodies; to amend the law in relation to the investment powers of trustees; and for connected purposes.

Introduced by: Malcolm Chisholm
On: 15 November 2004
Supported by: Johann Lamont, Hugh Henry
Bill type: Executive Bill
This document relates to the Charities and Trustee Investment (Scotland) Bill as amended at Stage 2 (SP Bill 32A)

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

REVISED EXPLANATORY NOTES
(AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament’s Standing Orders, this document is published to accompany the Charities and Trustee Investment (Scotland) Bill as amended at stage 2.
EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Executive in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill is in 4 Parts.

5. These are:
   - Part 1 – Charities
   - Part 2 – Fundraising for benevolent bodies
   - Part 3 – Investment powers of trustees
   - Part 4 – General and supplementary.

6. Commentary explaining the provisions introduced by each Part is provided below.

COMMENTARY ON PARTS

PART 1: CHARITIES

Chapter 1 – Office of the Scottish Charity Regulator

7. Section 1 establishes the Office of the Scottish Charity Regulator (OSCR). Firstly an office (or position) known as the “Office of the Scottish Charity Regulator” is established. A separate body corporate is then established. This is a body with a legal personality, known as “the Scottish Charity Regulator”. This body is then appointed to be the holder of the office that was initially established. Because the charity regulator has already commonly become known as OSCR, this is the term that is used throughout the Bill to mean the officeholder. Section 1 also sets out OSCR’s general functions. These are to determine charitable status, keep a public register of charities, encourage facilitate and monitor compliance with charity legislation, investigate misconduct and take remedial or protective action if necessary and to advise or make proposals to the Scottish Ministers on matters relating to its functions. Schedule 1 deals with the detailed membership arrangements for the Scottish Charity Regulator, with paragraphs 2 and 3 providing for the Regulator’s members and the chair and deputy being appointed by the Scottish Ministers (after normal public appointment procedures). Certain categories of person are
disqualified from being members (e.g. MSPs, MPs, MEPs, office holders of the Scottish Administration or others which may be prescribed by an Order made by the Scottish Ministers). The terms and conditions (including remuneration and allowances) of the Regulator’s members may be determined by the Scottish Ministers. **Paragraph 4** allows the Regulator to appoint a chief executive and other employees, under terms and conditions which require the Scottish Ministers’ approval. Although not covered by the Bill, it is intended that OSCR will become a non-Ministerial office holder of the Scottish Administration (i.e. a non-Ministerial department) and that the employees will be civil servants. The formal mechanism for this will be by a section 104 order made by Westminster under the Scotland Act 1998, following enactment of this Bill.

8. **Section 2** stipulates that OSCR must prepare and publish an annual report on the exercise of its functions, send a copy to the Scottish Ministers and lay a copy before the Scottish Parliament.

**Chapter 2 – Scottish Charity Register**

9. **Section 3** provides that OSCR must keep a public register of charities, reviewing it from time to time, and keeping it up to date. The section specifies certain information that the register must contain for each charity. This mandatory information is:

- the name of the charity;
- the principal office or the name and address of one of the charity trustees (unless, under subsection (4), OSCR is satisfied it is necessary to protect an individual or the charity’s premises);
- the charity’s purposes; and
- certain other information (including whether it is a designated religious charity or national collector).

10. In addition the register must include the dates of any directions or notices under the Bill that have been given to the charity by OSCR until the direction or notice has been complied with, when it is to be removed.

11. The Scottish Ministers may (under section 3(3)(f)) make regulations to add to the mandatory information to be held on the register and OSCR may also decide (subsection 3(g)) to include other information if it sees fit.

12. **Section 4** sets out the information that must be provided to OSCR by an applicant wishing to be entered on the register. This information includes the information required to be shown on the register and also a statement of the applicant’s purposes, constitution and the most recent statement of account (if there is one). As a result of section 5 the register will only hold details of organisations that OSCR considers meet the charity test (see below) and do not have inappropriate names. The Scottish Ministers may make regulations (section 6) to set out further details relating to the form of application for the register and the process by which OSCR will determine applications.
The charity test

13. **Section 7** sets out the charity test that must be satisfied by every body on the register. The test consists of two parts: the purposes of the body must be exclusively charitable and it must provide public benefit, either in Scotland or elsewhere. Unlike in the previous charity definition, none of the charitable purposes are assumed to provide public benefit. In addition, the body must be non-property-distributing, free from the control of Scottish Ministers or Ministers of the Crown, and non-political. However subsection 4A allows the Scottish Ministers to disapply, by affirmative order, either or both of the first two of these criteria.

14. The charitable purposes listed in **section 7(2)** are:

- prevention or relief of poverty;
- advancement of education;
- advancement of religion;
- advancement of health;
- the saving of lives;
- advancement of citizenship or community development;
- advancement of the arts, heritage, culture or science;
- advancement of amateur sport;
- the provision of recreational facilities with the object of improving the conditions of life for the persons for whom the facilities are primarily intended (this purpose is intended to preserve the charitable purpose covered by the Recreational Charities Act 1958);
- advancement of human rights, conflict resolution or reconciliation;
- the promotion of religious or racial harmony;
- the promotion of equality and diversity;
- advancement of environmental protection or improvement;
- the relief of those in need by reason of age, ill-health disability, financial hardship or other disadvantage;
- advancement of animal welfare; or
- any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

Further detail is provided by subsection 2A which clarifies that:

- the advancement of health includes the prevention or relief of sickness, disease or human suffering;
- the advancement of citizenship and community development includes rural or urban regeneration, and the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities;
sport means sport which involves physical skill and exertion;
the provision of recreational facilities applies only in relation to those which are primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage or are available to members of the public at large or to male or female members of the public at large (again, this seeks to preserve the terms of the Recreational Charities Act 1958);
the relief of those in need includes the relief given by the provision of accommodation or care; and
the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose for the advancement of religion.

Public benefit
15. Section 8 sets out certain criteria to which OSCR and the courts must have regard when determining whether a body provides public benefit. The first criterion covers the extent of any benefit gained by members or other persons or the disbenefit incurred by the public as a result of the body’s functions compared to the benefit to the public. The second criterion covers the extent to which any condition (including any charge or fee) restricting persons from obtaining the benefits from a body’s functions may be unduly restrictive if only a section of the public can receive those benefits.

16. Section 9 gives OSCR a statutory duty to issue guidance, following consultation with representatives of the charitable sector and such other persons as it sees fit, on how it determines whether a body meets the charity test.

Charity names and status
17. Section 10 sets out the circumstances when a body’s (including SCIOs) name may be considered to be objectionable. These are to ensure that an applicant’s, charity’s or proposed SCIO’s name is not too similar to that of another charity, likely to mislead the public, give the impression (falsely) that the body is connected to the Government, local authority etc., or is offensive.

18. Under section 11 a charity must inform OSCR at least 42 days before it wishes to change its name, and unless OSCR directs the charity not to do so within 28 days, permission is deemed to have been granted. OSCR may refuse to the change only if it considers the proposed name falls within the circumstances describes in section 10 as objectionable.

19. If a charity considers that another charity has a name too similar to its own, it can ask OSCR to review the names (section 12). If satisfied that there may be confusion, OSCR must direct either or both of the charities to change its name and must remove from the register a charity which refuses.

References to charitable status
20. Section 13 places restrictions on the way that bodies may use the term “charity” to describe themselves in order to protect the charity brand and attempt to avoid confusion for the public. Under section 13(1), only bodies entered in the Scottish Charity Register (“the
Register”) may refer to themselves as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”. Bodies registered elsewhere, such as with the Charity Commission in England and Wales often currently refer to themselves as “registered charities”, but under this Bill they will not be able to do this in Scotland unless they are also registered with OSCR or specifically note that they are “registered in England and Wales” or “with the Charity Commission”.

21. Under section 13(2), bodies on the Register which are established under the law of Scotland, or are managed or controlled in Scotland may use the terms “Scottish Charity” or “registered Scottish charity” to describe themselves. This provision aims to distinguish those charities which are directly registered with OSCR and based in Scotland from those which may be based elsewhere but also operate here.

22. A large number of “foreign” charities (i.e. registered outside Scotland) may only have relatively minor operations in Scotland, such as sending a newsletter or information to Scottish members, awarding a grant to a body in Scotland or merely advertising in a newspaper which may also be seen in Scotland. Under section 14, as long as they are registered elsewhere, do not occupy premises or carry out activities in an office, shop etc. in Scotland, these bodies may operate in Scotland using the term “charity” without having to register with OSCR only if they also refer to the territory where they are registered as charities. Hence such a body might, for example, refer to itself factually as a “charity registered in England and Wales” a “French charity” or a “charity recognised by the Inland Revenue” in Northern Ireland.

23. It is intended that all charities will have to clearly label their main documents to show that they are a charity and are registered (with names as set out above). Section 15 confers powers on the Scottish Ministers to make regulations requiring this and setting the detailed provisions about which documents must state a charity’s name etc. This will allow the Scottish Ministers to vary the documents to be labelled over time as different forms of communication or finance are introduced or to exempt certain charities or types of charity from some of these requirements. Initially, after allowing sufficient time for existing stocks of documents to be used up, it is expected that charities will have to label documents such as cheques, credit cards and annual reports, headed notepaper, raffle tickets and other advertising material etc.

Changes

24. Many changes that a charity may wish to make to its constitution may only be made with the consent of OSCR. This is because these changes could affect a charity’s status on the Scottish Charity Register. Section 16 lists those changes requiring OSCR’s consent as amending the charitable purposes in its constitution, amalgamating with another body, winding up or dissolving. If the change is to amend its purposes, the charity must give OSCR 42 days notice of the proposed change and may not carry out the change without OSCR’s consent. For the other changes, unless OSCR is willing to consent to the changes it must, within 28 days of being informed of the charity’s proposals, either refuse consent to the change or direct the charity not to make the change for a set period (up to 6 months) whilst it makes a determination. If neither of these actions is taken, OSCR is considered to have consented to the proposal.

25. Several other types of change which a charity may wish to make to its organisation may be made without OSCR’s consent (section 17), but the charity must inform OSCR within 3
months of the action being taken. These changes include: a change to the charity’s principal office or name of charity trustee specified on the register, other changes to details on the register, changes to its constitution (apart from its purposes), any amalgamations, winding up or dissolving actions taken by the charity (following OSCR’s agreement). Similarly OSCR must be informed of changes within 1 month following orders by the court to wind up or put the charity into administration or appoint a receiver.

Removal from the Register

26. **Section 18** requires OSCR to remove a charity from the Scottish Charity Register within 28 days of receiving an application from the charity itself requesting this, and to confirm in a notice that this has been done.

27. Under **section 30(1)**, one of the options available to OSCR upon completion of inquiries about a charity is that it may remove a charity from the register if it is satisfied that the charity no longer meets the charity test. If OSCR, following inquiries into a charity, gives a direction to the charity to take certain steps, but the charity fails to comply, OSCR must remove the charity from the register.

28. However, even when a body has been removed from the Register, any assets held by the body before it was removed which were raised to be used for charitable purposes are effectively “locked” for charitable uses. **Section 19** protects such assets, ensuring that several provisions of the Bill continue to apply to them, despite the charity’s removal from the register. The following provisions continue to apply:

- **Sections 28 and 29**: power of OSCR to make inquiries about charities (i.e. the body holding the protected assets), and to obtain documents and information;
- **Sections 31(1) to (3), and (5) to (9)**: powers of OSCR following inquiries;
- **Section 32**: notices and directions under section 31;
- **Section 33(2) to (4)**: reports on inquiries;
- **Section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b)**: Powers of Court of Session;
- **Section 37**: on charging expenses for a transfer scheme; and
- **Chapter 6: sections 45 and 46** on charity accounts.

29. These provisions allow OSCR to continue to oversee the use of the locked assets even though the body holding them is no longer a charity. It can investigate and take action if required. It can ensure that the body continues to prepare accounts showing how the assets are being used.

30. Under **section 19(4)**, OSCR may apply to the Court of Session for a scheme to transfer the locked assets of a charity removed from the register to another charity. A transfer scheme may only be approved if the Court is satisfied that it is needed to protect the assets or secure their proper application for the original purposes, and that such a transfer is the better way for this to be achieved. **Section 19(8)** allows the Scottish Ministers to exclude certain property which they
specify in an affirmative order from this section. The Scottish Ministers would have to have made an order specifying either items or types of property or property owned by particular persons which come under this description. This would, for instance, allow the Scottish Ministers to ensure that national assets owned by a charity removed from the Register could not be transferred to other bodies, potentially being lost to the nation.

Chapter 3 – Co-operation and information

Co-operation

31. **Section 20** provides a statutory duty for OSCR to seek to secure co-operation with other relevant regulators, which are defined in subsection 2 as public bodies or office-holders with functions that are similar to those of OSCR, or conferred on them to allow them to regulate persons for other purposes. This provision is intended to ensure that where possible the burden of dual or multiple regulation on the same body by several regulators is minimised.

32. **Subsection (3)** requires OSCR and any other regulator which has been authorised (under section 38(2)) to carry out OSCR’s functions to co-operate with each other so far as is consistent with their proper functions.

33. **Subsection (4)** emphasises that there is no requirement for either party co-operating in relation to this section to share information with anyone that they are prevented from disclosing by any other law. Hence no information that is restricted from disclosure by the Data Protection Act may be disclosed by one regulator to another.

Public access to Register

34. **Section 21** requires OSCR to make the Scottish Charity Register available for public inspection. It is expected that OSCR will use its web-site to make the register widely and freely available and to publicise its arrangements, but it will also be available, free, at the OSCR principal offices and otherwise as it thinks fit. This may, for instance, mean providing information from the register in Braille, large-print or other medium as requested. OSCR may also charge a fee, limited to the cost of supply, for preparing information if this is provided by alternative means or in other places.

Power of OSCR to obtain documents and information

35. Under **section 22** OSCR may require, by notice, any charity to provide it with documents or information which it requires for the charity register, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session.

Entitlement to be given information by charities

36. Under **section 23** a charity must provide to any person who makes a reasonable request, a copy of its constitution or latest statement of accounts (in what ever reasonable format that it is requested). The charity may charge a fee, limited to the lesser of the cost of supply or a maximum fee that the Scottish Ministers may set out in an order. However, the Scottish Ministers may make an order that exempts charities from this duty (**section 23(3)**).
Sharing information

37. **Section 24** sets out provisions to allow OSCR to disclose information to other public bodies or officeholders (e.g. regulators) and for them to disclose information to OSCR for purposes connected with their functions. **Subsection (1)** permits OSCR to disclose information to any public body or office holder. **Subsections (2) and (3)** allow several Scottish public bodies to disclose information to OSCR to assist it in its functions. Such disclosure is subject to any obligations as to secrecy or other restriction on disclosure of information however imposed (section 25(1)).

38. **Section 25** allows the Scottish Ministers to designate any public body or officeholder, whether in Scotland or not, such that OSCR may provide information to them (**subsection (3)(a)**) or may designate any Scottish public authority to allow it disclose information to OSCR (**subsection (3)(b)**), without any obligation as to secrecy or other restriction on disclosure of information. This section also removes restrictions on disclosing information to OSCR by a charity trustee, independent examiner or auditor of a charity’s accounts. Under **section 26**, it is an offence (with a penalty set at level 5 (currently £5000) or imprisonment up to 6 months on summary conviction) to provide false or misleading information to OSCR knowingly or to alter, conceal or destroy it deliberately.

Chapter 4 – Supervision of charities

Inquiries about charities etc.

39. **Section 28** gives powers to OSCR to make inquiries about charities, other bodies or a person appearing to represent themselves as, or as acting for, a charity, for either general or particular purposes. Under **subsection (2)**, OSCR may direct a person or body in regard to its inquiries, not to undertake specified activities for a period of up to 6 months. **Subsection 5** provides that it is an offence to fail to comply with such a direction without reasonable excuse and **subsection (5)** sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

Power of OSCR to obtain information for inquiries

40. Under **section 29**, OSCR may require, by notice, any charity to provide it with documents or information which it considers necessary for its inquiries, unless the charity would be entitled to refuse on the grounds of confidentiality in the Court of Session. **Subsection (4)** prevents OSCR from disclosing any information or explanation obtained under this section except for the purposes of its inquiries. **Subsection (5)** allows OSCR to pay a person expenses reasonably incurred in providing information under subsection 1. **Subsection (6)** provides that it is an offence to fail to comply with a notice without reasonable excuse and sets the level of fine to be level 4 (currently £2500) or imprisonment not exceeding 3 months, or both.

Powers of OSCR where a charity no longer meets charity test

41. **Section 30** requires OSCR to take actions if it appears to OSCR, as a result of inquiries, that a charity no longer meets the charity test. OSCR must either direct the charity to take steps OSCR considers necessary to meet the test (which may include applying to OSCR for approval of a reorganisation scheme to reform the charity’s constitution) or remove the charity from the register. If the charity fails to comply with the direction OSCR must remove it from the register.
Other powers of OSCR following inquiries

42. **Section 31** sets out further powers which OSCR may use following inquiries which have been made under **section 28**. If it appears to OSCR that there has been misconduct (which **section 103** defines as not including minor mismanagement) in the administration of a charity or that it is necessary for action to be taken to protect a charity’s property or ensure that property is used for charitable purposes, OSCR may (**subsection (4)**) suspend a charity trustee, agent or employee. Alternatively OSCR may (**subsection (6)**) give a direction to restrict the transactions or the payments that may be made in the administration of the body without OSCR’s consent. This is intended to protect the assets of a charity or a body that was representing itself as a charity. OSCR may also (**subsection (7)**) direct a financial institution (bank) or person holding property for a charity not to part with it without OSCR’s consent. This will allow OSCR to ensure that assets raised for charitable purposes are not removed from a charity or body, protecting them for use for those purposes.

43. Where it appears to OSCR, following inquiries, that a body has been falsely representing itself to be a charity, it may direct (**section 31(5)**) the body or person to stop doing so.

44. Where it appears to OSCR, following inquiries, that a person has been claiming to act for a charity, it may (**section 31(8)**) direct the person to stop representing itself as a charity and to pay to the charity or body any assets that it had collected. OSCR may also direct a bank to pay sums collected for the charity or not to part with the property without OSCR’s consent. This will ensure that OSCR has powers to require any assets raised in the name of a charity to be passed on to that charity.

45. **Section 32** provides details concerning the making and delivery of directions and notices in **section 31**. The maximum period for which OSCR may make directions is 6 months. **Subsection (5)** provides that it is an offence to fail to comply with a section 31 direction from OSCR, with the maximum penalty on summary conviction being level 5 on the standard scale (currently £5000) or maximum of 6 months imprisonment, or both.

Reports on inquiries

46. Under **section 33**, if OSCR takes direct action following inquiries under section 28 it must prepare a report about the inquiry and send a copy to the person in respect of whom the inquiry was made and publish it as it sees fit. Under **subsection (1)(b)** OSCR must also (unless it has previously prepared a report on the subject of those inquiries) prepare a report if it is requested to do so by the person of whom the inquiries were made. A report prepared under this section by OSCR may relate to two or more inquiries, meaning that for instance, OSCR may prepare a single report on the results of inquiries into a group of charities or on an annual monitoring exercise involving all charities. It is assumed that such reports will be published on the OSCR website. OSCR may also prepare reports about other inquiries it makes under section 28. In preparing these reports, **subsection (3)** provides that OSCR must not identify the name of any person except those in respect of whom the inquiry is made or publish any particulars that could identify any person unless OSCR is satisfied that it is required to avoid impairing the effectiveness of the report.
Powers of Court of Session

47. After making inquiries, OSCR may (as described in relation to section 28 to 31) take certain actions directly for a maximum period of 6 months. However, under section 34, following its inquiries OSCR may apply to the Court of Session for certain other or further actions to be taken. If it appears to the court that misconduct has occurred, to protect the property of the charity or to ensure that property is used for the charity’s purposes it may interdict the charity from taking prescribed actions, appoint a judicial factor to manage the charity’s affairs, appoint a trustee to a charitable trust, suspend or remove a trustee or manager of a charity, freeze its bank account and property. If it appears to the court that a body has been representing itself as a charity when it is not, it may interdict the body from this action, and also take similar actions that it may do against a charity.

48. Hence, if OSCR considers that action is required to be taken against a charity or body for longer than 6 months or to remove a trustee or appoint a factor, it must apply to the Court of Session.

Transfer schemes

49. Section 35 allows the Court of Session, if OSCR applies to it, to transfer the assets of a charity, or a body that has been representing itself as a charity, to another charity on certain conditions set out in subsection (2). These are that there has been misconduct or the transfer is necessary to protect the charity’s assets or merely to better achieve the charity’s purposes.

Powers in relation to English and Welsh charities

50. Section 36 allows the Court of Session to take action to protect the assets of a charity registered in England and Wales or a body not required to register (e.g. an exempt or excepted body under the Charities Act 1993) which are held in Scotland. The procedure (in subsection 5) is that the Charity Commission would request OSCR to apply to the court, and if satisfied that misconduct has taken place and that the assets require protecting, the court may order the person or institution holding the assets not to part with them without the court’s consent.

Delegation of functions

51. Section 38 allows OSCR to delegate certain of its regulatory functions to other regulators with devolved powers, hence the reference to a Scottish public authority with either mixed functions or no reserved functions. It may only delegate those functions relating to the supervision of charities in sections 28 to 35 (except section 30) (i.e. inquiries about charities, obtaining information and powers following inquiries).

52. Section 38(1) places OSCR’s powers for its regulatory functions in relation to charitable registered social landlords in Scotland with the Scottish Ministers. It is intended that this function will be carried out by Communities Scotland (CS) on the Scottish Ministers’ behalf.

Chapter 5 – Reorganisation of charities

53. Sections 40 and 41 provide a new regime allowing charities (which do not otherwise have the power in their own constitutions to reorganise themselves) to do so by seeking OSCR’s
approval. Currently this process normally has to be undertaken by applying to the Court of Session.

54. Under section 40, OSCR may approve a reorganisation scheme of a charity as long as certain conditions are satisfied. These conditions are that the charity’s purposes have been fulfilled as far as possible, can no longer be given effect to, are no longer charitable purposes, no longer provide an effective means of using its property or that part of the charity’s constitution is no longer desirable. In addition, OSCR must be satisfied that the reorganisation will allow the charity’s resources to be better used for its charitable purposes. Under sections 40(2) and (3), the Scottish Ministers may make regulations setting out the detailed procedures relating to OSCR’s dealing with charity reorganisations.

55. It is also worth noting that section 43(4) ensures that the new provisions do not prevent the Court of Session applying a cy pres scheme to reorganise a charity should it wish. This would normally be at the request of the charity or another person. Section 43(5) prevents charities established by Royal Charter, warrant or other enactment and a trust with property held by a local authority from using the provision in sections 40 and 41. However, a charitable endowment (either educational or non-educational) established under the Education (Scotland) Act 1980 may make use of the reorganisation provisions (sections 43(6) and (7)).

Section 44 Endowments

56. Section 44 provides that educational and non-educational endowments that are also charities will be covered by the reorganisation provisions in this part of the Bill, rather than the regime set out in Part VI of the Education (Scotland) Act 1980. However, section 104 of that Act, which requires a register of educational endowments to be maintained by the Scottish Ministers (in fact by the Student Awards Agency for Scotland on the Scottish Ministers’ behalf) continues to apply.

Chapter 6 – Charity accounts

Accounts

57. As under current legislation (sections 4 and 5 of the 1990 Act), section 45 requires all charities to keep proper accounting records. Charities must also prepare an annual statement of account and report on their activities, have these audited or independently examined (depending on the size of the charity) and provide a copy of the statement to OSCR. Accounting records must be retained for at least 6 years. Subordinate legislation will be prepared to set out the detailed requirements of the accounts to be prepared as this is the simplest means of allowing updating of thresholds and keeping abreast of changes in accounting methods. It is expected that the standard of accounts set out in regulations will accord closely with the UK Statement of Recommended Practice for Charities an updated version of which is currently being prepared on behalf of the Accounting Standards Board.

58. The regulations on accounting will also be used to set out different requirements for different classes or type of charities. For instance, religious bodies may, as now, be allowed to prepare accounts in a slightly different format, as long as they meet equivalent standards to other charities. Regulations will also set out the thresholds by which different sizes of charity
(probably judged on the value of its income, turnover or other measure) must prepare different levels of detail in their accounts and undergo different levels of audit or examination.

**Failure to provide statement of account**

59. **Section 46** provides that OSCR may appoint someone to prepare a statement of accounts for a charity that fails to send a copy to OSCR within the period prescribed in accounting regulations. The appointed person has powers of entry to the charity’s premises, access to financial documents and can demand information from charity trustees or employees. Costs of OSCR and the appointed persons may be charged to the charity trustees. **Subsection (6)** also provides that failure to comply with an appointed person’s requirements is an offence with a liability for a fine of level 3 (currently £1000) on the standard scale.

**Dormant accounts of charities**

60. **Sections 47 and 48** provide a revised regime to that set out in existing legislation (section 12 of the 1990 Act). This provides a means by which OSCR can redistribute sums of money held in charity bank accounts that have not been used for several years, so that these sums may be used for similar charitable purposes. A dormant account is defined (in **section 48(2)**) as one held in a bank and for which no payments or transactions have occurred for 5 years except a payment into the account or a transaction by the bank itself (e.g. payment of interest or bank charges). OSCR must be satisfied that the body in whose name the account has been held is a charity or was a Scottish Charity under the previous charity legislation before this bill is enacted. OSCR is also to make reasonable enquiries to try to locate a person concerned with the management or control of the body holding the dormant account before redistributing any funds. OSCR must transfer the credit in the dormant account (less any expenses etc. in compliance with regulations to be made by the Scottish Ministers under **section 48(1)**) to either a charity with similar purposes, or another charity that OSCR chooses, if it cannot tell what the purposes of the original charity were. **Section 103** includes a definition of “relevant financial institution” such that the deposit banks holding dormant accounts under consideration are those defined by the Financial Services and Markets Act 2000. It is intended that a section 104 order under the Scotland Act will be made following enactment of this Bill to ensure that this definition is automatically updated as new banks become defined in that Westminster legislation.

**Chapter 7 – Scottish charitable incorporated organisations**

**Scottish charitable incorporated organisation**

61. Chapter 7 (**sections 49 to 63**) establish a new legal form that charities may wish to adopt. The Scottish Charitable Incorporated Organisation (SCIO) is a legal form designed specifically for charities to enable them to become a corporate body, without having to become a company or industrial and provident society. SCIOs will be regulated by OSCR.

62. **Section 49 and 50** set out the basic mandatory requirements for a charity to become a SCIO. A SCIO is a corporate body and shall have a constitution, a principal office in Scotland and more than one member. The constitution of a SCIO must state its name and purposes and contain provisions about the membership and the trustees. Unlike a company limited by guarantee, the members of a SCIO will have no liability to contribute to the assets if it is wound...
up. The Scottish Ministers may make regulations specifying further matters relating to a SCIO’s constitution.

Name and status

63. **Section 52** provides that the Scottish Ministers may specify in regulations which documents a SCIO’s name must be shown on if they are issued or signed on its behalf. If the body’s name does not include either the words “Scottish charitable incorporated organisation” or “SCIO”, then documents must include a statement that it is a SCIO. Because all SCIOs must also be charities, these provisions are instead of those in section 13 which require a charity to state on its documents that it is a charity. **Section 53** establishes as an offence the issuing of any document which should include reference to SCIO, which does not. OSCR also has powers to direct a body which is not a SCIO from representing itself as such and failure to comply may lead to interdict by the Court of Session.

Creation of SCIO and entry in Register

64. **Section 54** sets out the procedure for application for registration of a SCIO. These provisions are similar to those for an application to be on the Register, with specific requirements relating to a SCIO. The effect of registration (**section 55**) is that on entry to the register as a SCIO, the body becomes a body corporate as described in the application. If a SCIO ceases to be a charity, it also ceases to be a SCIO.

Conversion, amalgamation and transfer

65. **Sections 56, 56A and 57** make provisions to allow a charity that is a company or an industrial and provident society to be converted to a SCIO. Such bodies cannot transfer if they have any share capital that is not fully paid up or if they have only a single member. An application for conversion must be accompanied by copies of both the resolution of the body to be converted to a SCIO and adopting the proposed constitution of the SCIO.

66. **Section 56A** imposes a duty on OSCR to consult with the Registrar of Companies or the Financial Services Authority (FSA) and such other persons it thinks fit before determining an application for conversion. OSCR must grant the conversion only where a charity if converted into a SCIO can continue to meet the charity test. It must refuse the application if the SCIO’s proposed name is objectionable under section 10, if the proposed constitution and powers of the SCIO do not meet the requirements of section 50 and any regulations under that section or if the application would be refused by virtue of regulations made under section 6(1). If the converted body meets the charity test OSCR may only refuse the application on these grounds or as a result of representations from those it has consulted under section 56A(1). These provisions allow the previous regulator to advise OSCR of any default by the body applying.

67. Under section 57, if OSCR grants an application for a charity’s conversion to a SCIO, as well as entering the body on the Register, it must send a copy of the body’s resolutions to convert and a copy of the entry in the Charity Register to the registrar of the original body (i.e. Companies House or the Financial Services Authority). It is intended that once OSCR has confirmed that it will grant the body’s application to become a SCIO, the relevant original registrar will cancel the body’s entry on the original register. To require this to occur is however
reserved and as such it is intended to include this in a section 104 order made in Westminster as a consequence of this Bill.

68. **Schedule 4** disapplies section 380 of the Companies Act 1985 in relation to the resolutions for conversion to a SCIO by a Scottish charitable company. This stops the company having to send these resolutions to Companies House before OSCR has decided whether or not to accept the application to convert.

69. **Section 58 and 59** provide for a number of SCIOs to amalgamate by application to OSCR. A resolution to amalgamate must be passed by either a two-thirds majority of those voting at a general meeting or a unanimous vote by the members of each of the SCIOs involved. If OSCR grants the application for amalgamation, it must enter the new SCIO on the register and remove the original bodies’ entries and all the property, rights and liabilities of all the old SCIOs belong to the new SCIO. Similarly, section 60 provides for a SCIO to transfer all its property, rights and liabilities to another SCIO, if OSCR confirms the application.

70. **Section 61** provides that a third party dealing with a SCIO is entitled to assume that the SCIO has sufficient legal powers under its constitution to enable it to act in the way it is attempting or proposing to act. Third parties may also assume that charity trustees are authorised to act on behalf of the charity they represent in any matter. It is effectively for SCIOs themselves, and their trustees, to ensure that they have the relevant powers. This is intended to provide a level of protection to those dealing, in good faith, with SCIOs and their trustees, in a similar manner to that provided to those dealing with registered companies.

71. Under **section 63**, the Scottish Ministers may make regulations to set out further provisions on SCIOs such as the application process, the administration of SCIOs, amalgamations, transfers, the winding up, insolvency or dissolution of SCIOs, the maintenance of other registers of information on SCIOs or as they see fit.

**Chapter 8 – Religious charities**

**Section 64: Designated religious charities**

72. **Section 64** allows OSCR to designate a charity that meets certain criteria as a designated religious charity. To be designated, the body its main purpose must be the advancement of religion, its main activity the regular holding of public worship and it must have been established in Scotland for at least 10 years and have a membership of at least 3,000 over the age of 16. In addition, it must have an internal organisation with supervisory and disciplinary functions over all its component parts and have a regime for keeping accounting record which OSCR considers correspond to those for other charities.

73. Designated religious charities will be exempt from certain provisions of the Bill; namely that it does not need to seek OSCR’s consent for certain of the changes to its constitution set out in section 16, OSCR may not direct the charity or its trustees to stop undertaking activities (under **section 28(2)**) nor to suspend its charity trustees (under **section 31(4)**) following its inquiries. The Court of Session may not (under **section 34(4)**) appoint a judicial factor, appoint a trustee, nor suspend a charity trustee or manager of the religious charity. Lastly, section 68 on
those disqualified from serving as a charity trustee does not apply to designated religious charities.

74. Under section 64(5), OSCR may withdraw the designated status from a designated religious charity if it considers the qualifying criteria no longer apply or if, following an investigation, OSCR considers that it is no longer appropriate for the body to hold that status.

75. These provisions largely replicate the existing regime under section 3 of the 1990 Act which allow the Scottish Ministers (now OSCR acting on their behalf) to designate religious bodies to allow similar exemptions where it is satisfied that an adequate supervisory and disciplinary regime is already in place.

Chapter 9 – Charity trustees

Section 65: Charity trustees: general duties

76. The term “charity trustees” (which is defined in section 103) is used throughout the Bill to describe those persons having general control and management of the administration of a charity. Depending on the form of the body, this term will generally refer to the directors, the members who form a management committee or group, the trustees of a trust, or if it is an unincorporated association, the persons who normally direct the managers of the body. The term is merely used as a generic term within this Bill and does not change other legislation. Hence the directors of a charitable company remain directors but take on duties as “charity trustees” under this Bill.

77. Section 65 sets out the general duty of care that charity trustees must follow. These are a codification of existing law and practice. Subsection (1) requires a charity trustee to act in the interests of the charity. In particular they have to seek to ensure that the charity acts consistently with its purposes and that they act with a level of care and diligence that is reasonably expected of someone managing another’s affairs. A charity trustee has a duty to ensure that a charity complies with any requirements of this Bill (subsection (2)). However, subsection (3) provides a caveat that none of the above duties require a charity trustee to act otherwise than is imposed on them by other enactment. Hence, the general charity trustee duties do not exempt them from acting, for instance in accordance with health and safety legislation, or for charitable companies, with companies legislation. A breach of the general duties (to act in the interests of the charity, and to ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of the Act) may be treated as misconduct in the administration of a charity.

Remuneration

78. Section 66 provides that a charity trustee may not normally be paid for carrying out duties and functions of being a charity trustee, unless specific authority for this is provided. This stems from the existing position that charities are generally understood to be voluntary organisations and that charity trustees will offer their services as such with no payment. However, under certain circumstances, it is acceptable that a charity trustee may also carry out additional services on behalf of the charity, i.e. services that another person (not a trustee) might otherwise undertake for payment. In these circumstances, and where the conditions set out in subsection 2 are satisfied, this “service provider” may be remunerated from the charity’s funds for those (additional) services. The conditions are that the maximum amount of the remuneration is set out in a written agreement, is reasonable, that the charity trustees are satisfied it is in the interests
of the charity, that a minority of trustees are either paid in this way or connected to trustees who are, and that the constitution of the charity allows it to occur. Despite the above, subsection (5) ensures that a charity trustee or service provider may receive remuneration from a charity if they are entitled to receive it under a provision in the charity’s constitution (in force on the day that the Bill is introduced to the Parliament), as a result of a court order, or under any enactment. This means that charities may not make changes to their constitution merely to allow payment of charity trustees before this Bill comes into force and that trustees may be paid if other legislation specifically allows it.

79. Section 67 sets out definitions for terms which are referred to in parts of section 66, such as those who would be considered to be connected with a trustee. Such a person is defined as “connected” to a charity trustee if they are married to them or are a civil partner to them, or living as if married, is a close family relative (i.e. a child, parent, grandchild, brother or sister of them or their spouse). Also an institution or body cooperate is considered to be “connected” with a charity trustee if it is controlled by them or a “connected” relative, or if they they have a substantial interest respectively.

Disqualification

80. Section 68 sets out the types of person who are disqualified form serving as a charity trustee. These are: anyone convicted of an offence involving dishonesty or an offence under this Bill, an undischarged bankrupt, anyone removed from serving as a charity trustee or in management or control of a charity (under previous charity law), by the Charity Commission in England and Wales, by the English courts, or from serving as a Company Director. Subsection (4) allows OSCR to waive the disqualification of a person, allowing them to serve as a charity trustee, unless this would prejudice company legislation. Under section 69, it is an offence to act as a charity trustee while disqualified from doing so. An offender is liable to either a fine up to level 5 (£5000) or imprisonment for up to 6 months on summary conviction or an unlimited fine or up to 2 years imprisonment, or both, on conviction on indictment.

Chapter 10 – Decisions: notices, reviews and appeals

81. Sections 70 to 77 set out a process by which most decisions by OSCR (or those which are taken on behalf of OSCR) may be challenged by those directly affected in a process that is intended to be simple and more cheaply accessible to charities than the current process which relies on the courts. Section 70 lists those decisions which may be reviewed and section 71 sets out the persons that must be informed about different decisions. It also provides that notices of decisions must set out the decision, the reasons and advice about seeking a review. Further definition of a formal notification is given in section 98. Sections 72 and 73 provide that, if requested by either the person or charity affected by the decision, OSCR must carry out an internal review of the decision. OSCR will publish procedures to set out how the internal reviews will be conducted, although a review is to be carried out within 21 days of receiving the request for it.

82. Section 74 requires the Scottish Ministers to appoint individuals to serve on a Scottish Charity Appeals Panel, a new tribunal to be set up to provide an independent appeal mechanism for decisions made by OSCR. Schedule 2 sets out further details of the Appeals Panel. Schedule 4 adds the Panel to the list of bodies in Part 2, Schedule 1 of the Tribunals and Inquiries Act 1992 and hence the Panel will be under the jurisdiction of the Scottish Committee
of the Council for Tribunals. Following open advertising, the Scottish Ministers will appoint individuals to be available to serve on the Panel. The number of Panels will depend on the caseload, but each panel will consist of 3 persons, and the chair at least will have been a solicitor or advocate for at least 5 years. It is intended that administrative support for the panel will be provided by the Executive. The Scottish Ministers will also establish procedural rules for the Panels.

83. Following an internal review of a decision by OSCR, a person who requested the review may (section 75(1)) appeal the decision to the panel, within 28 days of being notified of the review decision. The panel will consider the appeal and may under subsection (5), either confirm a decision by OSCR, quash OSCR’s decision (and direct it to take such other action as the Panel prescribes), or remit the decision to OSCR for reconsideration, with the Panel’s reasons. Under section 76, if a decision is remitted to it by the Panel, OSCR must, within 14 days, either confirm, vary, reverse or revoke its decision and give its reasons.

84. Under section 77, either the person requesting an appeal or OSCR may seek to have the appeal considered by the Court of Session. The Court may confirm or quash the decision. A decision by OSCR, or by a person to whom OSCR’s functions are delegated by virtue of section 38, to suspend a charity trustee, agent or employee (under section 31(4)) can be appealed by that person directly to the Court of Session (rather than the Panel).

PART 2: FUNDRAISING FOR BENEVOLENT BODIES

General

85. Part 2 regulates fundraising not just for bodies on the Scottish Charity Register, but for all benevolent bodies and charitable, benevolent and philanthropic purposes. Benevolent bodies are defined as any bodies established for charitable, benevolent or philanthropic purposes, whether they are actually charities or not. This means that many bodies which may have charitable purposes but do not provide a sufficient level of public benefit or may have chosen not to be restricted by the added regulation which falls upon charities, may, for instance, undertake public collections or fundraise (as long as they are transparent and do not claim to be charities).

86. Section 78 sets out a number of definitions which relate to Part 2. Section 79 also clarifies that any reference to representation or solicitation in Part 2 refers to any manner of representation, e.g. oral, written or in a statement published in a newspaper, film or radio or television programme.

Control of fundraising

87. Sections 80 and 81 give benevolent bodies greater control over those fundraising on their behalf. Section 80 requires professional fundraisers and commercial participators to have an agreement with a benevolent body before fundraising on their behalf. Regulations under section 82 can set out the requirements of this agreement. Any agreement which does not meet these requirements is only enforceable against the body through the courts. Professional fundraisers and commercial participators are entitled to remuneration or expenses as set out in the agreement.
88. **Section 80** also gives benevolent bodies (and OSCR on behalf of charities) the right to seek an interdict preventing a professional fundraiser or commercial participator fundraising on the body’s behalf, if they are doing so without an agreement or outwith an agreement in the prescribed format.

89. **Section 81** allows benevolent bodies to seek an interdict preventing anyone, other than a professional fundraiser or commercial participator (who would be covered by section 80), from fundraising on their behalf if they object to the methods of fundraising, if the person is not a fit and proper person to fundraise or if the body does not want to be associated with the venture.

90. **Section 82** provides the Scottish Ministers with powers to regulate fundraising through secondary legislation in a number of ways. This section will be used to make regulations setting out a requirement for professional fundraisers, paid charity fundraisers, commercial participators and possibly volunteers, to make a statement to potential donors regarding their remuneration or the amount of the donation that will go to the benevolent body. Regulations under this section will also cover the form of contract between professional fundraisers or commercial participators and benevolent bodies, as well as circumstances under which donations may be refunded. The Scottish Ministers have agreed to allow the sector time to develop a scheme of self regulation, however, powers under **section 82** may be used to further regulate benevolent fundraising if it was felt necessary.

**Public benevolent collections**

91. **Sections 83 to 91** set out a local authority led system for licensing public benevolent collections which replaces the provisions for the licensing of public charitable collections under section 119 of the Civic Government (Scotland) Act 1982. The provisions are very similar to those in the 1982 Act. The main changes are the extension of the definition of public benevolent collections in **section 83** to include collections of promises of money (such as direct debits), as well as collections of cash; clarification of the definition of public place under **section 83** and the inclusion of powers under **section 90** to regulate the collections of goods.

92. **Section 84** requires organisers of public benevolent collections (collections of cash or promises of money in a public place, or from house to house or business to business) to apply to the relevant local authority for permission to collect. **Section 85** requires local authorities to make any necessary enquiries before they either give permission to collect (with or without conditions), or refuse permission on a number of grounds. Local authorities may also withdraw permission already granted. Regulations under **section 85** may remove the duty on local authorities to undertake background checks for certain types of applications.

93. Under **section 86**, OSCR may designate charities who meet certain criteria as designated national collectors. This establishes a regime similar to the current provision under the 1982 Act by which the Scottish Ministers (now OSCR acting on their behalf) may designate bodies collecting in a number of local authority areas as “exempt promoters”. In the new regime, OSCR may specify the criteria to be met for the purposes of obtaining and retaining designated national collector status, and are required to consult certain persons beforehand. Collections by designated national collectors must be notified to the relevant local authority, who may prohibit the collection if it is likely to cause undue public inconvenience.
94. **Section 87** sets out a process for organisers of public benevolent collections to appeal against a local authority decision. Further procedures for public benevolent collections will be set out in regulations made under **section 89**.

95. **Section 88** gives OSCR powers to protect funds raised in a public charitable collection and **section 91** requires local authorities to consider guidance issued by OSCR in relation to public benevolent collections.

96. **Section 90** allows the Scottish Ministers to regulate the collections of goods from the public for charitable, benevolent or philanthropic purposes through secondary legislation. These regulations could include a requirement to notify local authorities about the collection, and can create offences for non-compliance.

**PART 3: INVESTMENT POWERS OF TRUSTEES**

97. **Sections 92 to 94** provide an extension to the investment powers of trustees (of all trusts, whether charities or not). The Trusts (Scotland) Act 1921 is amended by adding a provision (section 92(2)) allowing a trustee to make any kind of investment of the trust estate (including an investment in heritable property). The effect is that trustees will generally have the same powers of investment as if they were the beneficial owners of the trust estate. Subsection (2) also provides a new wide power for trustees to acquire heritable property for any other reason. These wider powers are subject to any restriction or exclusion imposed by other enactments and do not extend to certain categories of trustees (subsection (3)). Subsection (3) continues the policy of the Trustee Investments Act 1961 in relation to pre-existing trust deeds. No term in a private trust deed made before the passing of the 1961 Act was to restrict the investment powers granted to trustees by that Act. The new general power in subsection (2) is similarly not to be restricted. In relation to trust deeds made after the passing of the 1961 Act, where the investment powers contained in the 1961 Act are conferred the trustees are to have the new general powers. But if trustees in existing post-1961 Act deeds or in future deeds are prohibited from making certain investments then these prohibitions will continue to apply. This is because section 4(1) of the 1921 Act, in which the new general investment power is inserted, authorises only acts which are not at variance with the terms and purposes of the trust.

98. **Section 93** provides a number of duties that apply to trustees and must be followed before exercising the wider investment powers under section 92(2). **Schedule 3** (introduced by **section 94**) makes a number of amendments consequential on **sections 92 and 93** to other legislation relating to investment powers of trustees.

**PART 4: GENERAL AND SUPPLEMENTARY**

**Power of charity to participate in certain financial schemes**

99. **Section 94A** provides a power, unless expressly prevented by its constitution, for every Scottish charity to participate in common investment schemes and common deposit schemes. These schemes (commonly known as common investment funds or CIFs) may be registered with the Charities Commission only by charities registered in England and Wales. The Charities Act 1993 will have to be amended by the Home Office Charities Bill (section 23 of the Bill which
was re-introduced into the House of Lords on 18 May 2005 provides for this), before Scottish charities are able to join CIFs.

Financial assistance for benevolent bodies

100. **Section 95** allows the Scottish Ministers to make payments to benevolent bodies in relation to their activities, or to any person in connection with work which enables benevolent bodies to implement their purposes better.

Rate relief for registered community amateur sports clubs

101. **Section 96** makes provision for organisations that are registered with the Inland Revenue under Section 58 of the Finance Act 2002 as a community amateur sports club to receive 80% mandatory relief from non-domestic rates. Local authorities have discretionary powers to top up this relief to 100%.

Population of Register etc.

102. **Section 97(1)** provides a transitional arrangement to ensure that all existing Scottish Charities at the time that **paragraph 5(a)(ii) of schedule 4** of this Bill is commenced become automatically entered by OSCR on the Scottish Charity Register. **Paragraph 1 of schedule 4** repeals the section of the 1990 Act which entitles a body recognised by the Inland Revenue (as eligible for tax relief through having exclusively charitable purposes) under the Income and Corporation Taxes Act 1988 to describe themselves as a “Scottish charity”.

103. **Subsection (2A)** allows the Scottish Ministers to disapply section 3(3) by order for up to 18 months. Disapplying section 3(3) allows OSCR time to gather the necessary information on each charity before having to comply with the section. Ministers can also provide, by order, that for up to 12 months an unregistered charity or type of unregistered charity may continue to refer to itself as a “charity” despite not being on the Register. This provides a period of grace to allow existing (non-Scottish) UK and “foreign” charities operating in Scotland to apply to be entered on the Register by OSCR. It also allows foreign charities that do not intend to register, a period of grace to stop referring to themselves as “charities”. The provision also ensures that any provision of the Bill or of any other enactment will apply (with such necessary modifications) to such a body, as if it was entered onto the register, for so long as it is entitled to refer to itself as a “charity”.

104. **Subsection (2B)** defines an unregistered charitable body as one established under the law of a country or territory other than Scotland which is entitled to refer to itself as a charity (by any means and in any language) in that country or territory.

Notices, applications etc.

105. **Section 98** sets out details relating to the giving of notices, directions and consents or requests for review, applications and decision made. The formal communications must be in writing, but may also be made by electronic means (e.g. electronic-mail etc.). **Subsection (4)**
sets out the specific conditions and related timing for when a formal communication may be considered as having been made.

Offences by corporate bodies etc.

106. **Section 99** provides that when an offence under this Act is committed by a body corporate, a Scottish partnership or an unincorporated association, with the consent or connivance of a person controlling the body, the individual is also guilty of the offence and is liable to have proceedings taken against them.

Ancillary provisions

107. **Paragraph (a) of section 100** allows the Scottish Ministers to modify any enactment in order to ensure a body established by an enactment is able to meet the charity test in section 7(3)(b) of the Bill. This provision may be used if it were to be decided that an existing charitable non-departmental public body (NDPB) should remain a charity but was prevented from doing so by an enactment providing the Scottish Ministers control of the body via a power of direction.

108. **Paragraph (b) of section 100** provides ancillary powers for the Scottish Ministers to make other incidental, supplemental, consequential, transitional, transitory or saving provisions considered necessary for this Act.

109. **Section 101** sets out the procedures for the Scottish Ministers to make orders, regulations or rules by statutory instrument under the Act. Instruments are generally made by negative resolution, except orders under section 7(4A), 19(8) and those under section 100 which add to, replace or omit any part of the text of primary legislation, regulations under 63(d), 82(1) and commencement orders under section 104(2). These exceptions are subject to affirmative resolution in the Parliament.

110. **Section 102** relates to **schedule 4** which contains minor and consequential amendments to other primary legislation in consequence of this Act. **Schedule 4** includes amendments to several Acts:

    **Part 1: Acts**

- Paragraph A1 amends section 6(2) of the Recreational Charities Act 1958 by deleting the references to the Local Government (Financial Provisions etc) (Scotland) Act 1962. Section 6(2) of the 1958 Act extends part of the 1958 Act to those Scottish enactments which require “charity” to be interpreted in accordance with the law of England & Wales for tax purposes and it states that one of these enactments is the Local Government (Financial Provisions etc) (Scotland) Act 1962. However, paragraph 1 of the Bill already amends the 1962 Act to ensure that “charity” is to be interpreted in accordance with the new Scottish charity test) rather than in accordance with the law of England & Wales. Therefore the references to the 1962 Act in the 1958 Act are unnecessary;

- Paragraph 1 which amends section 4(10)(a) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 to refer to charities entered in the Scottish Charity Register to ensure that all charities on the Scottish Charity Register are
This document relates to the Charities and Trustee Investment (Scotland) Bill
as amended at Stage 2 (SP Bill 32A)

eligible to receive the appropriate reduction or remission of non-domestic rates. Paragraph 5 of schedule 2 of the 1962 Act is also repealed by this paragraph to remove the cross reference to the Recreational Charities Act 1958, as bodies previously recognised as Scottish charities under that Act will in future be expected to qualify as charities (and be eligible for rates relief) under the charitable purpose in section 7(2)(ga) of the Bill.

- Paragraph 2 which adds references to charities on the Scottish Charity Register to the Sex Discrimination Act 1975 to ensure that Act will continue to apply to charitable educational endowments following enactment of this Bill;
- Paragraph 3 which replaces the existing definition of “charitable purposes” in section 122 of the Education (Scotland) Act 1980, referring instead to this Bill;
- Paragraph 4 which replaces previous references to “Scottish Charities” and “charitable” referring instead to this Bill and repeals the previous provisions on the regulation of charitable collections in section 119 of the Civic Government (Scotland) Act 1992 relating to public charitable collections;
- Paragraph 4A disapplies section 380 of the Companies Act 1985 in relation to the resolutions for conversion to a SCIO by a Scottish charitable company. This stops the company having to send these resolutions to Companies House before OSCR has decided whether or not to accept the application to convert;
- Paragraph 5 which repeals the existing link in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 between the recognition by the Inland Revenue of bodies eligible for tax relief and bodies eligible to describe themselves as Scottish Charities, and existing provisions on the regulation of Scottish Charities by the Scottish Ministers;
- Paragraph 6 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Charities Act 1992. Section 119 on the regulation of charitable collections is superseded by this Bill;
- Paragraph 7 which updates section 19(3) of the Further and Higher Education (Scotland) Act 1992 to refer to charities as defined in this Bill instead of the Income Tax Acts. This section allows the Scottish Ministers to make modifications, by order, to the purposes and conditions of application for educational endowments;
- Paragraph 8 which brings the Scottish Charity Appeals Panel within the jurisdiction of the Scottish Committee of the Council on Tribunals;
- Paragraph 9 which repeals an amendment which was made to section 119 of the Civic Government (Scotland) Act 1982 by the Local Government etc. (Scotland) Act 1994. This updated section 119 on the regulation of charitable collections bringing it into line with the 1994 local government reorganisations;
- Paragraph 10 which applies the provisions of the Ethical Standards in Public Life etc. (Scotland) Act 2000 to the Scottish Charity Regulator;
- Paragraph 11 which updates sections 34(8) and 71(8) of the Land Reform (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions (Scotland) Act 1990;
Paragraph 12 which applies the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to the Scottish Charity Regulator, ensuring that members of the Scottish Charity Regulator are appointed in accordance with the public appointments process overseen by the Commissioner for Public Appointments in Scotland;

Paragraph 13 which updates paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003 to refer to a charity as defined in this Bill instead of as in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

Section 103: General interpretation

111. **Section 103** provides a number of general definitions of terms used throughout the Bill. Reference has been made to these in the relevant sections of the commentary above.

Section 104: Short title and commencement

112. **Section 104(1)** provides for the short title to the Bill. Subsection (2) provides that only sections 100, 101 and this section come into force when the Bill receives Royal Assent. The remaining provisions of the Act will come into force on a date (or dates) appointed by the Scottish Ministers by means of a commencement order or orders.
CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL
[AS AMENDED AT STAGE 2]

SUPPLEMENTARY FINANCIAL MEMORANDUM

PURPOSE

1. This memorandum has been prepared by the Scottish Executive in accordance with Rule 9.7.8B of the Standing Orders in consequence of amendments made to Charities and Trustee Investment (Scotland) Bill (the Bill) at Stage 2. This memorandum should be read in conjunction with the original Accompanying Documents.

Amendments changing the financial implications of the Bill

Section 7 – the charity test

2. Section 7(3)(b), the prohibition on charities’ constitutions allowing third party direction, has been amended to only refer to control and direction by Scottish Ministers or Ministers of the Crown. Section 7(3) continues to disallow charities whose constitutions permit the distribution of assets for non-charitable purposes. The existing subsection (4), the interpretation of “third party” has been removed.

3. A new order making power for Scottish Ministers has been put in place at section (4A) which allows them to disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order. This will allow Scottish Ministers to provide, by affirmative order that a body whose constitution allows it to distribute or apply its property for a non charitable purpose or whose constitution expressly permits Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities may remain a charity if it meets the other parts of the charity test. This power is created to allow the 5 national collections Non Departmental Public Bodies (The National Museums of Scotland, the National Library, The National Gallery, The Royal Botanic Gardens Edinburgh and the Royal Commission for Ancient and Historic Monuments) to remain as charities, as recommended by the Communities Committee. Scottish Ministers have committed themselves to exempting these bodies from this part of the charity test.

4. This changes the financial implications set out in the paragraphs 124 and 128 and the summary of the Financial Memorandum accompanying the Bill on introduction. In this the potential cost to the Scottish Administration of charitable Non Departmental Public Bodies losing their charitable status was recorded as being up to £7 million. The exemption of the 5 five National collections NDPBs would mean that this figure would be reduced. The value of the tax relief, non-domestic rates relief and donations flowing from the charitable status of the other 7 charitable NDPBs is estimated to be approximately £1.9 million per annum including...
some £1.34 million in local rates relief. Without the rates relief, which is ultimately funded by the Executive and therefore cost neutral to the Scottish Consolidated fund, the total benefit to these NDPBs of their charitable status is some £560,000. The Executive still plans to look at these NDPBs on a case-by-case basis during their reviews and decide whether or not they should cease to be either charities or NDPBs. Should decisions to give up the charitable status of these charities, alongside any other outcomes of the reviews, result in a net loss of income then the Executive will consider providing additional grant-in-aid funding to reflect this, but only if the restructuring of services is not feasible. As set out above, this could ultimately cost the Executive up to £560,000.
Present:

Gordon Jackson
Mr Stewart Maxwell
Mike Pringle

Dr Sylvia Jackson (Convener)
Christine May
Murray Tosh

Apologies were received from Mr Adam Ingram.

**Delegated powers scrutiny:** The Committee considered the delegated powers provisions in the following bill—

Charities and Trustee Investment (Scotland) Bill as amended at Stage 2

and agreed the terms of its report.
Delegated Powers Scrutiny

Charities and Trustee Investment (Scotland) Bill: Stage 2

10:31

The Convener: Agenda item 2 is delegated powers scrutiny of the Charities and Trustee Investment (Scotland) Bill, as amended at stage 2. As members will know, the stage 3 debate takes place this Thursday and we need to report to Parliament in advance of that. I will go through the various sections on which we commented previously. We have received feedback from the Executive on the amendments that have been made.

Section 2 is on the Office of the Scottish Charity Regulator’s annual reports. Section 2(4) would have obliged OSCR to comply with any directions of the Scottish ministers about the form, content and means of publication of the general report that the office will have to prepare annually under section 2. That ministerial power has now been removed, on the recommendation of the lead committee, which did not feel that it was necessary. There is not much more to say about the matter, so we will simply note the amendment.

Section 6 is entitled “Applications: further procedure”. At stage 1, the committee sought clarification on the drafting of the section, as provisions appeared to overlap. The Executive accepted that the section might require adjustment and undertook to introduce an appropriate amendment at stage 2. Accordingly, the Executive has removed the references to sections 4 and 54(2) from section 6(2), as the committee recommended. Section 6(1) has also been amended to include references to sections 56(1) and 58(1), which will allow ministers to make regulations in relation to applications from charitable companies or registered friendly societies to convert to a Scottish charitable incorporated organisation, or in relation to applications from SCIOs to amalgamate. Are members happy to report to Parliament that the amendments address our concerns?

Members indicated agreement.

The Convener: Section 7, which is on the charity test, sets out the criteria that a body will have to meet to be treated as a charity. Section 7(3) has been amended to refer specifically to the Scottish ministers or a minister of the Crown and section 7(4) has been removed. At stage 1, the Executive informed the committee that it intended to adjust the bill in relation to the non-departmental public bodies that relate to the five national collections, which is an issue about which we were
concerned. Therefore, new section 7(4A), has been inserted; it contains a new order-making power that will allow ministers to disapply either or both of paragraphs (a) and (b) of section 7(3) in relation to any body or type of body. The exercise of the power will be subject to the affirmative procedure. During stage 2, the Communities Committee welcomed the amendment as meeting concerns that it had raised. Are members content with the amendment?

Members indicated agreement.

The Convener: Section 9 will oblige OSCR to issue guidance on how it determines whether a body meets the charity test. Originally, the bill would have obliged OSCR to consult “such persons as it thinks fit”, but an amendment has been made that will oblige OSCR specifically to consult representatives of the charitable sector, as well as other persons. Are members content with the amendment?

Members indicated agreement.

The Convener: Section 15 will confer power on ministers to make regulations that require charities to include certain information on documents that they issue or sign. The regulations may also set out the information that is to be included on such documents. The regulation-making power was refined at stage 2 to include a power to exempt charities, or particular types of charities, from any of the requirements of the regulations. The Executive has explained that the change is needed to allow a period of grace for charities to use up stationery that does not comply with the requirements of the regulations. The owing-making power was refined at stage 2 to include a power to exempt charities, or particular types of charities, from any of the requirements of the regulations. The Executive has explained that the change is needed to allow a period of grace for charities to use up stationery that does not comply with the regulations. Orders that are made under section 15 will be subject to the negative procedure. Are members content with the amendment?

Members indicated agreement.

The Convener: Section 19 makes provision in relation to the property of charities that are removed from the register. Originally, the order-making power in section 19(8) would have applied only to assets that ministers considered to be of national importance, but the power has been amended so that it will now apply to any property that is specified in the order. In recognition of the width of the power, orders that are made under section 15 will be subject to the negative procedure. Are members content with the power as amended?

Members indicated agreement.

The Convener: Section 63 will confer on ministers the power to make detailed provision about applications for the constitution of the bodies that are to be known as Scottish charitable incorporated organisations and other related matters. The power, which will be subject to the affirmative procedure except in the case of regulations that are made under section 63(d), has been extended—by the inclusion of section 63(da)—to allow ministers to make provision by regulation for the maintenance of registers of information about SCIOs. Are members content with the amendment?

Members indicated agreement.

The Convener: Section 82 relates to regulations about fundraising. The committee raised concerns about section 82(2), in particular the powers in sections 82(2)(h) and 82(3), which the committee considered should be subject to the affirmative rather than the negative procedure. The committee also raised concerns about the power in section 82(5) to create offences. The committee’s general view was that the sanctions for breaches of subordinate legislation should, as far as possible, be set out in the primary legislation rather than delegated to subordinate legislation.

As we recommended, the Executive amended the bill so that regulations made under the power will be subject to the affirmative procedure. The Executive also clarified section 82(2)(c) so that the regulations will be able to determine the identification and information that professional fundraisers are to provide, rather than simply the information that they are to provide. However, the Executive does not seem to have addressed the committee’s other recommendations on the drafting of section 82, particularly those on the power to create criminal offences in regulations rather than the inclusion of offences in the bill.

I would like to know what members feel about that.

Christine May (Central Fife) (Lab): I accept that it might be difficult to specify the nature of the offences and that the Executive might circumscribe itself by doing so. However, I am concerned that not specifying the offences in the bill is not good legislative practice. Therefore, I would like the committee to seek clarification on the matter, perhaps during the stage 3 debate on Thursday afternoon.

Mr Stewart Maxwell (West of Scotland) (SNP): I do not see why it is particularly difficult to specify the offences in the bill. It is normal for offences to be in primary legislation rather than created through subordinate legislation. I do not understand why the Executive has chosen that method—we have not had a full explanation. However, given the timescale and the fact that the stage 3 debate is on Thursday, the best approach is, as Christine May rightly suggests, to question the minister in the debate to see whether we can get an explanation of the Executive’s approach.

The Convener: We will inform the lead committee of the issue and raise the matter as quickly as possible with the Scottish Executive.
We will then raise it in the stage 3 debate. Are there any other mechanisms that we should use?

Christine May: We might want to alert the Presiding Officer to the fact that we want to make a comment.

The Convener: Yes, although that has never been a problem in the past.

Section 94 is on consequential amendments. As introduced, the section allowed the Scottish ministers to amend by order any local, personal or private act of Parliament, as well as any other act of Parliament or of the Scottish Parliament, in relation to sections 92 and 93 of the bill. Section 94 has been removed by the Executive, which now takes the view that it is unnecessary, given the customary general powers to modify enactments, as provided for in section 100. Is that agreed?

Members indicated agreement.

The Convener: Section 97 is on the population of the register. A number of concerns were expressed at stage 1 regarding the bodies to be covered by the section. The committee was particularly concerned that the power was open ended and that no time limits had been included in the power such that, in theory, ministers could exempt any charity from the provisions of the bill without limit of time. Although ministers indicated at the time that they considered it impractical to include any time limits in the bill, it appears that, after further consideration and consultation with OSCR, they have revisited the section in the light of the comments that the committee and others made. As a result, the order-making powers have been revised substantially. In particular, the Executive has now included time limits for the exercise of the power. Are we content to report to Parliament that the Executive’s changes have addressed our concerns?

Members indicated agreement.

The Convener: Section 100 is on ancillary provision. The section makes the customary provision that allows amendments to primary and other legislation, in consequence of the bill, to be made by order. As a result of the removal of the power to make transitional, transitory or savings provisions from section 97, section 100(b) has been amended to include those provisions. Are we content with that amendment?

Members indicated agreement.

The Convener: Section 101 is on orders, regulations and rules. The section contains the usual procedural provisions relating to subordinate legislation under the bill. Amendments have been made to change the procedure for instruments under sections 19(8) and 81(1) from negative to affirmative and to provide that orders under new section 7(4A) are also subject to the affirmative procedure. Are we content to note those amendments?

Members indicated agreement.

The Convener: Section 104 is the short title and commencement. At stage 1, the committee questioned the drafting of the section, which provided for section 97 to be commenced on royal assent, although the terms that are referred to in that section were defined in section 103, which was to be commenced by order. As was promised by the Executive, the reference to section 97 has now been removed from section 104. Are members content with that amendment, which addresses our concerns?

Members: Yes.

The Convener: That brings us to the end of our consideration of the Charities and Trustee Investment (Scotland) Bill. To be fair, apart from issues around section 82, most of our concerns have been addressed.
Subordinate Legislation Committee

23rd Report, 2005 (Session 2)

Charities and Trustee Investment (Scotland) Bill at Stage 2
Remit:

1. The remit of the Subordinate Legislation Committee is to consider and report on-

   (a) any-

      (i) subordinate legislation laid before the Parliament;

      (ii) Scottish Statutory Instrument not laid before the Parliament but classified as general according to its subject matter,

and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation; and

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation.

*(Standing Orders of the Scottish Parliament, Rule 6.11)*

Membership:

Dr Sylvia Jackson (Convener)
Mr Adam Ingram
Gordon Jackson (Deputy Convener)
Mr Stewart Maxwell
Christine May
Mike Pringle
Murray Tosh
Committee Clerking Team:

Clerk to the Committee
Ruth Cooper

Senior Assistant Clerk
David McLaren

Assistant Clerk
Jake Thomas

Committee Support Manager
Catherine Fergusson
Charities and Trustee Investment (Scotland) Bill at stage 2

The Committee reports to the Parliament as follows—

Introduction

1. At its meeting on 7 June 2005, the Committee considered the inserted or substantially amended delegated powers provisions in the Charities and Trustee Investment (Scotland) Bill as amended at stage 2. The Committee reports to the Parliament on such provisions under Rule 9.7.9 of Standing Orders.

2. Under Rule 9.7.10, the Executive provided a supplementary subordinate legislation memorandum to the Committee, which is published at Annex A to this report.

Section 2  Annual Reports

3. Section 2(4) obliged the Office of the Scottish Charity Regulator to comply with any directions of the Scottish Ministers about the form, content and means of publication of the general report that the Office has under section 2 to prepare on an annual basis.

4. The Committee took no exception to this direction-making power at Stage 1 on which it expressed no other views. The power has now been removed following the recommendation of the lead committee which did not feel that it was necessary. The Committee notes the Executive’s amendment and has no further comment to make in relation to this power.

Section 6  Applications: further procedure

5. During its Stage 1 consideration, the Subordinate Legislation Committee sought clarification on the drafting of section 6(2)(a) as it inter-related to 4(d)(i) and 54(2)(d)(i), as the provisions appeared to overlap. In its response, the Executive accepted that the section may require adjustment and undertook to bring forward an appropriate amendment at Stage 2.
6. The Executive has subsequently removed the references to sections 4 and 54(2) from section 6(2). Section 6(1) has also been amended to include references to sections 56(1) and 58(1), to allow Ministers to make regulations in relation to applications to convert from a charitable company or registered friendly society to an SCIO (Scottish Charitable Incorporated Organisation) or for SCIOs to amalgamate. The Committee welcomes the amendments and is satisfied that they address the concerns it raised at stage 1.

Section 7 The charity test

7. Section 7 sets out the criteria which a body must meet to be treated as a charity. Subsection (3) provides that even although a body meets the criteria set out in subsection (1), it will not meet the charity test if it falls within any of the categories set out in the former subsection. Paragraph (b) of subsection (3) in its original form referred to the case where the constitution of the body expressly permits a third party, defined in subsection (4), to direct or otherwise control the body’s activities. The Committee noted that subsection (3) has been amended at stage 2 to refer specifically to the Scottish Ministers or a Minister of the Crown and subsection (4) has been removed.

8. The Executive indicated to this Committee at Stage 1 that it intended to adjust the Bill in relation to the NDPBs relating to the 5 national collections. In order to allow this, a new subsection (4A) has been inserted which contains a new order-making power that allows Ministers to disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body. Exercises of this power will be subject to affirmative procedure.

9. The Committee is content with these amendments.

Section 9 Guidance on charity test

10. Section 9 obliges the OSCR to issue guidance on how it determines whether a body meets the charity test. In its original form the OSCR was obliged to consult “such persons as it sees fit”. The Executive lodged an amendment at Stage 2 which obliges the OSCR to consult specifically with representatives of the charitable sector as well as with other persons. The Committee is content with this amendment.

Section 15 References in documents

11. Section 15 confers power on Ministers to make regulations requiring charities to include certain information on documents issued or signed by them.

12. This regulation-making power has been refined at Stage 2 to include a power to exempt charities or particular charities from any of the requirements of the regulations. The Executive explains that this is needed to allow a period of grace to use up stationery that does not comply with the regulations. The Committee is content with this amendment.
Section 19  Removal from Register: protection of assets

13. Section 19 makes provision for the property of charities that are removed from the Register. Subsection (8) of section 19 permits Ministers by order to disapply subsections (1) to (7) of that section.

14. The order-making power in subsection (8) in its original form applied only to assets that Ministers considered to be of national importance. This has now been amended so that the power now applies to any property specified in the order. The Committee noted that, in recognition of the width of the power, orders made under this power will be subject to affirmative procedure. The Committee is content with the power as amended.

Section 63  Regulations relating to SCIOs

15. This section confers the power on Ministers to make detailed provision about applications for the constitution of bodies to be known as “Scottish charitable incorporated organisations” (SCIOs) and other related matters. The power is subject to negative procedure except in the case of regulations under paragraph (d).

16. The power has now been extended by the inclusion of a new power at paragraph (da) to allow Ministers by regulation to make provision for the maintenance of registers of information about SCIOs. The Committee is content to note this amendment.

Section 82  Regulations about fundraising

17. In its Stage 1 Report, the Committee raised concerns in relation to the provisions in subsection (2), in particular the powers at 82(2)(h) and (3), which the Committee considered should be subject to affirmative rather than negative procedure.

18. The Committee also raised concerns in relation to the power to create offences by regulation at subsection (5). In the Committee’s view, sanctions for breaches of subordinate legislation should be, as far as possible, set out on the face of primary legislation rather than delegated to subordinate legislation.

19. The Executive has amended the procedure for regulations under this power to affirmative, as recommended by the Committee and has also provided some clarification in subsection (2)(c) so that regulations may make provision for both the identification and information to be provided by professional fundraisers rather than simply the information to be so provided. The Committee is content that the Executive has amended the procedure for these regulations to affirmative, as recommended by the Committee in its Stage 1 Report.

20. The Committee notes, however, that the Executive has not addressed its concerns in relation to the power to create criminal offences in regulations rather than on the face of the Bill. The Committee considers that best practice suggests that offences such as this should be created
in primary legislation, rather than left to subordinate legislation. The Committee therefore does not consider section 82(5) to represent good legislative practice. The Committee brings this to the attention of the Parliament and will seek clarification from the Executive during the Stage 3 debate.

Section 94   Consequential amendments

21. Section 94 in the Bill as introduced allowed Scottish Ministers to amend by order any local, personal or private Act of Parliament as well as any other Act of Parliament or Act of the Scottish Parliament, in relation to sections 92 and 93 of the Bill.

22. Section 94 has now been removed, as the Executive takes the view that it is unnecessary, given the customary general powers to amend enactments provided in section 100. The Committee is content with this power as amended.

Section 97   Population of Register etc.

23. During its stage 1 consideration, the Committee was particularly concerned that this power was open ended and that no time limits had been included in the power. The Committee noted that the effect of this provision was that it was possible that Ministers could exempt any charity from the provisions of the Bill without limit of time.

24. Following further consideration and consultation with OSCR, the Executive has revisited the section in the light of the comments made by the Subordinate Legislation Committee and others. The Committee noted that, as a result, the order-making powers have been revised substantially. In particular the Executive has now included time limits for the exercise of the power. The Committee is therefore content that this amendment addresses its concerns.

Section 100   Ancillary provision

25. This section makes provision to allow amendments to primary and other legislation in consequence of the Bill to be made by order.

26. As a result of the removal of the power to make transitional, transitory or savings provisions from section 97, paragraph (b) has been amended to include these provisions. The Committee is content with this amendment.

Section 101   Orders, regulations and rules

27. This section contains the usual procedural provisions relating to subordinate legislation under the Bill.

28. Amendments have been made to change the procedure for instruments under sections 19(8) and 81(1) from negative to affirmative and to provide that orders under new section 7(4A) are also subject to affirmative procedure. The Committee is content with this amendment.
Section 104 Short title and commencement

29. At Stage 1, the Committee questioned the drafting of this section, which provided for section 97 to be commenced on Royal Assent, although the terms referred to in that section were defined in section 103, which was to be commenced by order.

30. As agreed by the Executive at stage 1, the reference to section 97 has now been removed from section 104. The Committee is content that its concerns have been addressed by this amendment.
ANNEX A

SUPPLEMENTARY MEMORANDUM TO THE SUBORDINATE LEGISLATION COMMITTEE BY THE SCOTTISH EXECUTIVE

CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL

Purpose

1. This memorandum has been prepared by the Scottish Executive to update the Subordinate Legislation Committee on the changes made to Charities and Trustee Investment (Scotland) Bill (the Bill) at stage 2.

Amended Delegated and Direction Making Powers

Section 2 – Annual Reports

2. The obligation of OSCR to comply with any direction of the Scottish Ministers about the form, content and means of publication of its general report as set out in section 2(4) of the Bill has been removed.

Section 6 – Applications for further procedure

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

3. A reference to sections 56(1) & 58(1) has been added to subsection (1) so that Scottish Ministers may also make provision, by regulation, in relation to applications to convert from a charitable company or registered friendly society to a Scottish Charitable Incorporated Organisation (SCIO) or for SCIOs to amalgamate.

4. The circular references to sections 4 and 54(2) have been removed from subsection (2)(a) as recommended by the Subordinate Legislation Committee.

Reason for taking power

5. Such detailed operational matters are more appropriately dealt with in regulations rather than in primary legislation. A broad power is required as the Register of charities is a new register. Processes may change over time and provisions may need adjustment to deal with unpredictable eventualities. It is appropriate that Ministers should be able to make further provision for applications in relation to the conversion to a SCIO and the amalgamation of SCIOs as well as the creation of charities and SCIOs.
Section 7 – The Charity test

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by Statutory Instrument
Parliamentary procedure: Affirmative resolution of the Scottish Parliament

6. In relation to section 7(3), the existing subsection (4) has been removed. A new order making power for Scottish Ministers has been put in place at subsection (4A) which allows them to disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order.

Reason for taking power

7. During stage 1 there was much debate about the status of the 5 national collections Non Departmental Public Bodies and the Executive undertook to find a way to allow these bodies to retain their charitable status. This power will allow Scottish Ministers to provide, by affirmative order that a body whose constitution allows it to distribute or otherwise apply its property (on being wound up, or at any other time) for a non charitable purpose or whose constitution expressly permits Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, can be/or can remain a charity if it meets the other parts of the charity test. This gives Ministers a means to allow the 5 national collections NDPBs to remain charities. Exempting the bodies by order allows the flexibility necessary to deal with any future changes to those bodies.

Section 15 – references and documents

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

8. The regulation making power in section 15 allowing Scottish Ministers to set out the information to be contained in documents used by charities has been amended to allow them to exempt, in the regulations, charities or charities of a particular type from any of the requirements imposed by these regulations in relation to the way charities may refer to themselves in documents.

Reason for taking power

9. The power in section 15 relates to a matter of detail most appropriately dealt with in secondary legislation. The regulations will specify documents such as letters, cheques, facsimiles, e-mails etc. This type of detail may require frequent revision to take account of developments and changes in the forms of communication. The power to allow Ministers to exempt bodies from the regulations is intended to allow a period of grace for existing charities to use up stationery which does not comply with the regulations. It will be time limited and is practical matter which is felt appropriate to be set out in regulations.
Section 19 – removal from the register – protection of assets

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Affirmative resolution by Scottish Parliament

10. The order making power in subsection (8) has been amended so that Scottish Ministers may disapply by order subsections (1) to (7) in relation to any property which is specified in the order, rather than in relation to those assets they consider to be of national importance. The Parliamentary process for the order making power has also been changed to affirmative procedure.

Reason for taking power

11. The order making power in section 19(8) is necessary to enable Scottish Ministers to disapply the provisions. It will allow property acquired with public funds to remain under the control of the relevant public body should it lose charitable status. We consider the power to make future arrangements for such property to be an appropriate use of secondary legislation. The Parliamentary procedure has been altered to allow Parliament to fully consider whether it is appropriate for the property specified in the order to remain under the control of the body losing charitable status. Any order would need to be made well ahead of the body in question losing charitable status.

Section 63 – regulations relating to SCIOs

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

12. A new paragraph (da) has been added to clarify that the power conferred by this section allows Scottish Ministers, by regulation, to make provision for the maintenance of registers of information about SCIOs. This would allow OSCR to set up specific registers in relation to SCIOs.

Reason for taking power

13. Because SCIOs are a new legal form, it is likely that experience will dictate the need to develop additional requirements and practices. Setting out administrative details in regulations will allow for greater flexibility for the development of the SCIO as a legal form for charities. Regulations in respect of winding up and dissolution may not be made unless a draft is laid before and approved by the Scottish Parliament. Paragraph (da) has been added because OSCR may need to replicate existing registers for incorporated bodies such as a register of charges when converting a charitable company or registered friendly society to a SCIO.
Section 82 – Regulations about fundraising

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Regulations made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament except 82(2)(h) which is subject to affirmative procedure</td>
</tr>
</tbody>
</table>

14. Section 82(2)(c) has been amended to clarify that Scottish Ministers may make regulations about the provision of both the identification and information to be provided by professional fundraisers or commercial participators to potential donors in relation to benevolent contributions. Section 85(5)(d) has been amended slightly to ensure consistency between the information required under regulations made by Scottish Ministers under section 82(2)(c) and that required by the conditions set by local authorities for those undertaking public benevolent collections (section 85(5)(d)). The Parliamentary procedure for exercising the regulation making power in the way described in section 82(2)(h) has also been changed from negative to affirmative procedure as recommended by the Subordinate Legislation Committee.

Reason for taking power

15. The Scottish Ministers have agreed that plans for the self-regulation of fundraising should be given an opportunity to prove themselves. If this approach fails, the Scottish Ministers require to have the power to intervene and provide for the regulation of fundraisers and fundraising. Regulations under section 82(h) and section 82(3) will only be made if self-regulation failed. A power to regulate these activities using subordinate legislation would allow Ministers to act promptly without having to introduce primary legislation. Fundraising for charities and other benevolent purposes is an area that has been the focus of much concern and led to a decline in public confidence in this sector. An appropriate power to regulate a wide range of fundraising issues is therefore an important part of this Bill. The regulations will have a largely administrative procedural content. However, the Subordinate Legislation Committee commented that the regulations under section 82(h) were of significant importance and that they should be subject to affirmative procedure. The Executive agrees and has made the necessary amendments.

Section 94 – amendments consequential on Part 3

<table>
<thead>
<tr>
<th>Power conferred on:</th>
<th>The Scottish Ministers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power exercisable by:</td>
<td>Order made by statutory instrument</td>
</tr>
<tr>
<td>Parliamentary procedure:</td>
<td>Negative resolution of the Scottish Parliament (Affirmative if adds to or omits part of an Act)</td>
</tr>
</tbody>
</table>

16. The powers allowing Scottish Ministers to amend by order any local, personal or private Act of Parliament and any other act of Parliament or Act of the Scottish Parliament in relation to sections 92 & 93 of the Bill has been removed. This was felt to be unnecessary given the powers already provided in section 100.
Section 97 – population of register etc.

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

17. The order making power in this section has been substantially revised and time limits have been added. This was one of the recommendations made by the Subordinate Legislation Committee in their assessment of the Bill. The section provides that all existing Scottish charities will be entered automatically on the Register. The new subsection (2A)(a) allows Ministers to disapply section 3(3) for 18 months in relation to bodies transferred under section 97(1). This will allow OSCR the necessary time to collect the information required under that section in relation to all the charities transferred. The new subsection (2A)(b) also allows a non-Scottish unregistered charitable body to continue to refer to itself as a charity for a period of 12 months after commencement of the section. This allows the charity time either to apply to be on the register or alter the way it refers to its charitable status. The new subsection (2B) defines an “unregistered charitable body” as one which is established under the law of a country other than Scotland, and which is entitled to refer to itself as a “charity” in that country.

Reason for taking power

18. The provisions made by the regulations are time-limited. We therefore consider it unnecessary to put them on the face of the Bill. It also allows a degree of flexibility in dealing with unforeseen practical difficulties. The changes to the power have been made to improve clarity over how existing charities will be dealt with when the Act comes into force.

Section 100 – ancillary provision

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative and affirmative resolution of the Scottish Parliament

19. The power for Scottish Ministers to make transitional, transitory or saving provisions has been added to the ancillary powers in section 100. This follows the removal of this power from section 97.

Reason for taking power

20. The power for Ministers to make transitional, transitory or saving provisions is necessary to allow for the smooth transition for existing charities to the new regulatory framework. The provisions will be time limited and it is therefore not considered appropriate to put them on the face of the Bill.
Section 104 – short title and commencement

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: None

21. The reference to section 97 in section 104(2) has been removed. The Executive advised the Subordinate Legislation Committee of this decision at Stage 1.

Reason for taking the power

22. The order making power is required to ensure effective commencement of the Bill. The Executive agreed with the Subordinate Legislation Committee that it was unnecessary to commence section 97 on Royal Assent as section 101 allows commencement orders to contain transitional provisions.

Proposed changes at stage 3

Schedule 2

Power conferred on: The Scottish Ministers
Power exercisable by: Order made by statutory instrument
Parliamentary procedure: Negative resolution of the Scottish Parliament

23. The Scottish Ministers may make rules as to the practice and procedure of the Scottish Charity Appeal Panel. At stage 3 we intend to add a power to allow Ministers to make provision about the awarding of expenses by the Panel. Section 8 of the Tribunals and Inquiries Act 1992 requires Ministers to consult with the Council on Tribunals (who in turn must consult with the Scottish Committee of the Council) before making any rules of procedure.

Reason for taking power

24. During the passage of the Bill so far there has been some discussion about the prohibition on the Appeals Panel awarding expenses. The Executive intends to remove this prohibition. It is felt that it is appropriate to deal with the detail of how expenses will be awarded with the other detailed administrative provisions. The nature of the expenses will need to be reviewed regularly to ensure they remain relevant.
Marshalled List of Amendments selected for Stage 3

The Bill will be considered in the following order—

Sections 1 to 104  Schedules 1 to 4
Long Title

Amendments marked * are new (including manuscript amendments) or have been altered.

Section 1

Donald Gorrie

1 In section 1, page 1, line 22, at end insert—

< ( ) In exercising its functions, OSCR must have regard to the desirability of promoting—
(a) philanthropy,
(b) voluntary activity, and
(c) the health of the charitable sector.>

Patrick Harvie

46 In section 1, page 1, line 24, at end insert—

< ( ) OSCR may issue guidance pursuant to the performance of its functions.
( ) Before issuing guidance likely to have a significant impact on the charitable sector, OSCR must consult persons representative of the charitable sector and any other persons as it thinks fit.>

Malcolm Chisholm

20 In section 1, page 2, line 5, at end insert—

< ( ) In performing its functions OSCR must, so far as relevant, have regard to—
(a) the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed, and
(b) any other principle appearing to OSCR to represent best regulatory practice.>

Section 7

Scott Barrie

21 In section 7, page 4, line 22, at end insert <(including the provision of non-formal education opportunities through youth work to promote the development of young people, and the provision of other non-formal education opportunities)>
Donald Gorrie
2 In section 7, page 4, line 28, leave out <amateur>

Karen Whitefield
47 In section 7, page 4, line 28, leave out <amateur> and insert <public participation in>

Malcolm Chisholm
3 In section 7, page 4, line 29, after <facilities> insert <, or the organisation of recreational activities,>

Malcolm Chisholm
4 In section 7, page 4, line 30, after <facilities> insert <or activities>

Donald Gorrie
48 In section 7, page 5, line 11, leave out <and> and insert <or>

Malcolm Chisholm
5 In section 7, page 5, line 12, after <facilities> insert <or activities>

Patrick Harvie
49 In section 7, page 5, line 24, after <property> insert <or income (within the meaning given in section 19(1)(a) to (c))>

Patrick Harvie
50 In section 7, page 5, line 27, after <permits> insert <a local authority,>

Patrick Harvie
51 In section 7, page 5, line 28, after <activities> insert—
<(ba) its constitution allows more than one third of the persons who would, if the body was a charity, be the charity trustees, to be directly or indirectly appointed by a local authority, the Scottish Ministers or a Minister of the Crown,>

Patrick Harvie
52 In section 7, page 5, line 30, leave out <(a) and (b)> and insert <(b) and (ba)>

Section 8

Mary Scanlon
53 In section 8, page 6, line 4, leave out <(including any charge or fee)>
Donald Gorrie

54 In section 8, page 6, line 5, at end insert—

<(  ) For the purposes of subsection (2)(b), a condition which requires a person to be a member of a particular body in order to access the services provided by the body is not to be regarded as unduly restrictive if—

(a) the body’s purpose is to assist members of that group,
(b) the body does not discriminate between members of that group, and
(c) the community as a whole benefits directly or indirectly from the body’s work.>

Section 13

Malcolm Chisholm

6 In section 13, page 7, line 25, after <being> insert <established under the law of Scotland or>

After section 18

Christine Grahame

22 After section 18, insert—

<Information about charities removed from Register or defunct charities

(1) OSCR must maintain a list of all charities removed from the Register (under section 18 or otherwise) or defunct charities.

(2) The Scottish Ministers may by regulations make further provision as to the nature of the information to be contained in the list and the manner in which it may be held.

(3) Section 21 applies to the list maintained under subsection (1) as it applies to the Register.>

Section 19

Patrick Harvie

55 In section 19, page 10, line 33, leave out subsection (8)

Section 24

Malcolm Chisholm

23 In section 24, page 12, line 35, at end insert—

<(  ) A power to disclose information under subsection (1) or (2) is, unless section 25 otherwise provides, subject to any obligation as to secrecy or other restriction on disclosure of the information however imposed.>
Section 25

Malcolm Chisholm

24 In section 25, page 13, line 2, leave out from beginning to <restriction> in line 5 and insert—

<(2) No obligation as to secrecy or other restriction on disclosure of information however imposed>.

Malcolm Chisholm

25 In section 25, page 13, line 13, leave out from beginning to <functions> in line 17 and insert—

<(da) any person from disclosing any information to OSCR about any matter in respect of which the person is required or authorised by section (Duty of auditors etc. to report matters to OSCR) to make a report to OSCR.>

Section 28

Mr John Home Robertson

26 In section 28, page 14, line 24, at end insert—

<( ) OSCR may make inquiries under subsection (1) of its own accord or on the representation of any person.>

Section 31

Malcolm Chisholm

7 In section 31, page 16, line 11, at end insert <, or

( ) that a charity which is not entitled to refer to itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland.>

Malcolm Chisholm

8 In section 31, page 16, line 24, at end insert—

<(c) the charity representing itself as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, or, as the case may be

(d) the person representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland,>

Malcolm Chisholm

27 In section 31, page 17, line 3, at end insert—

<( ) OSCR’s power to suspend a person by giving notice under subsection (4)(a) or (b) does not apply if OSCR considers that the person has acted honestly and reasonably in relation to the misconduct concerned and ought fairly to be excused.>
Section 32

Malcolm Chisholm

9 In section 32, page 17, line 18, after <(5)(b)> insert <or (d)>

Section 34

Malcolm Chisholm

10 In section 34, page 18, line 30, at end insert—

<(...> Where, on an application by OSCR, it appears to the Court of Session that a charity which is not entitled to refer to itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, the court may exercise any of the powers set out in subsections (4)(f), (g) and (ha).>

Malcolm Chisholm

11 In section 34, page 19, line 10, at end insert—

<(...> interdict (whether temporarily or permanently) the charity or, as the case may be, the person from representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland or from such other action as the court thinks fit.>

Section 38

Malcolm Chisholm

28 In section 38, page 21, line 39, at end insert—

<(...> Sections 24 to 26 apply in relation to a public body or office-holder to whom OSCR’s functions are delegated by virtue of subsection (1) or (2) as they apply to OSCR, but subject to the following modifications—

(a) references in those sections to OSCR and to OSCR’s functions are to be read as references to the public body or office-holder and to the functions delegated to it, and

(b) the reference in section 25(da) to section (Duty of auditors etc. to report matters to OSCR) is to be read as a reference to subsection (8B).

(8B) Where any of OSCR’s functions are delegated to another public body or office-holder by virtue of subsection (1) or (2), a person to whom section (Duty of auditors etc. to report matters to OSCR) applies—

(a) must report to the body or office-holder on any matter which the person would, but for that delegation, be required by section (Duty of auditors etc. to report matters to OSCR)(2) to report on to OSCR,

(b) may report to the body or office-holder on any matter which the person would, but for that delegation, be authorised by subsection (Duty of auditors etc. to report matters to OSCR)(3) to report on to OSCR.
(8C) A duty or power which arises under subsection (8B) is not affected if the person in relation to whom it arises subsequently stops acting in the capacity mentioned in section (Duty of auditors etc. to report matters to OSCR)(1).

Section 39

Malcolm Chisholm
29 Leave out section 39

Section 43

Malcolm Chisholm
30 In section 43, page 24, leave out lines 3 and 4

Section 45

Donald Gorrie
56 In section 45, page 25, line 2, at end insert <and the duties of auditors in bringing any items of concern to the attention of OSCR>

After section 46

Malcolm Chisholm
31 After section 46, insert—

<Duty to report matters to OSCR

Duty of auditors etc. to report matters to OSCR

(1) This section applies to—

(a) any person appointed to carry out an independent examination or audit of a charity’s statement of account (including, in the case of a charity which is a company, any person appointed as auditor under Chapter 5 of Part 11 of the Companies Act 1985 (c.6)), and

(b) any person appointed for the purposes of section 249A(2) of that Act to prepare a report on the accounts of a charity which is a company, who is acting in the appointed capacity.

(2) A person to whom this section applies who becomes aware of any matter—

(a) which relates to the activities or affairs of—

(i) the charity who appointed the person, or

(ii) any institution or body corporate connected to that charity, and

(b) which the person has reasonable cause to believe is likely to be of material significance for the purposes of the exercise by OSCR of its functions under section 28, 30 or 31,

must immediately report on the matter to OSCR.
(3) A person to whom this section applies who becomes aware of any matter—
   (a) which does not appear to the person to be one which the person is required to
       report under subsection (2), but
   (b) which the person has reasonable cause to believe is likely to be relevant for the
       purposes of the exercise by OSCR of any of its functions,
       may report on the matter to OSCR.

(4) A duty or power which arises under subsection (2) or (3) is not affected if the person in
    relation to whom it arises subsequently stops acting in the capacity mentioned in
    subsection (1).

(5) An institution or body corporate is connected to a charity if—
    (a) it is an institution which is controlled (whether directly or through one or more
        nominees) by, or, as the case may be
    (b) it is a body corporate in which a substantial interest is held by,
        the charity or any one or more of the charity trustees acting in that capacity.

(6) Section (Meaning of “control” etc.) sets out when a person is to be treated as
    controlling an institution or as having a substantial interest in a body corporate.>

Section 56

Malcolm Chisholm

32 In section 56, page 30, line 15, leave out from <formed> to end of line 16

Section 65

Donald Gorrie

57 In section 65, page 36, line 24, at end insert <, and
    ( ) in circumstances capable of giving rise to a conflict of interest between the charity
    and any person responsible for the appointment of the charity trustee—
    (i) put the interests of the charity before those of the other person, or
    (ii) where any other duty prevents the charity trustee from doing so, disclose
        the conflicting interest to the charity and refrain from participating in any
        deliberation or decision of the other charity trustees with respect to the
        matter in question.>

Donald Gorrie

58 In section 65, page 36, line 29, leave out subsection (4) and insert—
    <( ) OSCR must treat any breach of the duty under subsection (1) or (2) in an appropriate
        and proportional manner, taking account of—
        (a) the seriousness of any breach and its consequences,
        (b) the human resources of the charity,
        (c) whether the breach was single or one of a series, and
whether the breach arose from inadvertence, minor administrative errors or deliberate intention.

Malcolm Chisholm

33 In section 65, page 36, line 29, leave out <may> and insert <is to>

Donald Gorrie

59 In section 65, page 36, line 30, at end insert—

<( ) All charity trustees must co-operate with OSCR to ensure (whenever possible) that any breach of a duty under subsection (1) or (2) is corrected and not repeated and that any trustee guilty of serious or persistent breaches is removed as a trustee.>

Section 66

Malcolm Chisholm

34 In section 66, page 36, line 32, at end insert—

<(A1) A charity trustee may not be remunerated for services provided to the charity (including services provided in the capacity as a charity trustee or under a contract of employment) unless subsection (1) entitles the trustee to be so remunerated.>

Malcolm Chisholm

35 In section 66, page 37, line 24, leave out <Subsection (1) does not prevent> and insert <Nothing in subsections (A1) or (1) prevents>

Malcolm Chisholm

36 In section 66, page 37, line 27, after <any> insert <authorising>

Malcolm Chisholm

37 In section 66, page 37, line 27, leave out from second <the> to end of line 28 and insert <15 November 2004>

Malcolm Chisholm

38 In section 66, page 37, line 30, at end insert—

<( ) For the purposes of subsection (5)(a), an “authorising provision” is a provision which refers specifically to the payment of remuneration—

(a) to the service provider concerned,
(b) where that service provider is a charity trustee, to a charity trustee, or
(c) where that service provider is connected to a charity trustee, to any person so connected.>
Section 67

Malcolm Chisholm

39 In section 67, page 38, line 37, leave out from beginning to end of line 10 on page 39 and insert—

<(  ) Section (Meaning of “control” etc.) sets out when a person is to be treated as being in control of an institution or as having a substantial interest in a body corporate.>

Section 75

Malcolm Chisholm

12 In section 75, page 43, line 20, leave out subsection (6)

Section 78

Malcolm Chisholm

40 In section 78, page 44, leave out lines 27 and 28

Section 84

Malcolm Chisholm

13 In section 84, page 51, line 2, leave out from <(or,)> to <(it)> in line 3 and insert <or by virtue of any enactment>

Malcolm Chisholm

14 In section 84, page 51, line 4, leave out <that person> and insert <the occupier of the land>

Malcolm Chisholm

15 In section 84, page 51, line 5, at end insert—

<(  ) In subsection (2), “occupier” means, in relation to unoccupied land, the person entitled to occupy it.>

Section 92

Christine Grahame

60 In section 92, page 55, line 16, at end insert—

<ec) To make arrangements for any investment made under this section to be held by a nominee company.>
Exercise of power of investment: power to appoint nominees

(1) The trustees of a trust may, for the purpose of exercising the power of investment under section 4(1)(ea) of this Act—
   (a) appoint a person to act as their nominee in relation to such of the trust estate, heritable as well as moveable, as they may determine, and
   (b) take such steps as are necessary to secure the transfer of title to that property to their nominee.

(2) A person may not be appointed as a nominee unless the trustees reasonably believe—
   (a) that the appointment is appropriate in the circumstances of the trust, and
   (b) that the proposed nominee has the skills, knowledge and expertise that it is reasonable to expect of a person acting as a nominee.

(3) The power to appoint a nominee is subject to any restriction or exclusion imposed by or under—
   (a) the trust deed, or
   (b) any enactment (within the meaning of the Scotland Act 1998 (c.46)).

(4) An appointment as a nominee shall—
   (a) be made in writing,
   (b) be subject to the trustees’ retaining power to—
      (i) direct the nominee, and
      (ii) revoke the nominee’s appointment, and
   (c) subject to subsection (4), otherwise be on such terms as to suitable remuneration and other matters as the trustees may determine.

(5) The trustees may not appoint a nominee on any of the following terms unless it is reasonably necessary for them to do so—
   (a) a term permitting the nominee to appoint a substitute,
   (b) a term restricting the liability of the nominee, or of any substitute, to the trustees or to any beneficiary,
   (c) a term permitting the nominee, or any substitute, to act in circumstances capable of giving rise to a conflict of interest.

(6) While a nominee continues to act for the trust, the trustees shall—
   (a) keep under review the arrangements under which the nominee acts and how those arrangements are being put into effect,
   (b) if circumstances make it appropriate to do so, consider whether there is a need to exercise their power—
      (i) to direct the nominee, or
(ii) to revoke the nominee’s appointment, and
(c) exercise either or both of those powers if they consider that there is a need to do so.”>

Christine Grahame

61 In section 93, page 56, line 26, at end insert—

<4B Delegation of management of investment
It shall be competent for a trustee to delegate the management of any investment under section 4(1)(ea) of this Act to such suitably qualified person as the trustee shall consider appropriate.”>

Malcolm Chisholm

62 In section 93, page 56, line 26, at end insert—

<4C Declaration of power to delegate investment management functions
(1) It is declared that the trustees of a trust have and have always had the power, subject to any restriction or exclusion imposed by or under the trust deed or any enactment, to authorise an agent to exercise any of their investment management functions at the agent’s discretion or in such other manner as the trustees may direct.
(2) In this section—

“enactment” has the same meaning as in the Scotland Act 1998 (c.46), and

“investment management functions” means functions relating to the management of investments of the trust estate, heritable as well as moveable.”>

Section 97

Malcolm Chisholm

16 In section 97, page 58, line 10, at end insert—

<( ) Subsection (1) does not affect OSCR’s power to remove a charity from the Register under section 30.>

Donald Gorrie

17 In section 97, page 58, line 10, at end insert—

<( ) Subsection (1) does not affect OSCR’s power to remove a charity from the Register under section 30; but if OSCR proposes to remove from the Register a body mentioned in that subsection, it must, before doing so—
(a) inform the charity that it may no longer meet the charity test and the grounds for that view, and
(b) give the charity an opportunity to respond.>
Section 98

Malcolm Chisholm

42 In section 98, page 58, line 31, after <court)> insert <, report>

Section 100

Malcolm Chisholm

18 In section 100, page 60, line 15, leave out <section 7(3)(b)> and insert <either or both of paragraphs (a) and (b) of section 7(3)>

After section 102

Malcolm Chisholm

43 After section 102, insert—

<Meaning of “control” etc.

(1) A charity which is able (whether directly or through one or more nominees) to secure that the affairs of a body are conducted in accordance with the charity’s wishes is, for the purposes of sections 28 to 35, to be treated as being in control of that body.

(2) For the purposes of sections (Duty of auditors etc. to report matters to OSCR)(5) and 67(2)—

(a) a person who is able to secure that the affairs of an institution are conducted in accordance with the person’s wishes is to be treated as being in control of the institution,

(b) a person who—

(i) is interested in shares comprised in the equity share capital of a body corporate of a nominal value of more than one-fifth of that share capital, or

(ii) is entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, more than one-fifth of the voting power at any general meeting of a body corporate,

is to be treated as having a substantial interest in the body corporate.

(3) The rules set out in Part 1 of Schedule 13 to the Companies Act 1985 (c.6) apply for the purposes of subsection (2) as they apply for the purposes of section 346(4) (connected persons etc.) of that Act (and “equity share capital” and “share” have the same meanings in subsection (2) as they have in that Act).>

Section 103

Malcolm Chisholm

44 In section 103, page 61, line 20, at end insert—

<“company” means a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,>
Malcolm Chisholm

45 In section 103, page 62, line 3, leave out <does not include minor> and insert <includes>.

Patrick Harvie

63 In section 103, page 62, line 4, at end insert—

<“public body” means any body established by a local authority, the Scottish Ministers or a Minister of the Crown,>.

Schedule 2

Malcolm Chisholm

19 In schedule 2, page 66, line 15, at end insert—

<( ) the payment of expenses.>
The following amendments were lodged as manuscript amendments under Rule 9.10.6. The Presiding Officer has agreed under that Rule that these amendments may be moved at the meeting of the Parliament on 9 June 2005. Amendment 31A will be debated in Group 10, and will be called immediately after amendment 31 (on page 6 of the Marshalled List). Amendment 64 will be debated in Group 3, and will be called immediately after amendment 59 (on page 8 of the Marshalled List).

After section 46

Malcolm Chisholm

31A As an amendment to amendment 31, line 14, leave out <who appointed the person>

Section 65

Donald Gorrie

64 In section 65, page 36, line 30, at end insert—
<( ) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—
(a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and
(b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.>
Charities and Trustee Investment (Scotland) Bill

Groupings of Amendments for Stage 3

Note: The time limits indicated are those set out in the timetabling motion to be considered by the Parliament before the Stage 3 proceedings begin. If that motion is agreed to, debate on the groups above each line must (subject to Rules 9.8.4A and 9.8.5A of Standing Orders) be concluded by the time indicated, although the amendments in those groups may still be moved formally and disposed of later in the proceedings.

Group 1: Matters to which OSCR must have regard in exercising functions
1

Group 2: Guidance
46

Debate to end no later than 15 minutes after proceedings begin

Group 3: OSCR’s regulatory powers – enforcement of trustee duties etc.
20, 27, 58, 33, 59, 64, 45

Group 4: Charity test – charitable purposes
21, 2, 47, 3, 4, 48, 5

Group 5: Charity test – excluded bodies etc.
49, 50, 51, 52, 18, 63

Debate to end no later than 50 minutes after proceedings begin

Group 6: Charity test – public benefit
53, 54

Group 7: References to charitable status
6, 7, 8, 9, 10, 11

Group 8: Removal of charities from Register
22

Group 9: Removal from Register – protection of assets
55

Debate to end no later than 1 hour 15 minutes after proceedings begin

Group 10: Duty of auditors etc.
23, 24, 25, 28, 29, 56, 31, 31A, 32, 39, 40, 42, 43, 44

Group 11: Inquiries about charities etc.
26
Group 12: Reorganisation of charities
30

Group 13: Duties of charity trustees
57

Debate to end no later than 1 hour 35 minutes after proceedings begin

Group 14: Remuneration of charity trustees
34, 35, 36, 37, 38

Group 15: Scottish Charity Appeals Panel – expenses
12, 19

Group 16: Regulation of public benevolent collections
13, 14, 15

Group 17: Investment powers of trustees
60, 41, 61, 62

Group 18: Pre-existing charities included in Register – powers of OSCR
16, 17

Debate to end no later than 1 hour 55 minutes after proceedings begin
Note: (DT) signifies a decision taken at Decision Time.

**Business Motion:** Ms Margaret Curran, on behalf of the Parliamentary Bureau moved S2M-2939—That the Parliament agrees that, during Stage 3 of the Charities and Trustee Investment (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated (each time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

- Groups 1 and 2 – 15 minutes
- Groups 3 to 5 – 50 minutes
- Groups 6 to 9 – 1 hour and 15 minutes
- Groups 10 to 13 – 1 hour and 35 minutes
- Groups 14 to 18 – 1 hour and 55 minutes

The motion was agreed to.

**Charities and Trustee Investment (Scotland) Bill - Stage 3:** The Bill was considered at Stage 3.

The following amendments were agreed to without division: 20, 3, 4, 5, 6, 23, 24, 25, 26, 7, 8, 27, 9, 10, 11, 28, 29, 30, 31A, 31, 32, 57, 64, 34, 35, 36, 37, 38, 39, 12, 40, 13, 14, 15, 41, 62, 16, 42, 18, 43, 44 and 19.

The following amendments were agreed to (by division)—

- 47 (For 74, Against 39, Abstentions 0)
- 33 (For 74, Against 26, Abstentions 6)
- 45 (For 65, Against 30, Abstentions 17)

The following amendments were disagreed to (by division)—

- 46 (For 34, Against 72, Abstentions 0)
- 50 (For 34, Against 80, Abstentions 0)
51 (For 10, Against 104, Abstentions 1)
53 (For 17, Against 98, Abstentions 0)
22 (For 47, Against 62, Abstentions 0)
55 (For 9, Against 101, Abstentions 0)

The following amendments were moved and, with the agreement of the Parliament, withdrawn: 1, 21, 49 and 60.

The following amendments were not moved: 2, 48, 52, 54, 56, 58, 59, 61, 17 and 63.

The Presiding Officer extended the time-limits under Rules 9.8.4A (a) and (c).

Charities and Trustee Investment (Scotland) Bill - Stage 3: The Minister for Communities (Malcolm Chisholm) moved S2M-2773—That the Parliament agrees that the Charities and Trustee Investment (Scotland) Bill be passed.

After debate, the motion was agreed to ((DT) by division: For 98, Against 0, Abstentions 15).
Business Motion

14:55

The Deputy Presiding Officer (Trish Godman): The next item of business is consideration of business motion S2M-2939, in the name of Margaret Curran, on behalf of the Parliamentary Bureau, setting out a timetable for stage 3 of the Charities and Trustee Investment (Scotland) Bill.

Motion moved,

That the Parliament agrees that, during Stage 3 of the Charities and Trustee Investment (Scotland) Bill, debate on groups of amendments shall, subject to Rule 9.8.4A, be brought to a conclusion by the time limits indicated (each time limit being calculated from when the Stage begins and excluding any periods when other business is under consideration or when the meeting of the Parliament is suspended or otherwise not in progress):

Groups 1 and 2 – 15 minutes
Groups 3 to 5 – 50 minutes
Groups 6 to 9 – 1 hour and 15 minutes
Groups 10 to 13 – 1 hour and 35 minutes
Groups 14 to 18 – 1 hour and 55 minutes.

Ms Margaret Curran.

Donald Gorrie (Central Scotland) (LD): I do not oppose the motion; I just want assurance that if, as is possible, some groups of amendments take longer than anticipated to deal with and others take less time than anticipated to deal with, there will be flexibility in the use of the timetable.

The Deputy Presiding Officer: The chair has discretion and we will keep an eye on that as stage 3 proceeds.

Motion agreed to.

Charities and Trustee Investment (Scotland) Bill: Stage 3

14:56

The Deputy Presiding Officer (Trish Godman): The next item of business is stage 3 of the Charities and Trustee Investment (Scotland) Bill. For the first part of the stage 3 proceedings, members should have a copy of the bill, the marshalled list, the supplement to the marshalled list and the groupings of amendments.

On amendments, an extended voting period of two minutes will be allowed for the first division. Thereafter, a voting period of one minute will be allowed for the first division after a debate on a group. All other divisions will last 30 seconds.

Section 1—Office of the Scottish Charity Regulator

The Deputy Presiding Officer (Murray Tosh): Group 1 relates to matters to which the Office of the Scottish Charity Regulator must have regard in exercising its functions. Amendment 1, in the name of Donald Gorrie, is in a group on its own.

Donald Gorrie (Central Scotland) (LD): I do not oppose the motion; I just want assurance that if, as is possible, some groups of amendments take longer than anticipated to deal with and others take less time than anticipated to deal with, there will be flexibility in the use of the timetable.

The Deputy Presiding Officer: The chair has discretion and we will keep an eye on that as stage 3 proceeds.

Motion agreed to.

"the desirability of promoting—
(a) philanthropy,
(b) voluntary activity, and
(c) the health of the charitable sector."

It is important that people continue to have the confidence to give their money and time to charities and that the charitable sector as a whole will blossom and flourish.

There are always technical arguments about whether such a provision should be included in legislation, but it is important that we make it clear that the bill is pro-charity. I will listen with interest to what the minister has to say. If she says the right things, I will not press amendment 1.

I move amendment 1.

The Deputy Minister for Communities (Johann Lamont): I trust that I can rise to the challenge of saying something that is sufficient to make Donald Gorrie act against his instincts.
Donald Gorrie made the point that he believes that the general thrust of the bill could be seen to be negative and, by implication, that it is anti-charitable sector. I argue that the bill’s thrust is against the corrupt use and abuse of the word “charity”, and against abuse of people who give of their time and resources to support good works. It is entirely right that, in regulating the sector, we will strengthen it rather than weaken it.

I acknowledge that amendment 1 is linked to the Communities Committee’s recommendation in its stage 1 report that the Executive should consider including in the bill

“more general reference to promoting a flourishing charitable sector in Scotland”.

I do not denigrate the thinking behind the lodging of amendment 1, but the bill has always been intended to help the charitable sector in Scotland to flourish by providing a robust but not overly onerous regulatory regime that will give the public confidence in donating to charity. That is the whole point of the bill.

We do not, however, believe that the bill should dictate how OSCR exercises its functions. OSCR is the independent regulator and should be concerned first and foremost with compliance with the law as set out in the bill. We intend that benefits to the sector will flow from that, in that public confidence will be increased and clarity will be provided to charities about what is required of them. Indeed, it is evident that the sector itself also has a responsibility to encourage the existence and development of a flourishing sector.

Although we agree whole-heartedly with the sentiment behind Donald Gorrie’s amendment, we do not believe that it should be stated on the face of the bill. The argument is not technical; we genuinely believe that there is a broad range of roles for OSCR and for the sector that are entirely determined by the existence of the legislation. I urge Donald Gorrie, who has listened attentively, to seek to withdraw amendment 1.

15:00

Donald Gorrie: The minister gets an alpha minus. I will not press amendment 1. With Parliament’s leave, I will withdraw it.

Amendment 1, by agreement, withdrawn.

The Deputy Presiding Officer: Group 2 is on guidance. Amendment 46, in the name of Patrick Harvie, is in a group on its own.

Patrick Harvie (Glasgow) (Green): Donald Gorrie’s amendment 1 nodded in the right direction; the sentiment behind amendment 46 is similarly intentioned. The placing of a duty on OSCR to consult representatives of the charity sector on guidance that will have a significant impact on the sector is a slightly stronger formulation than that which Donald Gorrie used. He said that OSCR

“must have regard to the desirability of promoting”
certain qualities in the sector. I do not expect a wave of support to come crashing down on me, as Donald Gorrie also somehow missed out on such a wave.

The intention behind amendment 46 is for the bill to lead to stronger and more constructive relationships between the regulator and the sector. It is possible to promote that kind of good practice through consultation and by working together in a number of different ways. It need not be on the face of the bill. It has been suggested that a concordat between the regulator and the sector could achieve that end.

Agreement to amendment 46 would make it crystal clear to all concerned that, where decisions have a significant impact on the sector—I am not talking about every little matter—the organisations concerned should expect to be consulted. Amendment 46 would not in any way undermine the independence of OSCR as a regulator. I hope that the minister will be open to the amendment.

I move amendment 46.

Christine Grahame (South of Scotland) (SNP): I support amendment 46. I refer Parliament to the spirit of the committee’s stage 1 report. In paragraph 21 of the executive summary, we say:

“The Committee … encourages the Executive to ensure that charities have the advice and support necessary to help them adapt to the new regulatory framework.”

The committee also made it plain that it did not want a burden to be placed on OSCR for specific guidance, but that charities should be given more general guidance about the appropriate direction in which to go, thereby helping them to avoid falling foul of regulations. The Scottish National Party supports amendment 46.

The Minister for Communities (Malcolm Chisholm): A similar amendment was lodged at stage 2 and the committee rejected it because it would have resulted in OSCR having to consult every time it issued any guidance. Although amendment 46 would not cause that problem, we will continue to resist such an amendment to the bill; its potential to cause difficulties outweighs any benefit. As the bill stands, there is nothing in it to prevent OSCR from producing guidance: in fact, OSCR already produces guidance on the current legislation and we expect it to continue to do so. It is entirely unnecessary to include a permissive provision.

On consultation, OSCR is already under a duty to consult on guidance on how it determines charitable status. It will also consult on some of the other guidance that it will issue. In deciding on
the guidance on which it is to consult, OSCR—as a public body—is under a duty to be proportionate, accountable, consistent and transparent. Not only is it unnecessary to place a duty on OSCR to consult, to do so could have a negative impact on OSCR’s regulatory function if, after repeated challenges of its assessment of what is significant under such a duty, OSCR were obliged to consult on even minor administrative guidance. Therefore, I ask Patrick Harvie to seek to withdraw amendment 46.

**Patrick Harvie:** I am not convinced that amendment 46 leaves open the possibility that OSCR will be forced to consult on every minor issue; the phrase “significant impact” is fairly clear. Therefore, I will press the amendment to a vote.

**The Deputy Presiding Officer:** The question is, that amendment 46 be agreed to. Are we agreed?

**Members:** No. **The Deputy Presiding Officer:** There will be a division.

**For**
Adam, Brian (Aberdeen North) (SNP)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseannna (Perth) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Graham, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Leckie, Carolyn (Central Scotland) (SSP)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
McDonald, Lewis (Aberdeen Central) (SNP)
Mcintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mile, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Galloway and Upper Nithsdale) (Lab)
Radcliffe, Nora (Gordon) (Lab)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (Con)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

**Against**
Aitken, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brooklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Bailleieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eade, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingston, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Mile, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Galloway and Upper Nithsdale) (Lab)
Radcliffe, Nora (Gordon) (Lab)
Rumbles, Mike (West Aberdeenshire and Kincardine) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (Con)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

**The Deputy Presiding Officer:** The result of the division is: For 34, Against 72, Abstentions 0.

Amendment 46 disagreed to.
The Deputy Presiding Officer: Group 3 is on OSCR’s regulatory powers. Amendment 20, in the name of the minister, is grouped with amendments 27, 58, 33, 59, 64 and 45. If amendment 58 is agreed to, amendment 33 will be pre-empted.

Johann Lamont: I am sure that the committee agrees that, over the piece, the bill has been a good piece of work, in that there has been a lot of constructive discussion and debate as the bill has progressed through its stages. However, there was a lot of wrestling and disagreement over mismanagement and misconduct, which is the issue that we seek to address in this group of amendments. I hope that members will forgive me if I take a bit of time to elaborate on the Executive’s position on those matters, as they are at the centre of some of the concerns about the bill.

The group is about OSCR’s regulatory powers and the enforcement of trustee duties. There was a huge concern that, if trustee duties were considered to be too onerous, people would be deterred from taking up the responsibility of being trustees at all and that there would be a consequential impact on charities. That is a concern that we all share, and it is certainly not the Executive’s intention to do anything to deter people from acting as trustees, so we were keen to find a way to make it clear that the regulatory framework was proportionate.

During stages 1 and 2 of the bill, there was significant discussion about what actions ought to be taken if breaches of charity trustee duties became apparent and about the definition of misconduct and the circumstances in which OSCR and the courts should take regulatory action against a charity trustee—or any other person—who breached any of the bill’s provisions.

There was concern that making the duties of charity trustees and the consequences of breach too onerous could discourage volunteers or anyone else from taking on a role in charities. On the other hand, the bill is intended to establish a robust regulatory regime from which the public can take reassurance that any charity is well regulated, so that they can therefore have confidence when donating to or volunteering for a charity. It is at the heart of the bill that we strike the balance between not deterring those who wish to give of their time and re-establishing and sustaining confidence in the sector.

Existing charity law refers to both misconduct and mismanagement, allowing ministers, through OSCR, and the courts to take action in the event of either arising. The bill as introduced sets out that any breach of the provisions by a charity trustee is to be treated as misconduct. For clarification, mismanagement is defined in the bill as being included within misconduct. At stage 1, many of those who gave evidence suggested that they considered mismanagement to be more related to mistakes and minor breaches than misconduct, which was considered to cover intentional breaches. That distinction is not necessarily sustained, however, even if it is how people feel about those two words. I do not want to dance on the head of a pin as far as that is concerned, although the issues are substantial. The distinction is not substantiated by the dictionary definition. The dictionary establishes that the words “misconduct” and “mismanagement” do not distinguish between intent and error. Amendments based on that understanding consequently do not achieve what was desired and give rise to unintended difficulties.

Many people felt that OSCR and the courts should be able to take regulatory action only in serious or intentional cases. The Executive has argued that it is more appropriate for the bill to be unequivocal and that any breach is misconduct, but that OSCR will, in practice, take only action that is necessary. The Executive attempted to reassure the Communities Committee at stage 2 that when OSCR took action, it would do so proportionately. As a public body, OSCR has a duty to act proportionately and reasonably under common law, and its decisions and processes may be subject to appeal or judicial review.

Despite the power of the argument that the Executive presented to it, at stage 2 the committee agreed to amendment 149, which amended section 65(4) so that any breach of the trustee duty

“may be treated as being misconduct”,

rather than

“is to be treated as being misconduct”.

In light of our concerns, I indicated to the committee that we would wish to return to the matter at stage 3. I wrote to the convener, explaining why we would wish to reverse that amendment at this stage.

At stage 2, the committee also agreed to amendment 5, which changed the definition of misconduct in section 103 so that it did not include minor mismanagement. The Executive understood why that was done, and although I do not wish to minimise the concerns that were reflected in that amendment, the Executive was concerned that, together with amendment 149, which was agreed to at the preceding committee meeting, amendment 5 had the effect of undermining OSCR’s discretion, removing clarity and making effective regulation more difficult.

Neither of those amendments offers charity trustees the sort of reassurances that the
committee sought, because it is still within OSCR’s discretion to decide whether or not a breach is misconduct, and even minor breaches—other than those related to bad management—can still be considered misconduct. It is normal practice in legislation that action can be taken by a regulator in any case of a breach of the law. As I argued in my recent letter to the committee, if action cannot be taken following a breach of legislation, there is little point in its being set out as part of the law; in practice, that merely amounts to guidance.

The amendments that we are proposing seek to impose specific requirements in the bill that OSCR must act proportionately and reasonably. Amendments 27 and 20 have been lodged to reassure members that actions against breaches of trustee duties and other cases of misconduct will not be taken unless they are really deemed necessary. That lies at the heart of the committee’s concerns. Amendment 27 specifically restricts OSCR’s section 31 powers to suspend a charity trustee unless such action is necessary and reasonable.

Amendment 20 is a more general provision that requires OSCR to act in accordance with best regulatory practice when carrying out all its functions. That provision is similar to the duty that has been proposed for the Charity Commission for England and Wales under the Home Office’s recently reintroduced Charities Bill. The criteria that are used to describe best regulatory practice—proportionality, accountability, consistency, transparency and targeting—are those that are recommended for regulation and enforcement by the better regulation task force, and they have been widely accepted. OSCR’s decisions are also subject to review and appeal, and it is under a duty to publish a report whenever it takes regulatory action under sections 30 and 31.

Donald Gorrie’s amendment 58 appears to have the same intended effect as our amendments 20 and 27. However, amendment 58 is limited to instances in which OSCR may consider action against charity trustees; it does not address the instances in which OSCR may consider action against the employees of charities. I believe that OSCR needs to act proportionately in respect of both charity trustees and charity employees. Our amendment 20 achieves that; amendment 58 does not.

Amendment 58 could cause other problems. It would restrict OSCR’s powers to take action against a breach of the charity trustee duties to ensure that they are appropriate and proportionate. That would be fine, but by also relating that restriction to the human resources of the charity, it would provide an unacceptable defence against breaching the law. The charity trustee duties are set out in the bill because they are important.

I turn to Donald Gorrie’s amendments 59 and 64. I understand that amendment 64 is intended to replace amendment 59, so I shall limit my comments to it. Amendment 64 seeks to place all charity trustees under a duty to take such steps as are reasonably practicable to ensure that any breach of a charity trustee’s duties is corrected by the trustee concerned and is not repeated and that any trustee who has been in serious or persistent breach of either or both duties under sections 65(1) and 65(2) is removed as a trustee. That complements the powers that OSCR has and I encourage the Parliament to support the amendment.

Amendments 33 and 45 reverse the changes that the committee made at stage 2. We trust that, as we have provided the reassurance in the bill that OSCR must act proportionately, members will understand the logic behind those amendments. Under amendment 20, OSCR will have a general duty to act proportionately in all its functions. Under amendment 27, OSCR’s specific powers to suspend a person from being in management or control of a charity are subject to its being able to justify that the person has not acted honestly and reasonably in relation to the misconduct concerned and ought not to be excused. I urge members to accept Executive amendments 20, 27, 33 and 45 and Donald Gorrie’s amendment 64, and to reject the other amendments in the group.

I move amendment 20.

Donald Gorrie: I will take this bit by bit, because, as Johann Lamont said, the issue to which this group relates is at the heart of the bill.

The amendment that is now amendment 64 started off as amendment 59. It suffered the usual fate of my amendments and was rewritten by the wise people who do those things. I suppose that it has been improved, although I cannot honestly say that I know why. I am going with amendment 64—one has to go with the flow.

The point of amendment 64 is simple, and Johann Lamont set it out correctly. If a trustee of a charity finds that another trustee who is the treasurer or holds some other post is failing to do his job by not sending in the accounts on time, it is up to them to put the screws on that other trustee to ensure that the accounts are sent in on time next year. If a trustee is failing in his duties seriously and persistently, it is the duty of the other trustees to remove him. That seems fairly straightforward and the Executive supports it, which is fine.
I turn to the issue of proportionate regulation, which my amendment 58 tries to achieve. To give the Executive due credit, after discussing the issue with committee members it lodged amendments 20 and 27, which achieve most of what we were on about in raising the question of any penalty being proportionate to the wrongs done. We felt that the bill did not distinguish between somebody who had put in their accounts a day late and somebody who was off to the Bahamas with all the money. We want there to be proportionate penalties or disciplinary action against trustees. Executive amendment 20 meets that aim reasonably well as it states:

“regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed”.

If a small charity is slightly incompetent about its accounts, it gets a stern letter saying, “Look you really have to brace up and do this better next year.” That is proportionate to the offence.

Amendment 27 deals with whether OSCR can suspend a charity trustee. It states that if “the person has acted honestly and reasonably in relation to the misconduct concerned” he or she will be excused.

The two Executive amendments 20 and 27 are helpful. Members will not be surprised to hear that I think that my amendment 58 is better, but I recognise that the world is as it is and I will go with the flow and not move amendment 58.

However, I feel strongly about the Government’s amendments 33 and 45. Those amendments seek to overturn the amendments at stage 2 that related to misconduct. This is not a party-political issue; it is a common-sense or how-one-sees-the-world issue. As I see the world, misconduct is quite different from mismanagement. In support of that view, I will pray in aid a senior civil servant, Mr A J MacDonald, who is a civil service commissioner. This very important gentleman wrote a report for the benefit of Mr Elvidge, who runs our civil servants, as a follow-up to the report of the Fraser inquiry. In his report, Mr MacDonald clearly distinguishes between misconduct and mistakes in administration. For example, he says:

“there are, in my view, no instances of ‘misconduct’ which would cause me to advise you to consider disciplinary proceedings against any official”.

That means that there was no misconduct. He goes on to say:

“Mistakes were made in the administration of the Holyrood Project”.

He is talking about the way in which the project was mismanaged, rather than a matter of misconduct. The problems were a matter of poor administration rather than misconduct. The judgment of officials might or might not have been satisfactory but the matter was not one of misconduct.

Although I could bore members with many more quotes, I will not. However, it is quite clear that, in the eyes of that civil service dignitary, there is a difference between misconduct and mismanagement. I still feel that there is an issue. I will not make a big political point about it, but I might well abstain when it comes to voting on amendments 33 and 45. The Executive has a genuine point of view on which it has been advised, and it will therefore go ahead and do its thing, but it is wrong.

I hope that members will support amendments 64, 20 and 27. They can make up their own minds about amendments 33 and 45.

Christine Grahame: The Scottish National Party supports amendments 20 and 27. I note that amendment 58 has been supplanted by amendment 64, which we also support.

I have the same concerns as Donald Gorrie has with regard to amendments 33 and 45. The committee was clear that there is a world of difference between mismanagement and misconduct. Mismanagement might be so gross that it can be interpreted as being misconduct, but there are minor errors that cannot be called misconduct. The SNP will not be supporting the Executive’s amendments 33 and 45, which seem to fly in the face of the rather decent-spirited amendments that were agreed to at stage 2 and which reflected the strong views of the committee, whose stage 1 report says:

“The Committee recommends that the Executive should amend the definition of “misconduct” in section 103 to reduce the possibility of those charity trustees who make relatively minor and genuine errors of mismanagement having action taken against them.”

That was a unanimous recommendation and, as far as I know, the committee’s view has not shifted.

Scott Barrie (Dunfermline West) (Lab): Members who have not followed the bill in as great a level of detail as committee members have might be slightly confused about the amount of time that we seem to have given this afternoon to the words “mismanagement” and “misconduct”. However, I stress that the point is not anorakish or semantic. The committee’s position reflects concerns that were raised with the committee by many witnesses and which were highlighted by a number of the committee’s members who spoke in the stage 1 debate.

We have all struggled to find a way around the issue, given that we were dealing with the bill as it was and the fact that the Executive believed mismanagement and misconduct to mean the
same thing, while almost everyone else thought that there was a clear distinction between the two terms. The debates and amendments on the issue at stage 2 reflected many people's desire to encompass that distinction in the bill.

As Johann Lamont said in her opening remarks, amendment 20 goes a considerable way towards helping us out of the difficulty that we appear to be in over this issue by making it clear that OSCR should act proportionately and be accountable. Agreeing to that amendment would go some way towards resolving some of the difficulties that some of us have had over the issue.

We must make it clear that we have laboured this point so consistently and strongly because we do not want to dissuade anybody from becoming a charity trustee. We certainly do not want to encumber people with a bad reputation because of a genuine error that may be construed, in other circumstances, as the action of someone who was at it. It is that distinction that we want to make.

Amendment 20 goes some way towards achieving the right balance and is a welcome addition at this stage. It is worthy of support.

Mary Scanlon (Highlands and Islands) (Con): I am happy to follow my committee colleagues and speak to the amendments, as have others, in a non-party-political way. This has been a serious issue for the committee, and I seek further clarification from the minister on amendments 27 and 45.

I, too, will be a bit of an anorak. The “Oxford English Dictionary” defines misconduct as:

“Improper or unacceptable conduct or behaviour.”

It defines mismanage as:

“To manage badly or wrongly”.

I am not sure that we have the solution to the problem today.

Amendment 27 states:

“OSCR's power to suspend a person by giving notice under subsection (4)(a) or (b) does not apply if OSCR considers that the person has acted honestly and reasonably in relation to the misconduct”.

How can someone honestly and reasonably indulge in unacceptable or improper behaviour? I find that difficult to understand. I understand that a person could act honestly, reasonably and innocently in relation to mismanagement, but could they act honestly and reasonably in relation to misconduct? The definition of misconduct does not sit fairly and squarely with honest and reasonable behaviour. Someone cannot honestly and reasonably behave in an unacceptable and improper way.

If amendment 45 were agreed to, the bill would read, “misconduct” includes mismanagement.

Does that mean honest and reasonable misconduct or downright serious, unforgivable, unacceptable or improper behaviour? I have serious problems with the amendments. It seems that we would be making misconduct acceptable. Amendment 27 states that misconduct is acceptable, as it attaches the words “honestly” and “reasonably” to it.

I seek further clarification from the minister on the matter. I would like to support amendments 27 and 45 but, like Donald Gorrie, I may have to abstain on the issue.

Linda Fabiani (Central Scotland) (SNP): As Mary Scanlon says, there is a difference between misconduct and mismanagement. What the terms mean to potential trustees and the general public is important. I do not accept the argument that misconduct and mismanagement mean the same thing, and I believe that the vast majority of people do not think that they mean the same thing. I do not care about all the talk from the civil servants and the semantic dancing that is going on here. As far as I am concerned, if someone is accused of misconduct there is a perception that they have knowingly done something wrong.

I ask every MSP to consider what their own position would be if they were a charity trustee who was reported as having been guilty of misconduct. They would have the press all over the place, looking to see whether they had filched money, taken a holiday abroad or whatever. Mismanagement is a different thing. Someone who has submitted their accounts a day late has mismanaged and pays the penalty for that. Misconduct is completely different. I refuse to accept that the might of the civil service down the road could not come up with an acceptable way of reflecting the unanimous view of the Communities Committee.

15:30

Johann Lamont: It is obvious that consensus has managed to break down for a little while before we move on to more positive matters.

It is not the view of the civil service down the road that it is seeking to ensure that its will prevails over that of the Parliament. The Scottish Executive has come to a view, which it has expressed through its amendments, about how to address the concerns that have been raised. Members can criticise the Executive for that, but the situation has not arisen because civil servants want to dance on the head of a pin. I assure Linda Fabiani that although I might not have applied my intellectual faculties to the matter in the way that she would wish me to, I have actually tried to apply them, as have people throughout the Executive. Therefore, she can take dispute with
me, rather than try to take the argument somewhere else.

Linda Fabiani and others have said before that they do not accept that, for the purposes of the law, misconduct is regarded as a subset of mismanagement. We can take a view one way or the other on whether we want to believe that, but we must determine how the law would be interpreted if a case came to court.

Although we do not want to deter trustees from taking an active part in the work of charities, there is another side to the matter. We must not create the impression that being a trustee brings no consequences and responsibilities with it if there is wilful misconduct, and trustees have a responsibility to try their best not to make mistakes.

I am intrigued that Donald Gorrie brought into his defence someone who reported on the Fraser inquiry report—I contend that that was a challenging comparison. The civil service commissioner to whom Donald Gorrie referred said that misconduct was distinct from blameworthy behaviour. However, the civil service commissioner was clear at the start of his report. He makes certain assumptions about culpability when he sets out his approach to determining whether misconduct has taken place. That he does so is evidence of the fact that any judgment about intent or error is not inherent in the term “misconduct”. If it were, he would not have needed to set out that statement at the start of his report.

In some ways, the example of the Fraser inquiry and what it reported on highlights the fact that sometimes there is a false distinction between the consequences of misconduct and those of mismanagement. If anything were to happen in the Parliament as a consequence of a mistake rather than as a result of wilful error, there would still be a significant impact on the Parliament. Equally, we all accept that mistakes made over time would have an impact on a small charity, regardless of the motives of the people who made the mistakes. That is what we are wrestling with today, and what the Executive has wrestled with.

We were concerned about the committee’s approach at stage 2 in trying to include in the bill a way of recognising and addressing the problem. We contend that the committee’s approach was not the right way to address the problem because it would not give the reassurance about the position of trustees that people sought. Indeed, it would create in the legislation extra layers before OSCR could take action.

It is important that OSCR acts proportionately when it takes action. OSCR would be expected to act proportionately if someone did not put a stamp on an envelope or forgot to post their accounts. If a charity has a series of problems because a range of mistakes have been made, we would not expect OSCR not to intervene. However, the way in which OSCR intervened would still have to be proportionate.

I urge people not to think that there is a huge division in the chamber, but to recognise that we are wrestling with two distinct matters: the effective management of charities; and support for people who want to become active in charities. If we support the Executive amendments, the Executive will address those concerns with the committee and give strength to OSCR’s role while making it clear that our expectation of OSCR is that it should act proportionately. I urge members to support amendments 20, 27, 33, 45 and 64.

Amendment 20 agreed to.

Section 7—The charity test

The Deputy Presiding Officer: Group 4 is on the charity test and charitable purposes. Amendment 21, in the name of Scott Barrie, is grouped with amendments 2, 47, 3, 4, 48 and 5.

Scott Barrie: The effect of amendment 21 would be to extend the definition of “the advancement of education” in the list of charitable purposes in the bill to recognise the significant contribution that youth work makes through the provision of non-formal education opportunities to promote and support the development of young people.

Amendment 21 is similar to an amendment that I lodged at stage 2. When the Deputy Minister for Communities spoke to that amendment, she suggested that I had not provided an adequate definition of youth work. She also expressed concern that the amendment, rather than widening the definition of education, might narrow it by excluding other types of non-formal education. Clearly, that is the opposite of what I was trying to achieve.

Amending the definition of education in the bill’s list of charitable purposes would complement the Scottish Executive’s commitment, which it made in “A Partnership for a Better Scotland”, to develop and launch a national youth work strategy before the end of the current session of Parliament. Amendment 21 should be seen in that context. If we extend the definition of education, we will not only recognise the significant contribution that youth work makes but help it to meet future challenges by making it more attractive for external funders to support and nurture the sector.

I am aware that section 7(2)(m) in the list of charitable purposes refers to “any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.”
It may well be that the Minister for Communities thinks that that is enough to cover the issue that I raise. If so, I will welcome his further reassurance on the point. It would also be helpful if he could confirm that his understanding of the definition of education includes not just schools but education in its widest sense. That will go a long way to clarifying the point that I raise.

Amendments 2 and 47 deal with amateur sport, and I know that other members will speak to them extensively. There has been a lot of lobbying from sporting organisations about the outmoded and outdated use of the word “amateur”, and we need to consider the matter. Amendments 2 and 47 are worthy of consideration and support.

I move amendment 21.

Donald Gorrie: I have some sympathy with amendment 21 and I hope that the minister will be able to give reassurances on the point.

On amendments 2 and 47, I hope that all will end satisfactorily. As Scott Barrie said, there is a great deal of concern in the sporting world about the use of the word “amateur”. Many British, Scottish and international sporting bodies have dropped the word from their titles because it is an outdated term. I lodged amendment 2, which seeks to leave out the word “amateur”, but Karen Whitefield subsequently lodged amendment 47, which seeks to leave out the term “amateur sport” and include the term “public participation in sport”. Amendment 47 is a reasonable amendment, which achieves what I was trying to achieve. I understand public participation to mean people who are on the park doing the thing, not people who are watching it on the telly in the bar or people in the crowd. I assume that that is how “public participation” is to be understood. I am content to support amendment 47 rather than amendment 2.

The Executive’s amendments 3 and 4 seek to include in the list of charitable purposes the “organisation of recreational activities” as well as the provision of facilities. They stem from an amendment that I lodged at stage 2 and withdrew—because I am a nice sort of guy—under pressure from the deputy minister, so I am pleased to have converted her to the right cause. I will support amendments 3 and 4 because they help to deal with the issue that I raise in amendment 48. The bill says that a sport must involve “physical skill and exertion”. Personally, I have little physical skill but I used to be quite good at exertion; brute force and ignorance are what one needs for middle-distance running, and I had that. I do not have physical skill, but I admire people who do. A sport can involve physical skill but not breaking into a sweat. For example, snooker, billiards, pool, gliding, croquet, angling, target shooting and other activities that I will not bore members with are recognised by sportscotland as sports, but most people would agree that they do not involve physical exertion. However, the bill will still cover those sports if we agree to amendment 4, which proposes to add “or activities” after the word “facilities”. I am content not to push amendment 48 if amendments 3 and 4 cover the matter properly.

The Communities Committee did much good work on the charitable purposes and greatly improved them. Even the English have copied some of our proposed charitable purposes, so if we can educate them, we are really in business.

Karen Whitefield (Airdrie and Shotts) (Lab): I lodged amendment 47 following representations by sportscotland and the Scottish Sports Association, which expressed concerns about the use of the term “amateur”. As Scott Barrie said, the term “amateur” is outmoded and has no place in a modern sporting context. Sport seeks to improve how it works and part of that involves professionalisation of the governing bodies and the employment by organisations of qualified coaches and youth and volunteer development officers, for example. Far from holding back good sporting activities, those people are helping to increase participation and to ensure that participants develop their potential to the full.

Of course, a strict interpretation of the term “amateur” would rule out clubs that use professional coaches and other professionals to develop their sports. That would have a negative effect on the future of sport in Scotland. It is right that such activities are allowed to continue and that we encourage sport in Scotland in that.

The term “amateur” is little used today. The Commonwealth Games Council for Scotland used to confine competition in games to amateur athletes, but that requirement has been removed. The Olympic movement, which was founded on amateur participation, has also reflected changes. The word “amateur” cannot be found in today’s Olympic charter. The list of other sports professional bodies that have done likewise goes on.

If we are serious about helping Scottish sport to develop in the 21st century, we must reflect how sport in the 21st century operates and recognise the benefits of participation in sport. Removal of the term “amateur sport” to be replaced by the words “public participation in sport” would be a sensible and positive step forward, on which I thank sportscotland and the Scottish Sports Association for their support. I urge members to support amendment 47.

The Deputy Presiding Officer: I advise members that, as little time is left to complete this group and the next group, I exercise my rights under rules 9.8.4A(c) and possibly (a) of standing
orders to extend the timetable at the end of this section. Members should understand that if we do not make up the time on later groups, that will impact on the final debate on the bill.

15:45

Malcolm Chisholm: The bill was amended at stage 2 to include a charitable purpose that would cover charities that are recognised under the Recreational Charities Act 1958. Amendments 3 to 5 respond to the concern that was expressed at stage 2 that that purpose was not broad enough to cover bodies that arrange recreational activities but do not own the grounds on which they take place. The deputy minister agreed that we would consider that further. Having done so, we believe that the purpose should be extended to include organising recreational activities as well as providing facilities.

Amendment 21, in the name of Scott Barrie, is similar to one that he lodged at stage 2. We support what he is trying to do and fully recognise the importance of non-formal education and youth work. The purpose of “the advancement of education” already covers all forms of education, including non-formal education through youth work, as proposed in the amendment. Many charities that have a wide range of education purposes are already charities under the current law, and we certainly intend that that will continue. We are concerned that referring to specific forms of education in the bill could lead to the inference that other forms of education are not included. That is not to detract from the value that we place on youth work or non-formal education; it is merely that we do not wish that purpose to be artificially restricted. I hope that I have reassured Scott Barrie that our intention is certainly not to prevent bodies that provide non-formal education and youth work from becoming charities. I fully support the role that they play and repeat that non-formal education and youth work are already covered by the purposes.

Amendments 2 and 48, in the name of Donald Gorrie, and amendment 47, in the name of Karen Whitefield, deal with the purpose of “the advancement of amateur sport”. The inclusion of amateur sport as a charitable purpose originated as an extension of “the advancement of health” purpose. For that reason, the current definition of which types of sport are considered to be charitable purposes is the same as that in the bill as drafted. They are restricted to sports that involve “physical exertion and skill”. We are opposed to amendment 48, which would change the wording to “physical exertion or skill” because physical exertion is integral to the link with healthy activity.

Mary Scanlon: Will the minister clarify whether any amendment in the group might impact in any way on the charitable status of private sports clubs?

Malcolm Chisholm: I am not aware that that is relevant. However, if information is available to me, I will obviously give it to members later.

The current provision would exclude sports such as chess, snooker or darts. Amendment 48 would allow those activities to be charitable under the sports purpose, and we want to resist the amendment because we are keen to maintain the link with the encouragement of healthy activity.

The word “amateur” was included in the purpose to reflect the fact that it is the promotion of sporting activity by the general public that makes sport charitable. We do not believe that the use of the word “amateur” bars a club from employing a professional to coach and play for a team, as long as that is done to advance amateur sport. We understand the arguments that have been made by sportscotland and others about the use of the word “amateur” being outmoded, but we do not believe that amendment 2, which would remove the word “amateur”, is the whole answer. That would not mean that high-profile professional sports clubs could automatically be charities, as they would in any event be barred by the asset distribution test in section 7(3)(a), but it could allow bodies that promote or support such clubs to be charities. We do not believe that those bodies are, or should be, charities. Instead, we prefer the wording that is used in amendment 47, which is aimed more clearly at the reasons why sport is a charitable purpose—that is, it is as an extension of “the advancement of health” purpose and bodies that encourage the general public to get involved in sport should have charitable status.

I ask Scott Barrie to seek to withdraw amendment 21, Donald Gorrie not to move amendments 2 and 48, and members to support amendment 47, in the name of Karen Whitefield, and the Executive amendments.

The Deputy Presiding Officer: Christine Grahame should make her comments very brief.

Christine Grahame: I will be terribly brief.

I cannot accept the minister’s position with respect to amendment 48. I understand that snooker is a sport, but the physical exertion that is involved is tiny—men simply lean over a table and push a little ball about. Therefore, the word “or” is more appropriate than the word “and”. [Interruption.] I cannot see the definition.

I would like members’ attention again. My second point is on amendment 47. I have only a tiny amount of time to speak—I will then let another member say something. I have difficulties with Karen Whitefield’s proposal that the purpose
should be “public participation in sport”. If a person stands and shouts their lungs out in the hope that Scotland will score a goal, that is public participation in sport in my book, but I would not say that it is a charitable purpose. The definition is slack. I was content with the “amateur sport” wording that we started with and to leave it to OSCR to decide whether there was too much professionalism and therefore whether something was no longer a charity.

**Dennis Canavan (Falkirk West) (Ind):** I have considerable sympathy with amendment 47, which fits in well with the Executive’s declared policy of encouraging more sports participation by the general public. However, will the minister tell us whether the removal of the word “amateur” might open up a loophole that some people might exploit? I accept that the lines between amateurism and professionalism are not as clearly defined as they used to be, but some sports clubs are professional by nature. For example, most senior football clubs are professional clubs and some are big business. Not many clubs, if any, make a handsome profit or pay a handsome dividend to their shareholders, but some pay out huge—in some cases excessive—amounts of money to their players. As I understand it, currently even a professional football club can set up a separate charitable trust for a charitable purpose, which might fall into any of the categories in section 7(2), such as the advancement of sport or the relief of poverty. However, I question whether the professional activities of such clubs should be allowed to have charitable status. I ask the minister to tell us whether amendment 47 might create a loophole in that regard, but apart from that I am very much in agreement with the spirit of amendment 47.

**Scott Barrie:** On the points that Christine Grahame and Dennis Canavan made, the important point that we should bear in mind is that amendment 47 was lodged in response to representations from the sporting community.

**Christine Grahame rose—**

**Scott Barrie:** I listened to what the minister said about the value that the Executive places on youth work and other forms of non-formal education and I take on board his assurance that such areas will not be excluded from the definition of charitable purpose and that non-formal education will be fully encompassed by section 7(2)(b), which provides for the charitable purpose of “the advancement of education”.

On that basis, I ask the Parliament’s agreement to withdraw amendment 21.

**Christine Grahame:** On a point of order, Presiding Officer. I simply want to make the point that I do not recollect the suggestion being made by sportscotland to the Communities Committee.

**The Deputy Presiding Officer:** That was not a point of order; it was an observation.

**Amendment 21, by agreement, withdrawn.**

**Amendment 2 not moved.**

**Amendment 47 moved—[Karen Whitefield].**

**The Deputy Presiding Officer:** The question is, that amendment 47 be agreed to. Are we agreed?

**Members:** No.

**The Deputy Presiding Officer:** There will be a division.

**FOR**

Aruckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Rutherglen) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Leckie, Carolyn (Central Scotland) (SSP)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)

**AGAINST**

Aruckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Rutherglen) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
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Jackson, Gordon (Glasgow Govan) (Lab)
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Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Leckie, Carolyn (Central Scotland) (SSP)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McKernan, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Amendment 5 moved—[Malcolm Chisholm]—and agreed to.

The Deputy Presiding Officer: Group 5 is on the charity test and excluded bodies. Amendment 49, in the name of Patrick Harvie, is grouped with amendments 50 to 52, 18 and 63. On this grouping I can allow only Patrick Harvie to speak and the minister to respond.

Patrick Harvie: I will try to be quick. Like the other amendments that I have lodged, my amendments in the group originate from the Scottish Council for Voluntary Organisations, which is the representative body of the charitable and voluntary sector in Scotland. My amendments cover three broad issues. I expect some of them to be resisted as the arguments have been rehearsed previously, but I hope that some of them will elicit a little more sympathy.

Amendment 49 would change the charity test in one small way in that a body would fail the charity test if its income or property—rather than its property alone—were distributed, or if its constitution allowed for its income or property to be distributed. The amendment would provide an additional safeguard and I hope that it will be seen as a constructive addition to the bill.

Amendments 50 and 51 are about the principle of independence. It is important to note that in general the bill has managed to achieve a central place for the idea that charities are independent. The bill has managed to preserve that principle, but certain aspects of the provisions could be improved. Independence for charities should mean independence from government at all levels. Amendment 50 would add local authorities, so that if charities were under the direct control of local authorities, that situation would have to change. It seems no more reasonable that local authorities should control an organisation that has charitable status than that other levels of government should do so. It is important to note that the amendment would not change the power of ministers to exempt certain categories, so that where councils would be unable to continue to provide a certain level of services if charitable status were lost, the matter could be addressed through ministerial order.

Amendment 51 deals not with direct control but with the appointment of trustees. The argument will be familiar to those who have been involved in the consideration of the bill. The idea comes from the original McFadden report recommendation that no more than a third of trustees should be appointed by public bodies. I do not expect any last-minute conversions on the issue, but I feel that the point of principle about public appointments undermining the independence of charities should be aired in our debate today. I look forward to hearing the minister’s comments.
Finally, amendment 52 is about the disposal of property. The amendment reflects an important principle. It would ensure that property that may have been given to an organisation specifically because it had charitable status should not be distributed to non-charitable bodies. The SCVO has expressed serious concerns about the ministerial power on the issue and I am happy to give voice to those concerns in the chamber.

I move amendment 49.

Johann Lamont: Presiding Officer, this is a series of significant amendments so, although I shall try to speak at a canter, I hope that you will allow me leeway to make the points that need to be made.

Amendment 18 ensures that ministers can alter any enactment for the purposes of preventing a body from failing the charity test because its constitution allows asset distribution for a non-charitable purpose, as set out in section 7(3)(a), as well as because its constitution allows ministers to control its activities, as set out in section 7(3)(b). That will allow ministers to remove or alter any power in an enactment that allows a body to distribute its assets for a non-charitable purpose and will therefore allow it to meet the charity test.

Section 7(3)(a) prevents a body with a constitution that allows it to distribute or otherwise apply any of its property from being a charity. Amendment 49 would add to that section any income as defined under paragraphs (a) to (c) of section 19(1). That is unnecessary as the definition of property already includes any income the body receives. The addition of a separate reference to income in section 7 could cast doubt on what is meant by property elsewhere in the bill.

16:00

Section 19 includes a specific reference to the type of property that is subject to the section, because it is intended to ring fence the charitable assets and any income accrued from charitable assets of a body that is removed from the register, so that they can continue to be used for charitable purposes, and to exclude assets acquired after the body ceased to be charitable. That provision is not relevant to section 7. Any income received by a charity would automatically become the property of the charity and would be a charitable asset, so property does not need to be defined in the same way.

Patrick Harvie is right to say that there is an important debate to be had on the issue of independence and its significance to the sector. Amendment 50 would mean that a body would fail the charity test if a local authority had a power of direction over it. We believe that the independence of such bodies at local level is best assured by the trustee duties to act in the interest of the charity. Those will be strengthened if the Parliament agrees to amendment 57, in the name of Donald Gorrie, which deals with conflicts of interest.

Amendment 51 reflects the recommendation in the McFadden report that only a third of a charity’s trustees should be allowed to be appointed by a third party. We have always argued and—Patrick Harvie may not be surprised to note—we continue to believe that what is important is not how a charity trustee is appointed but how they behave once in position. Amendment 57 provides further reassurance that if a conflict of interest arises, a trustee should put the interests of the charity first or refrain from taking part in any discussion or decision.

Amendment 52 would prevent ministers from exempting bodies from the asset distribution test that I have outlined. The amendment would prevent the five national collections non-departmental public bodies from remaining charities. During discussions of the status of those bodies at stage 1, it was argued that charitable status was extremely important to them and to Scotland, and that it should be protected. It was also argued that, because of the national importance of the collections that they hold, control of those collections should remain in the hands of ministers. The constitutions of the bodies provide that, if they cease to exist, their assets revert to ministers. That provides valuable protection, ensuring that nationally important collections remain in the hands of the nation. We would resist any change to the provision.

Amendment 52 would prevent the five bodies from retaining their status as charities. If amendment 51 is not agreed to, amendment 52 will fall. However if amendment 51 is agreed to and amendment 52 is not, some of the five national collections bodies will fail the test, because ministers appoint their trustees.

Amendment 63 would insert in section 103 a definition of a public body. The only references in the bill to public bodies relate to co-operation in section 20 and information-sharing powers in section 24. The definition that is set out in the amendment could cause problems for the operation of those sections, as it would exclude any public body established by enactment, including many regulators that also oversee charities, such as the Scottish further and higher education funding council and the care commission. OSCR itself would not be included in the definition.

I have two further points to make about independence. First, direction at ministerial level is enshrined in law, so it is distinct from local authority powers of direction. Secondly, any exemption that is applied by ministers will be
subject to affirmative decision by the Parliament. I hope that that gives members the comfort that they seek. Clearly, this is an issue that has exercised members’ minds from the bill’s early stages.

I ask Patrick Harvie to withdraw amendment 49 and not to move the other amendments in his name. I ask the chamber to support amendment 18.

The Deputy Presiding Officer: Mr Harvie, there is no time for you to do anything other than indicate whether you intend to press or to seek leave to withdraw amendment 49.

Patrick Harvie: Given the minister’s explicit assurance that income is covered, I seek permission to withdraw amendment 49.

Amendment 49, by agreement, withdrawn.
Amendment 50 moved—[Patrick Harvie].

The Deputy Presiding Officer: The question is, that amendment 50 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Adam, Brian (Aberdeen North) (SNP)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fox, Colin (Lothians) (SSP)
Gibson, Rob (Highlands and Islands) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Leckie, Carolyn (Central Scotland) (SSP)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
McFee, Mr Bruce (West of Scotland) (SNP)
Morgan, Alasdair (South of Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)

Against
Alten, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
Mcaveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Monteith, Mr Brian (Mid Scotland and Fife) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Amendment 51 moved—[Patrick Harvie].

The Deputy Presiding Officer: The question is, that amendment 51 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Fox, Colin (Lothians) (SSP)
Harvie, Patrick (Glasgow) (Green)
Leckie, Carolyn (Central Scotland) (SSP)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)

Against
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brinkin, Rhona (Midlothian) (Lab)
Brocketbank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Naím and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Fergusson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)

Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rucherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)

Jamiesson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Maxwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNutty, Des (Clydebank and Milngavie) (Lab)
Mline, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Monteil, Mr Brian (Mid Scotland and Fife) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)

Nairn, Mr John (Highlands and Islands) (SNP)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stevenson, Stewart (Banff and Buchan) (SNP)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)

Sturgeon, Nicola (Glasgow) (SNP)
Swinburne, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

ABSTENTIONS
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)

The Deputy Presiding Officer: The result of the division is: For 10, Against 104, Abstentions 1.

Amendment 51 disagreed to.

Amendment 52 not moved.

The Deputy Presiding Officer: Thank you, Mr Harvie. Let us be grateful for small mercies. [Laughter.] When I said that, I was thinking only about the timetable.

Section 8—Public benefit

The Deputy Presiding Officer: Group 6 is headed “Charity test—public benefit”. Amendment 53, in the name of Mary Scanlon, is grouped with amendment 54.

Mary Scanlon: With amendment 53, I seek to delete the words “including any charge or fee”, which were inserted by an amendment moved by John Home Robertson at stage 2. Throughout the bill’s progress, I have raised concerns over the phrase “unduly restrictive” in relation to public benefit. Many witnesses, including from OSCR, have explained how the term is likely to be interpreted. That has given some reassurance, although the phrase “unduly restrictive” is open to wide and variable interpretation. However, I have no doubt that the meaning will become enshrined in law as precedents are set.

The advancement of education is enshrined in a 1601 statute as a charitable purpose. There is no need for secondary justification for tax purposes. However, the addition of the words “any charge or fee” over and above “unduly restrictive” is a step too far.

The issue behind John Home Robertson’s amendment was independent schools. It is surely for parents to decide whether they wish to make financial sacrifices to pay for their children’s education on top of what they pay in income tax and council tax; it is surely for parents—not politicians or the Office of the Scottish Charity Regulator—to decide whether they are getting value for money.

All independent schools operate on a not-for-profit basis. Any revenue surpluses are ploughed back into investment in the provision of high-quality education, so how can OSCR say that a fee is too high? How can OSCR decide whether the education of our children is too high quality? If the overheads of some of our old independent schools, in their historic buildings and grounds, require a higher fee, it is surely for the parents to decide whether the money is worth paying. We are talking about the one chance that every parent gets to educate their child.

Section 8 challenges the basic tenet of individuals to exercise freedom of choice on how much of their own money they wish to spend and how they wish to spend it—whether it be on their children’s education or to pay for treatment in an independent hospital. The inclusion of section 8 brings the politics of envy and not the politics of reason. The end result could be the loss of charitable status for tax purposes. Fees would have to be raised by up to 5 per cent, meaning that there would be less money to pay for bursaries to support those from less well-off families. The result would be elitism and exclusion, not the choice and inclusion that we have at present.

Independent schools should be deemed as charities, as they save the taxpayer £150 million a year. They contribute hugely to the quality of Scottish education and Scottish life. They cannot be deemed to be “unduly restrictive” on the basis of a charge or a fee. As I said, the advancement of education is a charitable purpose and requires no secondary justification. All surplus income is reinvested into serving pupils with the best education.

Inland Revenue issues are the responsibility of the Westminster Parliament. Amendment 53 refers to the loss of rates relief and anything else that relates to the Scottish Parliament.

I move amendment 53.

Donald Gorrie: There are two separate issues and my amendment 54 tries to tease out what counts as “unduly restrictive”. I shall be interested in what ministers have to say in response and I would like them to give assurances on the points that I raise.

A housing association clearly benefits its tenants, but it could be argued that it does not provide public benefit. Similarly, it could be argued that a faith charity that is restricted to members of that faith is “unduly restrictive”. It could also be argued that a regimental association or a former pupils association was “unduly restrictive”. I think that all those organisations can be genuine charities and can benefit the community. Amendment 54 says that an organisation can be a bona fide charity if its membership is restricted but it benefits the people in the group that it is supposed to benefit and does not discriminate unfairly between them, especially if
"the community as a whole benefits directly or indirectly".

Various people have criticised the wording of the amendment, as they always do, but I think that the idea behind it is important and I hope that the minister will make it clear that, even without amendment 54, "unduly restrictive" will be interpreted in a reasonable fashion.

I turn to amendment 53, in the name of Mary Scanlon. I supported John Home Robertson’s amendment at stage 2, because the issue goes wider than fee-paying schools and covers a whole range of organisations, clubs, societies and associations. For example, a golf club that charges a modest fee and operates as a community enterprise can be a bona fide charity. However, a golf club that charges high fees and might not allow people in would not, in my view, be a charity, although running such a club is a perfectly respectable activity. The level of charges is a legitimate point for OSCR to take into account.

The issue of fee-paying schools has aerated some people in the press. It is worth making it clear to members that the Inland Revenue is a United Kingdom enterprise and tries to run things on a level playing field across the UK. The procedures of the Inland Revenue, as supported by legal judgments in the past, are such that, where there is a diversion between Scottish law and English law, English law is followed. Therefore, if by any remote chance OSCR were to interpret the bill as indicating that some fee-paying schools did not provide public benefit—and that is up to OSCR’s chief executive and her colleagues—so long as the Westminster law, as interpreted by the Charity Commission for England and Wales, accepted fee-paying schools as charities, the Inland Revenue would go with the English decision.

People should not get too excited about the subject. A lot of people in the fee-paying sector genuinely feel that they can demonstrate a public benefit and I feel that there is no risk of their losing charitable status, but that is up to OSCR. We are trying to supply an independent organisation with sensible rules and I believe that we are achieving that.

If the minister says the right things, I will not press amendment 54, but I shall certainly vote against amendment 53.

The Deputy Presiding Officer: I call John Home Robertson, to be followed by Christine Grahame, but I can give you only a minute each.

16:15

Mr John Home Robertson (East Lothian) (Lab): That is disappointing.

I have been accused of many things in my life, but never before have I been accused of indulging in the politics of envy. Amendment 53 would delete the change that was made by the amendment that I moved at stage 2 on 20 April, which was agreed to by eight votes to one. The single vote against it was Mary Scanlon’s. My amendment sought to make crystal clear the meaning of the public benefit test in section 8. I wanted to emphasise that public benefit means just that—benefit to the public, not benefit that is restricted to people who can afford to purchase a particular service. The provision of benefits for financially exclusive groups of people is not what any reasonable person would recognise as a public benefit. As amended at stage 2, section 8 sets a realistic and fair test for OSCR, the independent regulator, to apply. The same test will apply to all charitable organisations, not just schools.

I read in today’s press that some people are already looking for loopholes that might enable organisations that do not pass the public benefit test—and therefore do not satisfy the criteria for registration as Scottish charities—to get charitable tax relief. That would be an absurd state of affairs, but it raises bigger questions for the Inland Revenue than it does for us. It might be a useful start to establish that Musselburgh Grammar School, which is genuinely a public school, should not have to pay more rates than Loretto School, which is not quite so public, as is the case at present.

My former colleagues at Westminster are about to resume their consideration of the charities legislation for the rest of the United Kingdom. I suggest that they would do well to adopt the sound principle that we are establishing on the basis of wide political and public consensus here in Scotland. I urge the Parliament to reject amendment 53.

Christine Grahame: We need a little more light and a little less heat. Section 8 applies not just to independent schools, but to a wide spectrum of organisations, of which private hospitals and sports clubs are just two examples. The issue is proportionality. The test is whether the payment made is so great that it is unduly restrictive, which means that the organisation that charges the fee is not inclusive. That is a matter not for the Parliament, but for OSCR.

Mention has been made of the Inland Revenue. I understand that, as Donald Gorrie highlighted, the Inland Revenue will completely ignore the position that OSCR takes on charitable status in that it will treat organisations that have been disarmed of charitable status as if they were charities. I think that that is something to get excited about. It makes me despair when Westminster is prepared to override the will of the Scottish Parliament to do something for Scotland. That is not a constitutional point; it is a fact.
The Deputy Presiding Officer: You must finish now.

Christine Grahame: The only reason why I feel that amendment 54 cannot be supported is that its use of the phrase “directly or indirectly” in paragraph (c) of the subsection that it seeks to insert is very woolly.

The Deputy Presiding Officer: I ask the minister to be brief.

Johann Lamont: I will be as brief as I can.

Since the bill was introduced, an attempt has been made to turn its passage into an argument about people’s views on a particular part of the independent sector, which of course is highly diverse. That is not what the bill is about. The issue of how people choose to spend their money on their children would be more appropriate to raise in a debate about education. We are talking about the regulation of charities and those organisations that are entitled to call themselves charities.

Amendment 53 seeks to reverse an amendment that was made at stage 2. It would remove the reference in the public benefit test that highlights the fact that, in deciding whether a body provides public benefit, OSCR can consider whether any charge or fee is unduly restrictive. The Executive did not object to that amendment at stage 2 because it did not alter the public benefit test. It was always intended that OSCR would be able to consider charging as part of the test and the amendment made that clear in the bill. That does not mean that a body will automatically fail the test because it charges a fee, but OSCR will have to have regard to that issue.

I hope that I can reassure all charities that charging a fee so that access is granted to services will not automatically prevent bodies from being deemed as charities. Whether charitable status is granted will depend on individual circumstances and OSCR will consider each body on a case-by-case basis.

Amendment 54 is intended to address an issue that Donald Gorrie raised at stage 2. He seeks to clarify that the public benefit test does not prevent a body that is targeted at specific groups from being deemed as charitable. I assure him that, as it stands, the bill does not prevent that. That is made clear by the fact that the public benefit provision refers specifically to circumstances in which the benefit is provided only to a section of the public.

Although I have no difficulty in offering reassurance on the point, I have some concern about the possible impact of amendment 54 as drafted. Because it outlines which conditions should never be considered as unduly restrictive, OSCR could find itself unable to deny charitable status to bodies with a discriminatory membership condition that would otherwise have been considered to be unduly restrictive. Moreover, some membership bodies that charge different rates for students or older people, for example, might be viewed under the provision as discriminating between members.

As I said, the public benefit test as it stands will include those bodies that are targeted at specific groups. I hope that what I have said will reassure Donald Gorrie. On that basis and because of the possible problems that I have highlighted, I ask him not to move amendment 54.

I emphasise that at the heart of the purpose of the public benefit test is the desire to give confidence to the charitable sector and to those who wish to give of their time and money. There is no presumption against or in favour of any group. Equally, any group that seeks charitable status should be able to establish public benefit. I am confident that OSCR, as an independent regulator, can take a rational, dispassionate and objective view of these matters. I believe that the public benefit test, as identified in the bill, gives sufficient guidance on the matter.

The Deputy Presiding Officer (Trish Godman): As we have run out of time, I ask Mary Scanlon whether she wants to press or withdraw amendment 53.

Mary Scanlon: I would like to press amendment 53.

The Deputy Presiding Officer: The question is, that amendment 53 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Goldie, Miss Annabel (West of Scotland) (Con)
Johnstone, Alex (North East Scotland) (Con)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
MonTHE, Mr Brian (Mid Scotland and Fife) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Tosh, Murray (West of Scotland) (Con)

Against
Adam, Brian (Aberdeen North) (SNP)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumbarton) (Lab)
The Deputy Presiding Officer: The result of the division is: For 17, Against 98, Abstentions 0.

Amendment 53 disagreed to.

Amendment 54 not moved.

Section 13—References to charitable status

The Deputy Presiding Officer: Group 7 is on references to charitable status. I am afraid that we will have to move very quickly on the group. Amendment 6, in the name of the minister, is grouped with amendments 7 to 11.

Malcolm Chisholm: All the amendments in the group are aimed at the provisions relating to references made about a body's charitable status. Amendment 6 corrects an inconsistency in section 13. Section 13(4) does not refer to bodies that are "established under the law of Scotland", which is referred to in section 13(2). Amendment 6 corrects that omission and brings subsections (2) and (4) into line with each other.

Amendments 7 to 11 will allow OSCR and the Court of Session to act against charities that falsely represent themselves, or that are so represented by persons, as Scottish charities or registered Scottish charities. Without that provision, the requirement that charities are not to be so represented is insufficient.

I move amendment 6.

Amendment 6 agreed to.
After section 18

The Deputy Presiding Officer: Group 8 is on the removal of charities from the register. Amendment 22, in the name of Christine Grahame, is in a group on its own.

Christine Grahame: Amendment 22 is a humble and practical amendment that I hope will find favour—indeed, I think that a similar amendment that I lodged at stage 2 found favour with some committee members. The amendment simply seeks to provide for a list of charities that are defunct or have been removed from the register.

Members may wonder what the purpose of the amendment is. One often thinks of the student with no money who tries to find a charity to help them. A charity that was set up some time ago may still be lurking somewhere; even if it is no longer functioning, it may still have assets that, under its charitable purposes, are directed specifically to a football bursary, let us say. The student might not know that the charity existed and might have great difficulty finding it. However, if OSCR kept a list, anyone who sought to find out whether a defunct charity or a charity that had been removed from the register still had assets would be able to find such bodies centrally and, perhaps, access them.

When I raised that idea in committee, the minister rejected my amendment, saying that "such a list is unnecessary, as section 47 allows financial institutions to inform OSCR of any dormant charity accounts."—[Official Report, Communities Committee, 27 April 2005; c 2095.]

That is simply allowing; it is not compelling. If we were to compel, a comprehensive list would be available to the whole of Scotland. I cannot understand why the minister is so resistant to that idea. The amendment seems sensible and practical. The measure would be useful to many people throughout Scotland and I look forward to hearing what the minister has to say about it.

I move amendment 22.

Johann Lamont: I am overwhelmed by members' humility.

Christine Grahame lodged a similar amendment at stage 2 but withdrew it after the Executive agreed to consider the issue further. Following careful consideration, I still fail to see what benefits amendment 22 would bring.

Although the bill does not place a duty on OSCR to maintain or publish a list of defunct charities or charities that have been removed from the register, nothing would prevent OSCR from creating a list of charities that have been removed from the register if it wished to do so, as I have said before. Indeed, it is anticipated that OSCR will maintain such a list. However, to require OSCR to do that has the potential to cause confusion, particularly as the amendment provides for a single list of charities that are defunct and of those bodies that are no longer charities. If OSCR maintained the information voluntarily, it could separate the bodies and have two lists. Moreover, if the list led some people to the mistaken belief that a particular body was still a charity, OSCR could suspend the list, whereas, because the amendment would oblige OSCR to keep a publicly available list, OSCR would be unable to react in that way if a problem were to arise.

It has been argued that a list would provide greater clarity but, given that the only real charities will be those bodies that are named on the register, the situation is arguably already very clear: any body that did not appear on the register would not be a charity. If it was necessary to establish whether a body had previously been a charity, OSCR could specifically be requested to provide that information. In any event, OSCR is required to publish a report on each case on which it takes action, which would include action that results in removing a charity from the register.

It has also been argued that a list of defunct charities would facilitate the revival of such charities or the redistribution of their assets. However, provisions in the bill allow OSCR to deal with charities that would previously have lain dormant, so a list of defunct charities is unnecessary. Assets of a charity that is removed from the register are protected by section 19 and dormant charities are covered by regulations under section 48. Under the accounting regulations, it is proposed that any dormant or defunct charity will still have to submit its accounts to OSCR. If it has failed to do so or, on examination of the accounts, there was concern, OSCR could apply to the Court of Session to reorganise the charity under section 41 to enable its resources to be applied for charitable purposes to better effect. The Executive believes that those provisions mean that the number of defunct charities should be relatively few, which makes a list of them unnecessary.

There is a risk that requiring OSCR to produce and maintain such a list could be an inefficient use of its resources. OSCR should retain the flexibility to produce lists if it feels that there is sufficient demand, but it should not be under a duty to do so. Therefore, I humbly ask Christine Grahame to seek agreement to withdraw amendment 22.

The Deputy Presiding Officer: Does Christine Grahame wish to press or withdraw the amendment?

Christine Grahame: I wish to press it.
The Deputy Presiding Officer: The question is, that amendment 22 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Brookebank, Mr Ted (Mid Scotland and Fife) (Con)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Ewing,ergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Alex (Galloway and Upper Nithsdale) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (Mid Scotland and Fife) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Gorde, Miss Annabel (West of Scotland) (Con)
Graham, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Johnstone, Alex (North East Scotland) (Con)
MacAskill, Mr Kenny (Lothians) (SNP)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Neil, Alex (Central Scotland) (SNP)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, Tavish (Shetland) (SNP)
Scott, John (Ayr) (Con)
Smith, Eleanor (Highlands and Islands) (Green)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicola (Glasgow) (SNP)
Sturgeon, Nicola (Glasgow) (SNP)
Swinson, John (Central Scotland) (SSCUP)
Swinney, Mr John (North Tayside) (SNP)
Welsh, Mr Andrew (Angus) (SNP)
White, Ms Sandra (Glasgow) (SNP)

AGAINST
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Bailie, Jackie (Dumfartoon) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eddie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnis, Ross (West of Scotland) (LD)
Glen, Marilyn (North East Scotland) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Ruther Glen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Moffatt, Mr John (West of Scotland) (Con)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatlie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, Iain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephan, Nicoll (Aberdeen South) (LD)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)

The Deputy Presiding Officer: The result of the division is: For 47, Against 62, Abstentions 0.

Amendment 22 disagreed to.

Section 19—Removal from Register: protection of assets

The Deputy Presiding Officer: Group 9 is on removal from the register and the protection of assets. Amendment 55, in the name of Patrick Harvie, is in a group on its own.

16:30

Patrick Harvie: Many of the arguments on this subject were rehearsed when we discussed one of my previous amendments. The issue of the protection of assets concerns charities that are...
removed from the register and organisations losing their charitable status. I hope that the minister can respond on the principle of protecting assets and distributing them only to other charities. That does not relate to organisations whose existence will continue, including the national collections. I look forward to the minister's response.

I move amendment 55.

Malcolm Chisholm: Section 19 sets out procedures for protecting the assets of a charity that is removed from the register. It requires the body to continue to apply its assets in line with its charitable purposes, following removal from the register. Section 19(8), which amendment 55 seeks to remove, was intended to allow ministers to disapply the provisions by order in special circumstances. Ministers would have to have good reasons to exempt a body that was losing its charitable status from section 19, and any order that was made would be subject to the affirmative procedure, and would therefore have to be justified to and considered by Parliament. It is important to be able to disapply section 19 so that if, for example, a non-departmental public body lost its charitable status, property that had been obtained with public funds could remain under that NDPB's full control. I ask Patrick Harvie to withdraw amendment 55.

Patrick Harvie: I will press the amendment.

The Deputy Presiding Officer: The question is, that amendment 55 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

FOR
Baird, Shiona (North East Scotland) (Green)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Ruskell, Mr Mark (Mid Scotland and Fife) (Green)
Scott, Eleanor (Highlands and Islands) (Green)
Turner, Dr Jean (Strathkelvin and Bearsden) (Ind)

AGAINST
Adam, Brian (Aberdeen North) (SNP)
Aitken, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Cragie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Davidson, Mr David (North East Scotland) (Con)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Gibson, Rob (Highlands and Islands) (SNP)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Ingram, Mr Adam (South of Scotland) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
MacAskill, Mr Kenny (Lothians) (SNP)
Macdonald, Lewis (Aberdeen Central) (Lab)
Macintosh, Mr Kenneth (Eastwood) (Lab)
Maclean, Kate (Dundee West) (Lab)
Macmillan, Maureen (Highlands and Islands) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
Marwick, Tricia (Mid Scotland and Fife) (SNP)
Mather, Jim (Highlands and Islands) (SNP)
Matheson, Michael (Central Scotland) (SNP)
Maxwell, Mr Stewart (West of Scotland) (SNP)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McFee, Mr Bruce (West of Scotland) (SNP)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLeitchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeill, Mr Duncan (Greenock and Inverclyde) (Lab)
McNeill, Pauline (Glasgow Kelvin) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Morgan, Alasdair (South of Scotland) (SNP)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoo, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Neil, Alex (Central Scotland) (SNP)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peattie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
The Deputy Presiding Officer: The result of the division is: For 9, Against 101, Abstentions 0.

Amendment 55 disagreed to.

Section 24—Disclosure of information by and to OSCR

The Deputy Presiding Officer: Group 10 is on the duty of auditors. Amendment 23, in the name of the minister, is grouped with amendments 24, 25, 28, 29, 31, 31A, 32, 39, 40 and 42 to 44.

Malcolm Chisholm: The central amendment in this group is amendment 31. It inserts into the bill a duty for auditors, independent examiners and reporting accountants to report to OSCR matters of material significance to the exercise of OSCR’s functions under sections 28, 30 and 31. The new section introduced by amendment 31 will also allow those who examine a charity’s accounts to report any other matter that they believe to be of relevance to OSCR’s functions, but which is not covered by that duty. Amendment 42 ensures that a report made in accordance with that duty must be in writing.

The amendments have been lodged in response to calls from the Institute of Chartered Accountants of Scotland and the Communities Committee that the bill as introduced did not give those examining a charity’s accounts enough guidance or protection to enable them to report matters to OSCR. I have some more details on those amendments, but I will turn instead to amendment 31A. It removes the reference to an external examiner who has been appointed to audit or examine independently a charity’s statement of account being appointed by the charity mentioned in subsection (2) of the new section introduced by amendment 31. We lodged amendment 31A after it was pointed out to us that not all charities appoint their own external examiner.

Amendment 56 is similar to one that was lodged at stage 2, and will not be necessary if the Executive amendments are agreed to.

Amendment 25 links the removal of the restrictions on disclosure because of an obligation of confidentiality under section 25 to the new duty to disclose inserted by amendment 31. In doing so it answers ICAS’s concerns that the provision did not extend to reporting accountants examining the accounts of a charitable company.

Amendment 28 inserts further provisions into section 38 so that the duty to report and the removal of confidentiality also apply to auditors, independent examiners and reporting accountants when OSCR’s functions have been delegated to Scottish ministers or another public authority.

Amendments 23, 24, 29, 32, 39, 40, 43 and 44 are technical and their purpose is to reposition existing provisions as a consequence of the new section proposed in amendment 31.

I urge members to support the Executive amendments in the group. I ask Donald Gorrie not to move amendment 56, as it will no longer be necessary.

I move amendment 23.

Donald Gorrie: I am happy to satisfy the minister. My amendment 56 had the same objective as the Executive amendments; the minister has produced voluminous amendments that cover the issue much better. They provide the protection that the auditors felt they required from being sued for breach of confidentiality if they reported adversely on a charity to OSCR. I will not move amendment 56.

The Deputy Presiding Officer: Minister, you will not have anything to add to that.

Amendment 23 agreed to.

Section 25—Removal of restrictions on disclosure of certain information

Amendments 24 and 25 moved—[Malcolm Chisholm]—and agreed to.

Section 28—Inquiries about charities etc

The Deputy Presiding Officer: Group 11 is on inquiries about charities. Amendment 26, in the name of John Home Robertson, is in a group on its own.

Mr Home Robertson: Amendment 26 would provide explicitly for OSCR to make inquiries about any charity in response to information or representations that it might receive from any source about that charity. I have some more details on those amendments, but I will turn instead to amendment 31A. It removes the reference to an external examiner who has been appointed to audit or examine independently a charity’s statement of account being appointed by the charity mentioned in subsection (2) of the new section introduced by amendment 31. We lodged amendment 31A after it was pointed out to us that not all charities appoint their own external examiner.

Amendment 56 is similar to one that was lodged at stage 2, and will not be necessary if the Executive amendments are agreed to.

Amendment 25 links the removal of the restrictions on disclosure because of an obligation of confidentiality under section 25 to the new duty to disclose inserted by amendment 31. In doing so it answers ICAS’s concerns that the provision did not extend to reporting accountants examining the accounts of a charitable company.

Amendment 28 inserts further provisions into section 38 so that the duty to report and the removal of confidentiality also apply to auditors, independent examiners and reporting accountants when OSCR’s functions have been delegated to Scottish ministers or another public authority.

Amendments 23, 24, 29, 32, 39, 40, 43 and 44 are technical and their purpose is to reposition existing provisions as a consequence of the new section proposed in amendment 31.

I urge members to support the Executive amendments in the group. I ask Donald Gorrie not to move amendment 56, as it will no longer be necessary.

I move amendment 23.

Donald Gorrie: I am happy to satisfy the minister. My amendment 56 had the same objective as the Executive amendments; the minister has produced voluminous amendments that cover the issue much better. They provide the protection that the auditors felt they required from being sued for breach of confidentiality if they reported adversely on a charity to OSCR. I will not move amendment 56.

The Deputy Presiding Officer: Minister, you will not have anything to add to that.

Amendment 23 agreed to.

Section 25—Removal of restrictions on disclosure of certain information

Amendments 24 and 25 moved—[Malcolm Chisholm]—and agreed to.

Section 28—Inquiries about charities etc

The Deputy Presiding Officer: Group 11 is on inquiries about charities. Amendment 26, in the name of John Home Robertson, is in a group on its own.

Mr Home Robertson: Amendment 26 would provide explicitly for OSCR to make inquiries about any charity in response to information or representations that it might receive from any source about that charity. It would provide for OSCR to take action on information received from whistleblowers, but I stress that OSCR would have full discretion to decide whether to act on such information. The amendment is not intended to be a charter for malicious clypes.

We all want to improve the reputation of Scottish charities. That is one of the key objectives of the bill. We know from experience that virtually all the
charities in Scotland, big and small, are good, efficient and conscientious organisations—genuine charities. That makes it all the more important that any organisations that do not come up to those high standards should be dealt with promptly and fairly to safeguard the reputation of all the good charities.

I have been in elected office for a long time—some would say far too long.

Members: Hear, hear.

Mr Home Robertson: I knew members were awake. During that time I have come across just two cases involving questionable charities. People tried to blow the whistle, but under the old arrangement, nothing happened. I went into some detail about the Atlantic Salmon Conservation Trust (Scotland) and the Algrade Trust in the Communities Committee, and what I said can be found at column 2100 of the Official Report of the committee meeting on 27 April 2005. That is on the record, so I will not repeat it now. The point is that I tried to raise questions about the Algrade Trust and the Atlantic Salmon Conservation Trust (Scotland) as the local MP, but as far as I know, nothing was done about either case.

I am grateful to the minister for undertaking to reflect on the case for a whistleblower provision in the bill when she replied to the debate in the committee. I hope that OSCR will ensure that appropriate inquiries can be made into such matters in future, and I offer amendment 26 to the Parliament as a way to ensure that that can happen.

I move amendment 26.

Johann Lamont: John Home Robertson’s amendment 26 would set out in the bill that OSCR may make inquiries either of its own accord or as a result of representations by the public. It is likely that a large proportion of the inquiries that OSCR undertakes will be sparked by a complaint or inquiry by the public. One of the aims of the bill is to reassure the public by providing an independent regulator to whom they can turn if they are concerned about a charity’s activities. As the bill stands, any member of the public may make a complaint to OSCR that could lead to an inquiry. It is nevertheless important to retain a degree of discretion for OSCR, and to state that it does not have a duty to investigate every complaint. There is, after all, always a possibility of vexatious or malicious complaints. OSCR will be accountable and will have to be reasonable in deciding not to investigate a complaint. Given the arguments made by John Home Robertson both today and at stage 2, which are on record in the Official Report, and the fact that amendment 26 sits well with the objectives of the bill, we agree with it and urge the Parliament to support it.

Amendment 26 agreed to.

Section 31—Powers of OSCR following inquiries
Amendments 7, 8 and 27 moved—[Malcolm Chisholm]—and agreed to.

Section 32—Suspensions and directions: procedure
Amendment 9 moved—[Malcolm Chisholm]—and agreed to.

Section 34—Powers of Court of Session
Amendments 10 and 11 moved—[Malcolm Chisholm]—and agreed to.

Section 38—Delegation of functions
Amendment 28 moved—[Malcolm Chisholm]—and agreed to.

Section 39—Bodies controlled by a charity
Amendment 29 moved—[Malcolm Chisholm]—and agreed to.

Section 43—Reorganisation: supplementary
The Deputy Presiding Officer: Group 12 is on the reorganisation of charities. Amendment 30, in the name of the minister, is in a group on its own.

Malcolm Chisholm: The amendment removes the exclusion preventing local authority charitable trusts from being reorganised under sections 40 and 41 of the bill. It follows concerns raised by OSCR, and will allow local authorities to apply to OSCR to approve a reorganisation scheme, under the new legislation, of many charitable trusts held by them. We understand that several local authorities have indicated that the provision would be of significant benefit, and it will allow more efficient operation of many small trusts.

I move amendment 30.
Amendment 30 agreed to.

Section 45—Accounts
Amendment 56 not moved.

After section 46
Amendment 31 moved—[Malcolm Chisholm].
Amendment 31A moved—[Malcolm Chisholm]—and agreed to.
Amendment 31, as amended, agreed to.

Section 56—Conversion of charity which is a company or registered friendly society: applications
Amendment 32 moved—[Malcolm Chisholm]—and agreed to.
Section 65—Charity trustees: general duties

The Deputy Presiding Officer: Group 13 is on the duties of charity trustees. Amendment 57, in the name of Donald Gorrie, is in a group on its own.

Donald Gorrie: The purpose of the amendment is to make it clear that when, as quite often happens, a person is put on to a charity as a charity trustee from another body—which might be the local council, a chamber of commerce, a church, a school or whatever—their first duty is to be a charity trustee rather than to look after the interests of the other body. The amendment is supposed to cover the issue of the independence of arm’s-length companies and other charities of that sort. The issue is quite clear and the wording of the amendment has had the acceptance of those up aloft. I therefore hope that members will vote for it.

I move amendment 57.

Johann Lamont: As I mentioned in an earlier discussion, Donald Gorrie’s amendment is helpful. It clarifies in the bill how conflicts between the interests of the charity and that of any person responsible for appointing a trustee should be dealt with. We believe that the amendment reflects current good practice relating to how such conflicts are dealt with by charities. Putting the text of the amendment in the bill will help to reassure the public of the practical independence of trustees in whose appointment an outside body or person has had a role. We therefore encourage Parliament to agree to it.

Amendment 57 agreed to.

Amendment 58 not moved.

Amendment 33 moved—[Malcolm Chisholm].

The Deputy Presiding Officer: The question is, that amendment 33 be agreed to. Are we agreed?

Members: No.

The Deputy Presiding Officer: There will be a division.

For
Aitken, Bill (Glasgow) (Con)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baker, Richard (North East Scotland) (Lab)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Butler, Bill (Glasgow Anniesland) (Lab)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Douglas-Hamilton, Lord James (Lothians) (Con)
Eadie, Helen (Dunfermline East) (Lab)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Finnie, Ross (West of Scotland) (LD)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Glen, Marilyn (North East Scotland) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Jackson, Dr Sylvia (Stirling) (Lab)
Jackson, Gordon (Glasgow Govan) (Lab)
Jamieson, Cathy (Carrick, Cumnock and Doon Valley) (Lab)
Jamieson, Margaret (Kilmarnock and Loudoun) (Lab)
Johnstone, Alex (North East Scotland) (Con)
Kerr, Mr Andy (East Kilbride) (Lab)
Lamont, Johann (Glasgow Pollok) (Lab)
Livingstone, Marilyn (Kirkcaldy) (Lab)
Lyon, George (Argyll and Bute) (LD)
Macdonald, Lewis (Aberdeen Central) (Lab)
Maclean, Kate (Dundee West) (Lab)
Martin, Paul (Glasgow Springburn) (Lab)
May, Christine (Central Fife) (Lab)
McAveety, Mr Frank (Glasgow Shettleston) (Lab)
McCabe, Mr Tom (Hamilton South) (Lab)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
McLetchie, David (Edinburgh Pentlands) (Con)
McMahon, Michael (Hamilton North and Bellshill) (Lab)
McNeil, Mr Duncan (Greenock and Inverclyde) (Lab)
McNulty, Des (Clydebank and Milngavie) (Lab)
Milne, Mrs Nanette (North East Scotland) (Con)
Morrison, Mr Alasdair (Western Isles) (Lab)
Muldoon, Bristow (Livingston) (Lab)
Mulligan, Mrs Mary (Linlithgow) (Lab)
Munro, John Farquhar (Ross, Skye and Inverness West) (LD)
Murray, Dr Elaine (Dumfries) (Lab)
Oldfather, Irene (Cunninghame South) (Lab)
Peacock, Peter (Highlands and Islands) (Lab)
Peatlie, Cathy (Falkirk East) (Lab)
Pringle, Mike (Edinburgh South) (LD)
Purvis, Jeremy (Tweeddale, Ettrick and Lauderdale) (LD)
Radcliffe, Nora (Gordon) (LD)
Robson, Euan (Roxburgh and Berwickshire) (LD)
Rumbles, Mike (West Aberdeenshire and Kincardine) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Scott, Tavish (Shetland) (LD)
Smith, Elaine (Coatbridge and Chryston) (Lab)
Smith, lain (North East Fife) (LD)
Smith, Margaret (Edinburgh West) (LD)
Stephen, Nicol (Aberdeen South) (LD)
Stone, Mr Jamie (Caithness, Sutherland and Easter Ross) (LD)
Swinhurst, John (Central Scotland) (SSCUP)
Tosh, Murray (West of Scotland) (Con)
Wallace, Mr Jim (Orkney) (LD)
Watson, Mike (Glasgow Cathcart) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)
Wilson, Allan (Cunninghame North) (Lab)
 AGAINST
Adam, Brian (Aberdeen North) (SNP)
Ballard, Mark (Lothians) (Green)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
The result of Group 14 is on amendments 35 to 38. Amendment 34, in the name of the minister, is grouped with the remuneration of charity trustees. Amendment that there is now agreement on the way forward.

The Deputy Presiding Officer: The result of the division is: For 74, Against 26, Abstentions 6.

Amendment 33 agreed to.
Amendment 59 not moved.
Amendment 64 moved—[Donald Gorrie]—and agreed to.

Section 66—Remuneration for services

16:45

The Deputy Presiding Officer: Group 14 is on the remuneration of charity trustees. Amendment 34, in the name of the minister, is grouped with amendments 35 to 38.

Johann Lamont: This is an important group of amendments that have generated a great deal of discussion and debate. I hope that you will give me sufficient time, Presiding Officer, to outline what we seek to do. The amendments deal with the section of the bill that relates to remuneration for services. The remuneration of charity trustees has been much debated during the progress of the bill. I am grateful to those who gave evidence to the Communities Committee and to members of the committee for their input, and I am pleased that there is now agreement on the way forward.

Some people in the charity sector strongly believe that, to cement their position in the voluntary sector and to avoid any conflict of interest, charity trustees should not be remunerated for any work that they carry out as charity trustees. That view is held by some members of the Opposition parties. The contrary argument is that the level of service that is required of the trustees of some charities demands payment, otherwise people would not agree to be charity trustees in the first place. That is particularly true for larger charities. Many charity trustees are paid or receive a benefit for their services as trustees. For instance, many student associations pay students to be a charity trustee—for example, the treasurer—of their association. That covers lost income and allows them to take a sabbatical from their studies for a limited period.

It might be helpful if I clarify the existing position in charity law in Scotland. There is currently no restriction on the payment of charity trustees or those who are in control of charities provided that there is express legal authority for such payment to be made. The authority for payment can be included in a charity's constitution or in another enactment, or it can be given by a Court of Session order. If authority by one of those means exists, a charity may remunerate a person who is carrying out the normal duties of a charity trustee; a person who is providing additional services that a trustee would not normally provide; or a trustee who is also an employee of the charity.

The bill will tighten up the circumstances in which a charity trustee may receive remuneration in the future. Although there is a view that the payment of trustees should not be the norm, we need to provide sufficient flexibility to allow the bill to suit the wide range of charities in the sector. Permitting remuneration only in highly defined circumstances is the best way of achieving that.

Amendment 34 and amendment 35, which is consequential on amendment 34, will clarify the position. Amendment 34 will add a new subsection to set out clearly that a charity trustee cannot be remunerated for their services as a charity trustee, for other services or for services as an employee of the charity unless the strict conditions in section 66 are complied with. The conditions are that the maximum payment must be reasonable and set out in a written agreement and that the charity trustees must be satisfied that the payment is in the interests of the charity. Also, only a minority of charity trustees may receive remuneration, and there must be no provision in the charity's constitution that expressly prohibits the payment. The bill will also ensure that payment cannot be made to persons who are connected to charity trustees unless the same conditions apply. That will prevent a charity from being controlled by charity trustees who pay their close family for services to the charity, for instance.

It would be wrong for us to remove existing rights for some charity trustees who already have a right to be paid, or for whom Parliament or the Court of Session has decided that payment is appropriate. That was covered in section 66(5) of the bill as introduced. Discussion during stage 1 indicated concern that the provisions were not tight enough, so the Executive's amendments 36...
to 38 will clarify that the exemption from having to meet the conditions in that section for a charity whose existing constitution allows payment will apply only where payment is specifically allowed by an “authorising provision”. There had been concern that some charity constitutions might contain non-specific, wide-ranging provisions allowing any payment that the charity trustees considered to be in the interests of the charity. The constitution will now be required to refer specifically to the payment or remuneration of a charity trustee and the provision will apply only to charities with an authorising provision in their constitution prior to the introduction of the bill on 15 November 2004.

A slightly separate but related issue is whether the employees of a charity should be allowed to serve as trustees of their employer. In an ideal world, it might be preferable for those controlling a charity to be entirely independent of those employed by it, but neither we nor the charitable sector live there.

I am aware that the rules that we are setting in this bill must be suitable for the wide range of charities in the sector. It is accepted that we expect more and more of our charities—more efficiency, more effectiveness and for them to be more businesslike. In some cases, it is particularly useful for the employees of a charity to be represented on the controlling body. For example, many further education colleges and universities have both academic and non-academic staff members on their board of management. That is also of wider value. It is desirable for employees to have an input in deciding the direction of their company, and perhaps that should also apply to charities.

With the amendments, the bill will give us an appropriate, flexible system that will provide reassurance to charities and the public that their funds will be used sensibly and transparently but will also help the sector to be more businesslike and effective in its operations.

I move amendment 34, and urge members to accept the other Executive amendments in the group.

Amendment 34 agreed to.

Amendments 35 to 38 moved—[Malcolm Chisholm]—and agreed to.

Section 67—Remuneration: supplementary

Amendment 39 moved—[Malcolm Chisholm]—and agreed to.

Section 75—Appeals to Scottish Charity Appeals Panel

The Deputy Presiding Officer: Group 15 is on the Scottish charity appeals panel. Amendment 12, in the name of the minister, is grouped with amendment 19.

Malcolm Chisholm: The amendments address whether the Scottish charity appeals panel should be allowed to award expenses or compensation. The issue was debated by the committee at some length at stage 2.

Following further consideration, the Executive has decided that the Scottish charity appeals panel should have the power to award expenses but not compensation. That is in line with the views expressed by the committee in the debate.

Accordingly, amendment 12 will remove the subsection in section 75 that prevents the panel from awarding expenses to OSCR or to any person who appeals a decision. Amendment 19 will add a power to the provisions in schedule 2 to allow ministers to set out that the panel may award expenses to both OSCR and the appellant in certain circumstances. That is important to safeguard against malicious or vexatious appeals. The detail on making awards of expenses will be set out in the rules on the practice and procedure of the panel, which will be made following consultation with the Council on Tribunals.

I move amendment 12.

Amendment 12 agreed to.

Section 78—Interpretation of Part 2

Amendment 40 moved—[Malcolm Chisholm]—and agreed to.

Section 84—Regulation of public benevolent collections

The Deputy Presiding Officer: Group 16 is on regulation of public benevolent collections. Amendment 13, in the name of the minister, is grouped with amendments 14 and 15.

Malcolm Chisholm: Amendments 13 to 15 relate to the bill’s provisions on public benevolent collections. They were drafted after concerns were raised after concerns were raised in relation to similar proposals in the Home Office Charities Bill.

Section 84(2)(c) allows a benevolent body to hold a collection on land that it owns or occupies without obtaining local authority consent if the body must expressly or implicitly allow public access to the land. There is concern that land that a benevolent body occupies but to which the public have access by virtue of an enactment, such as the Land Reform (Scotland) Act 2003, would not be covered. Therefore, the occupier would be required to obtain local authority permission for the collection that they wished to hold on the land. That is a valid concern, so we have lodged amendment 13, which seeks to extend section 84(2)(c) to cover the situation.
Amendments 14 and 15 are consequential on amendment 13.

I move amendment 13.

Amendment 13 agreed to.

Amendments 14 and 15 moved—[Malcolm Chisholm]—and agreed to.

Section 92—Extension of general powers of trustees

The Deputy Presiding Officer: Group 17 is on the investment powers of trustees. Amendment 60, in the name of Christine Grahame, is grouped with amendments 41, 61 and 62.

Christine Grahame: I will move amendment 60, but I may have to seek leave to withdraw it. I want to hear what the minister has to say about his amendment 41.

Amendments 60 and 61 are Law Society of Scotland amendments and they are quite technical. Under old Scots law rules, there is a general rule against the delegation of trust duties. Current market practice has developed in such a way that, to comply with electronic market deadlines, individual shareholders have shares held in nominee names. If anything goes wrong with the nominee, the trustee could be exposed to unlimited personal liability. Therefore, amendment 60 seeks to give authorisation to trustees to have investments held by a nominee company. Under the same general rule against the delegation of trust duties, if anything went wrong with a third party, the trustee could be exposed to unlimited liability. Amendment 61 seeks to give authorisation to trustees to delegate investment decisions to a suitably qualified person.

Amendments 60 and 61 seek to give trustees the power to wield the wider investment powers that are contained in the bill. I look forward to hearing the minister advise whether his amendments deal with those issues.

I move amendment 60.

Malcolm Chisholm: During the consultation on the draft bill and the evidence taking by the Communities Committee and the Finance Committee, there were calls for a provision to allow trustees to appoint nominees in relation to trust investments. There were also calls for the bill to be amended to include a provision on the power of trustees to delegate decision-making powers. It was argued that that would bring improvements in both investment performance and income for some charities and trusts. The Communities Committee recommended in its stage 1 report that further consideration should be given to ensuring that trustees have the specific power to delegate investment of funds to fund managers. Amendment 41 provides a default power for trustees to appoint nominees in relation to trust investments and to transfer the title of the assets to the nominees.

The purpose of Christine Grahame’s amendment 60 is similar to that of amendment 41, but I believe that her amendment would be less effective than amendment 41 because it does not set out the key elements of the duty of care to which trustees must pay particular regard in exercising the power. Therefore, I ask Christine Grahame to withdraw her amendment 60.

Amendment 62 will provide a default power for trustees to delegate to agents the management of investments, including discretionary management of investments. The purpose of Christine Grahame’s amendment 61 is similar to that of amendment 62, but I believe that it would be less effective than amendment 62 because it does not indicate that this is a clarification of the current law, nor that the law extends to the discretionary management of investments. The Executive amendments were drafted in consultation with the Scottish Law Commission and they have its support. Therefore, I ask Christine Grahame not to move amendment 61. I ask the Parliament to support amendments 41 and 62.

Amendment 60, by agreement, withdrawn.

Amendment 41 moved—[Malcolm Chisholm]—and agreed to.

Amendment 61 not moved.

Amendment 62 moved—[Malcolm Chisholm]—and agreed to.

Section 97—Population of Register etc

17:00

The Deputy Presiding Officer: Group 18 is on pre-existing charities that are included in the register and the powers of OSCR. Amendment 16, in the name of the minister, is grouped with amendment 17.

Johann Lamont: Amendment 16 is necessary to dispel any doubt about whether OSCR has the ability to remove charities from the register when they no longer meet the charity test. Although section 97 is aimed at achieving the transition from the current regulatory regime to that provided for under the bill, it is not a temporary provision.

The charities that transfer to the register from the current HM Revenue and Customs index—the former Inland Revenue index—will be able to continue to operate as charities under the bill. Like any new charities that will be recognised and registered after the bill is passed, they will cease to be charities only if they decide not to continue as charities, when they can apply for removal from
the Scottish charity register under section 18, or if it appears to OSCR, following inquiries, that they no longer meet the charity test, when they will be removed from the register. Amendment 16 is intended to make it clear that section 97 does not make charities’ status unassailable and that OSCR can remove them in the same way as it will be able to remove new charities from the register.

The first half of amendment 17 mirrors amendment 16, but the second part attempts to include text from stage 2 amendment 93. The amendment would require OSCR to inform an existing charity that it believed that the charity did not meet the charity test and to listen to the charity’s response before using its power in section 30 to remove the charity from the register.

I understand and agree with the intention of amendment 17, but it is unnecessary, as section 30 provides OSCR with an alternative power to direct a charity to take such steps as it considers necessary to ensure that the charity meets the test. Therefore, OSCR can issue a charity with such a direction before deciding whether it needs to remove the charity from the register.

In practice, if a straightforward way exists to ensure that a charity can continue to meet the charity test, OSCR is unlikely to remove it from the register without giving it a chance to remedy the problems and time to respond. That is particularly the case since amendment 20 provides that in performing its regulatory functions, OSCR must be proportionate.

OSCR is also required to prepare a report on the subject matter of inquiries that result in the removal of a charity from the register. Any decision by OSCR to remove a charity from the register can, of course, be reviewed or appealed if the charity disagrees with OSCR’s decision. Removal from the register does not occur until the time that is set out under the appeal mechanism has passed. If a review or appeal is requested, it must run its course before the charity is removed. That gives a charity time to consider OSCR’s decision and to respond to or remedy the problems that have been identified. Therefore, I ask Donald Gorrie not to move amendment 17.

I move amendment 16.

The Deputy Presiding Officer: I call Donald Gorrie to speak to amendments 17 and 16 very briefly.

Donald Gorrie: Amendment 17’s purpose is to give a second kick at the ball to existing charities that might not satisfy OSCR’s new rules. The amendment would give them a second chance. The minister gave a satisfactory explanation of the various consultation procedures that OSCR will follow with organisations if they are in danger of not qualifying. In the light of that, I am happy not to move amendment 17.
Amendment 45 agreed to.

Amendment 63 not moved.

Schedule 2
SCOTTISH CHARITY APPEALS PANEL

Amendment 19 moved—[Malcolm Chisholm]—
and agreed to.

The result of the division is: For 65, Against 30, Abstentions 17.

Amendment 45 agreed to.
Charities and Trustee Investment (Scotland) Bill

The Deputy Presiding Officer (Trish Godman): The next item of business is a debate on motion S2M-2773, in the name of Malcolm Chisholm, that the Charities and Trustee Investment (Scotland) Bill be passed.

17:07

The Minister for Communities (Malcolm Chisholm): The Charities and Trustee Investment (Scotland) Bill aims to provide a regulatory framework—with an independent regulator—that is clear and proportionate, that allows charities in Scotland to flourish and which gives the public confidence in the charity brand following previous instances of misconduct that have served to undermine public confidence in donating. The bill, which the charity sector has called for for a long time and to which we gave a commitment in our partnership agreement, is good for the charity sector and for Scotland. We all want an environment in which charitable activity can flourish.

The bill is the result of extensive consultation, which the Communities Committee recognised and commended. I would like to record in the Official Report the Executive’s thanks to all those who took part in the consultation and to those who have contributed to the bill’s development. I also thank the Communities Committee and its staff for their hard work and their careful scrutiny of the bill. Last, but by no means least, I thank the Executive bill team and Johann Lamont, who did a lot of work at stage 2, as well as before and after it. The bill is now much stronger as a direct result of so many people having taken the time and opportunity to engage constructively in its development. I look forward to that engagement continuing as we move towards implementation of the act and development of the secondary legislation.

Dr Sylvia Jackson (Stirling) (Lab): I am sorry that I did not have the opportunity earlier to make the point that I am about to make. As the minister knows, the Subordinate Legislation Committee raised a number of issues, most of which have been addressed by the Executive. However, the committee is still concerned about section 82(5) of the bill which, as the minister knows, is on fundraising regulations and the power to create offences. The committee’s view is that the power to create criminal offences should be in the bill and not left to regulations, and that the bill, as drafted, does not constitute good legislative practice. I would be grateful if the minister would spell out why it was decided not to amend the bill in that regard.

Malcolm Chisholm: In our response to the Subordinate Legislation Committee’s stage 1 report, we confirmed that the power in section 82 would not specifically create a criminal offence. The regulations may provide for an offence, but that can only be provided for in accordance with section 82(5) through the sanction of a fine not exceeding level 5 on the standard scale. That was considered to be appropriate because we might need flexibility to deal with evolving fundraising methods in the future. It will allow the regulations to make different provision for different circumstances. Any regulations will be consulted on and will come before the Subordinate Legislation Committee. Once again, we have seen the strength of the Scottish Parliament’s committee system, in that the Subordinate Legislation Committee was able to debate and grapple with important matters that were central to the objectives of the bill.

There was robust debate on the public benefit test, but there was little disagreement with the bill’s central keystone, which is that every charity should be required to show that it provides benefit and that decisions on conferring charitable status should be taken case by case by an independent regulator.

During the parliamentary process, the Executive listened to the concerns of the Communities Committee and others about the list of charitable purposes. I believe that we now have the right list; it encapsulates the key purposes that the public think should be charitable purposes and is flexible enough to allow the test to evolve and grow.

The bill and the charity test provide a robust regulatory regime that will give the public confidence in the charity brand.

Patrick Harvie (Glasgow) (Green): Will the minister give way?

Malcolm Chisholm: I will do so in a moment.

The bill lays out clear rules about what constitutes a charity and gives the Office of the Scottish Charity Regulator the proper powers to deal with wrongdoing. The fundraising provisions provide further reassurance that people who donate to charity can have confidence in how their donations are used. They make provision for greater regulation and increased transparency in how the money from fundraising is raised.

Patrick Harvie: I endorse strongly much of what the minister has said, but concerns still remain among charities that have complex governance structures. Will the minister reassure such charities on how those structures are defined in the bill?

Malcolm Chisholm: Let me first say that, because I was looking round at the time, the last
word that I said before I took the intervention should have been "used" rather than "raised".

On Patrick Harvie's question, we believe that section 103 will provide a flexible definition that describes charity trustees broadly rather than narrowly, and in a way that is not prejudicial to charities that have complex governance structures. We believe that that addresses the difficulties that have been suggested by charities, such as the National Trust for Scotland, which have constitutions that set out unusual governance arrangements. It is right that the constitution of a charity should determine who is in general control and management of the administration of that charity.

I had better move to my conclusion so that other members can speak in this short debate. Much work remains to be done; we need to appoint the members of OSCR, set up the appeals panel and develop the various regulations that will provide the practical detail. I look forward to continuing positive and practical discussions on those issues throughout the process.

I am delighted to commend the bill to Parliament and ask members to give it their full support.

I move,

That the Parliament agrees that the Charities and Trustee Investment (Scotland) Bill be passed.

The Deputy Presiding Officer: I call Christine Grahame and I ask her to be as quick as possible.

17:12

Christine Grahame (South of Scotland) (SNP): I feel as if I should stand up and then sit down if I am to be as quick as possible.

The vast majority of volunteers in the charitable sector are excellent, dedicated and honest people. They work in a vast and varied sector, which ranges from wee shops that sell second-hand toys and furniture in order to help ill-treated animals—there is one such shop opposite my office in Galashiels—to mega-charities such as Oxfam. However, when a few bad apples contaminated the barrel, the repercussions on donations and on people's attitude towards the sector were ill-deserved. The bill will remedy that situation by providing a framework and an independent office—OSCR—whose role, which should not be underestimated, will be to regulate and assist the charitable sector.

I believe that the Communities Committee strengthened the bill. We had the usual healthy tensions that should exist between a committee and a minister, such as the skirmish over a humble little amendment of mine, which I never expected to win. The distraction concerning the independent schools sector skewed things, because the bill is vast and comprehensive and deals with much more that independent schools, including many things that are much needed in Scotland. The SNP will support the bill.

17:13

Mary Scanlon (Highlands and Islands) (Con): I, too, thank the clerks and—in this instance—the bill team. I also thank my committee colleagues who, except on one issue, all left their political hats at the door so that they could focus on passing decent charities legislation. I must also express my admiration—I am being very sycophantic today—for the way in which the ministers responded in a measured and considered manner to all but one of the amendments.

At stage 1, the Scottish Conservatives welcomed the bill's general principles of reviewing and updating charity law. We commend the work of the voluntary and charitable sector, which provides services in a way that the state could not. We wish to encourage people to give to charities in the knowledge that the moneys that are received will be used for the purposes for which they were intended. We also welcome the full role of OSCR in regulating and investigating charities.

However, I must express one concern, which is relevant to most bills that we pass in Parliament. My concern is that so much of the spirit of understanding and of the practicalities of implementation and interpretation are written in guidance that is published at a later date, which may be months or more after the bill is passed. We often sign up to amendments and to legislation in good faith and are blissfully unaware of the regulations that will follow. When awkward questions were asked about the bill, the replies were often that the issue would be covered in guidance or that it would be up to OSCR to decide.

Unfortunately, the inclusion of the amendment on OSCR's powers to determine public benefit in relation to a charge or a fee is the one aspect that we find, regrettable, to be unacceptable. Therefore, with regret, the Conservatives cannot fully support the bill because of that amendment. We cannot vote against the bill because of the support that I have given it throughout stages 1 and 2 and pre-legislative scrutiny, and because of the support that we have given to the general principles and the main content. We will therefore, with regret, abstain in the vote on the bill.

17:16

Donald Gorrie (Central Scotland) (LD): As other members have said, there is a long history behind the bill—I took part in a committee that discussed the issue more than 30 years ago. We
must pay tribute to Jean McFadden and her committee and to Jackie Baillie who, as a minister in the early days of Parliament, got the vehicle going.

This is a great day for Scottish charities as we pass this important bill. Consideration of the bill at stages 1 and 2 showed us working effectively; there was good consultation of all sorts of people in different parts of the country and many witnesses came before the committee.

Amendments were discussed thoroughly at stage 2. There were some good moments, such as when it was agreed that, in respect of amendments on payment of trustees, no members would press their amendments because we were coming from a variety of directions. The compromise that the minister has put forward today is very suitable.

The one sour note that I will sound is that we must reconsider timetables for bills’ later stages. First, the discussion and negotiations about amendments prior to the stage 3 debate must be done better. It is not satisfactory to receive several pages of amendments on the closing date because that means that we cannot discuss them and negotiate. Secondly, some parts of the debate this afternoon have been ridiculously curtailed; more members should have been enabled to speak. We must consider that matter.

However, that does not detract from the importance of the bill and the great consensus behind it. On most issues, we have achieved a reasonable set of rules to put forward to OSCR. The members of OSCR must be elected and the organisation must take off thoroughly—it has started quite well. It is up to OSCR to interpret this reasonable bill in a reasonable manner so that an engine can be put into Scottish charities, which are such an important part of our life.

17:18

Tricia Marwick (Mid Scotland and Fife) (SNP):
It is a great pleasure to speak in the debate. My interest in charities legislation and the need for it predates my election to Parliament in 1999. I know that many other members have also striven over the years to keep the subject on the agenda.

The bill is essential in order that we can restore public confidence in charities and the people who operate them. The generous people of Scotland have the right to expect that their hard-earned money is spent wisely and not misused, and that the people who operate charities are fit to carry out such duties. The bill will achieve all those things. It is long overdue, very welcome and will go a long way towards restoring public confidence in Scottish charities.

This Scottish Parliament has done Scotland proud with the bill. I plead with the Conservatives to set aside their narrow interests, to embrace the legislation as a good thing and to allow the Scottish Parliament to give unanimous support for charities in Scotland.

17:19

Karen Whitefield (Airdrie and Shotts) (Lab):
The bill will help to establish a framework that will provide greater clarity for Scottish charities and greater reassurance for members of the public who donate to them. The bill has been shaped by the views and experiences of the charitable and voluntary sector in Scotland. Even the independent schools, which may not be happy with the final shape of the bill, must concede that their views were listened to and taken into account during scrutiny.

The establishment of OSCR as a statutory body corporate with responsibility for delivering the key elements of the bill is a sensible way forward. Using the two-part test, OSCR will have sufficient flexibility to take a reasonable approach to determination of charitable status, which is to be welcomed. That is why today Mary Scanlon was so wrong to argue that there should be an exemption for independent schools. If she truly cared about the charitable sector in Scotland, she would have argued that it needs to be protected. Why did she not argue that the Red Cross, which provides health care services in Scotland, and the YMCA, which delivers education, should get the same exemptions as the independent schools and hospitals that she was so keen to protect?

As the convener of the Communities Committee, I would like to thank a number of people who have been invaluable in the process of scrutinising the bill. I start by thanking my colleagues on the committee, who worked through difficult issues tirelessly while also working on stage 1 of the Housing (Scotland) Bill. I thank the committee clerks for their constant support and advice during stages 1 and 2. I thank all those who gave oral and written evidence to the committee and thereby helped to broaden members’ knowledge. I thank the staff of the Scottish Parliament information centre for the informative briefings that they provided to committee members.

Last and by no means least, I thank the Scottish Council for Voluntary Organisations for its determination to ensure that the bill came before Parliament and, more recently, for its assistance in facilitating pre-legislative visits. I am sure that I speak for all members of the Communities Committee when I say that those visits and the evidence that we heard in their course proved to be invaluable during our later deliberations.
I will welcome the passing of the Charities and Trustee Investment (Scotland) Bill today. It is yet another building block in Parliament’s efforts to nurture and strengthen voluntary and charitable activity in Scotland. We all know the benefits of that activity, both to individuals and to the wider community. I am pleased to support the bill.

17:22

**Linda Fabiani (Central Scotland) (SNP):** I, too, welcome the principles of the bill. I am disappointed about the provisions relating to misconduct, because I think that we are storing up problems for the future. I cannot understand why we cannot continue to refer to “mismanagement” and “gross mismanagement”, rather than to “misconduct” as a collective term. However, that is how the process works—we made our arguments and we were beaten on the issue.

The bigger picture—the bill as a whole—is much more important, which is why I am disappointed that Scotland’s charities bill will not be agreed to unanimously. It is pretty shameful that poor Mary Scanlon has been left by herself to face the embarrassment of what the Conservative party is doing today. I guess that’s life.

I give a broad welcome to the bill and hope—I am sure that it will—that it will work for the charitable sector in Scotland. Monitoring by OSCR, the Executive and Parliament will be necessary and will ensure that the bill works for a long time, to the benefit of charities in Scotland in the future.

17:23

**The Deputy Minister for Communities (Johann Lamont):** I thank all those who have been involved in getting us to where we are today. In particular, I thank the convener of the Communities Committee, committee members and the clerks for their hard work and the rigour with which they developed proposals relating to the bill. I also thank all those who managed to cope with my moving from poacher to gamekeeper during the bill process. It has been a long journey.

Duncan McNeil, in one of his grumpy modes, said that he did not see why we should thank everyone at the end of the day, because people were only doing their jobs. I was tempted to say that when we express thanks shortly before passing a bill it can be a bit like the Oscars. However, it is relevant for me to point out that, despite the noise and thunder at stage 1 from the SSP regarding one issue in the bill, the SSP was the only party that lodged no amendments at either stage 2 or stage 3. We had the old politics of debate by resolution, when the challenge that the Parliament presents to all of us is the hard work of committees, of listening to interested groups and bodies, of working with one another within the committee structure and the chamber, and of recognising that there are diverse, wide-ranging and challenging interests across Scotland that deserve to be heard and to influence our legislation. I welcome the broad, deep and serious work that has been done by the vast majority of those who serve in the chamber. I am delighted to be part of the process today.

There was a lot of traffic and there were a lot of noises off in connection with the purpose of the bill. However, we know that legislation was important to the charitable sector; the sector itself asked for it. The bill is important for those who are active in the sector, for those who benefit from the sector, for those who wish to give of their time and money to the sector, and for the fundraising base of the organisations in the sector.

A flourishing charitable sector is important for the new way in which we do government, and I am genuinely disappointed that the Tories will not be able to support the bill as it stands. OSCR will be accountable to this Parliament. OSCR will be obliged to consult on its guidance and this Parliament has shown itself in the past to be very proactive—through its committee structure in particular—in pursuing issues with which it is uncomfortable. I therefore regret that the Tories will not support the bill.

Congratulations have been offered to many people, including Jean McFadden, on moving the debate forward. However, I hope that people will not take it amiss if I add congratulations to people such as Jackie Baillie—people who drove on the debate and encouraged others to take up the issue. In particular, I congratulate Margaret Curran who, when she was Minister for Communities, acted swiftly to deal with scandals over the financial mismanagement of charities. Those scandals were generating huge anxiety, which was beginning to erode people’s faith. At one point, we were perilously close to seeing real damage being inflicted on the sector. Margaret Curran, knowing how hard a challenge it would be for us all, moved quickly to commit the Executive to a bill. She is to be congratulated on doing that.

Although we knew that legislation was necessary, we also knew that it would not be easy, because of the nature of the sector. The very things that we love about the charitable sector are the very things that make it difficult to legislate on. It is eccentric and it is odd. I congratulate the bill team on its capacity to respond to the very strange, different and unexpected things that came up as the bill went through its stages. The bill team was able to understand the eccentricities and the strengths of the sector, and the team,
together with many in this chamber, was able to respond.

This is a good day for the charitable sector and a good day for the Parliament. We now have an objective and independent regulatory system that is in a position not to presume for or against anyone. The only thing that organisations have to do is to meet the public benefit and charity tests. The vast majority of organisations that are currently charities will be able to meet those tests. Regulation and management of the sector will be not for us, but for OSCR, which is an independent body. That will be a great strength, both for the sector and for Scotland.

I am very happy to add my thanks to all those who have been involved, and to encourage support for the bill at decision time.

The Presiding Officer (Mr George Reid): Decision time is fixed for 17:30, so I suspend the meeting until then.

17:28

Meeting suspended.
The Presiding Officer: The final question is, that motion S2M-2773, in the name of Malcolm Chisholm, that the Charities and Trustee Investment (Scotland) Bill be passed, be agreed to. Are we agreed?

Members: No.

The Presiding Officer: There will be a division.

FOR
Adam, Brian (Aberdeen North) (SNP)
Arbuckle, Mr Andrew (Mid Scotland and Fife) (LD)
Baillie, Jackie (Dumbarton) (Lab)
Baird, Shiona (North East Scotland) (Green)
Baker, Richard (North East Scotland) (Lab)
Ballance, Chris (South of Scotland) (Green)
Ballard, Mark (Lothians) (Green)
Barrie, Scott (Dunfermline West) (Lab)
Boyack, Sarah (Edinburgh Central) (Lab)
Brankin, Rhona (Midlothian) (Lab)
Brown, Robert (Glasgow) (LD)
Butler, Bill (Glasgow Anniesland) (Lab)
Byrne, Ms Rosemary (South of Scotland) (SSP)
Canavan, Dennis (Falkirk West) (Ind)
Chisholm, Malcolm (Edinburgh North and Leith) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Crawford, Bruce (Mid Scotland and Fife) (SNP)
Cunningham, Roseanna (Perth) (SNP)
Curran, Frances (West of Scotland) (SSP)
Curran, Ms Margaret (Glasgow Baillieston) (Lab)
Deacon, Susan (Edinburgh East and Musselburgh) (Lab)
Eadie, Helen (Dunfermline East) (Lab)
Ewing, Fergus (Inverness East, Nairn and Lochaber) (SNP)
Ewing, Mrs Margaret (Moray) (SNP)
Fabiani, Linda (Central Scotland) (SNP)
Ferguson, Patricia (Glasgow Maryhill) (Lab)
Finnie, Ross (West of Scotland) (LD)
Fox, Colin (Lothians) (SSP)
Glen, Marlyn (North East Scotland) (Lab)
Godman, Trish (West Renfrewshire) (Lab)
Goldie, Miss Annabel (West of Scotland) (Con)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harper, Robin (Lothians) (Green)
Harvie, Patrick (Glasgow) (Green)
Henry, Hugh (Paisley South) (Lab)
Home Robertson, John (East Lothian) (Lab)
Hughes, Janis (Glasgow Rutherglen) (Lab)
Hyslop, Fiona (Lothians) (SNP)
Jackson, Dr Sylvia (Stirling) (Lab)
ABSTENTIONS

Aitken, Bill (Glasgow) (Con)
Brocklebank, Mr Ted (Mid Scotland and Fife) (Con)
Davidson, Mr David (North East Scotland) (Con)
Douglas-Hamilton, Lord James (Lothians) (Con)
Fergusson, Alex (Galloway and Upper Nithsdale) (Con)
Fraser, Murdo (Mid Scotland and Fife) (Con)
Gallie, Phil (South of Scotland) (Con)
Johnstone, Alex (North East Scotland) (Con)
McGrigor, Mr Jamie (Highlands and Islands) (Con)
Mcletchie, David (Edinburgh Pentlands) (Con)
Milne, Mrs Nanette (North East Scotland) (Con)
Mitchell, Margaret (Central Scotland) (Con)
Scanlon, Mary (Highlands and Islands) (Con)
Scott, John (Ayr) (Con)
Tosh, Murray (West of Scotland) (Con)

The Presiding Officer: The result of the division is: For 98, Against 0, Abstentions 15.

Motion agreed to.

That the Parliament agrees that the Charities and Trustee Investment (Scotland) Bill be passed.
## Charities and Trustee Investment (Scotland) Bill

[AS PASSED]

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Part 1—Charities

Chapter 1—Office of the Scottish Charity Regulator

1 Office of the Scottish Charity Regulator

(1A) There is to be an office to be known as the Office of the Scottish Charity Regulator.

(1B) There is established a body corporate, to be known as the Scottish Charity Regulator, which is to be the holder of that office.

(1C) That office-holder is referred to in this Act as “OSCR”.

(1D) OSCR has the functions conferred on it by or under this Act and any other enactment.

(2) OSCR’s general functions are—

(a) to determine whether bodies are charities,

(b) to keep a public register of charities,

(c) to encourage, facilitate and monitor compliance by charities with the provisions of this Act,

(d) to identify and investigate apparent misconduct in the administration of charities and to take remedial or protective action in relation to such misconduct, and

(e) to give information or advice, or to make proposals, to the Scottish Ministers on matters relating to OSCR’s functions.

(3) OSCR may do anything (whether in Scotland or elsewhere) which is calculated to facilitate, or is conducive or incidental to, the performance of its functions.
(4) Subsection (3) does not enable OSCR to do anything in contravention of any express prohibition, restriction or limitation on its powers which is contained in any enactment (including this Act).

(5) OSCR must perform its functions in a manner that encourages equal opportunities and in particular the observance of the equal opportunity requirements.

(5A) In performing its functions OSCR must, so far as relevant, have regard to—
  (a) the principles under which regulatory activities should be proportionate, accountable, consistent, transparent and targeted only at cases in which action is needed, and
  (b) any other principle appearing to OSCR to represent best regulatory practice.

(6) Schedule 1 makes further provision about the Scottish Charity Regulator.

2 Annual reports

(1) As soon as practicable after the end of each financial year, OSCR must—
  (a) prepare and publish a general report on the exercise of its functions during that year,
  (b) send a copy of the report to the Scottish Ministers, and
  (c) lay a copy of the report before the Scottish Parliament.

(2) A general report may include, in particular, any general recommendations which OSCR may have arising from the exercise of its functions during that year and any previous financial year.

(3) It is for OSCR to determine the form and content of a general report and by what means it is to be published.

CHAPTER 2

SCOTTISH CHARITY REGISTER

The Register

3 Scottish Charity Register

(1) OSCR must keep a register of charities to be known as the “Scottish Charity Register” (and referred to in this Act as “the Register”).

(2) The Register is to be kept in such manner as OSCR thinks fit.

(3) The Register must contain a separate entry for each charity entered in it setting out—
  (a) the name of the charity,
  (b) the principal office of the charity or, where it does not have such an office, the name and address of one of its charity trustees,
  (c) the purposes of the charity,
  (d) where the charity is a designated religious charity or a designated national collector, that fact,
  (e) where—
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(i) a direction is given under section 11(3), 12(2) or (3), 16(6), 28(2), 30(1) or 31(5) to (9), or

(ii) a notice is given under section 31(4),

in relation to the charity, the fact that the direction or notice has been given and the date on which it was given,

(f) any other information in relation to the charity which the Scottish Ministers by regulations require to be set out in the Register, and

(g) any other information in relation to the charity which OSCR considers appropriate.

(4) OSCR must, despite subsection (3)(b), exclude the information specified in that provision from a charity’s entry in the Register if, on the application of the charity (whether together with its application for entry in the Register or separately), OSCR is satisfied that including that information is likely to jeopardise the safety or security of any person or premises.

(5) OSCR must, if it is satisfied that a direction or notice of a type described in subsection (3)(e) has been complied with or no longer has effect, remove reference to the direction or notice from the charity’s entry.

(6) OSCR must—

(a) from time to time, review each entry in the Register, and

(b) if it considers any information set out in a charity’s entry to be inaccurate—

(i) amend the entry accordingly, and

(ii) notify the charity of the amendment made.

Applications

4 Application for entry in Register

An application for entry in the Register must—

(a) state the name of the body making the application (the “applicant”),

(b) state the principal office of the applicant or, where it does not have such an office, the name and address of one of the persons who, if the applicant is entered in the Register, will be its charity trustees,

(c) be accompanied by—

(i) a statement of the applicant’s purposes,

(ii) a copy of the applicant’s constitution, and

(iii) the applicant’s most recent statement of account (if any), and

(d) contain such other information, and be accompanied by such other documents, as may be—

(i) required by regulations under section 6(1), or

(ii) otherwise requested by OSCR.
5 Determination of applications

(1) OSCR may enter an applicant in the Register only if it considers that the applicant meets the charity test.

(2) OSCR must refuse to enter an applicant if—

(a) it considers that the applicant’s name falls within section 10, or

(b) the application must, by virtue of regulations under section 6(1), be refused, but must not otherwise refuse to enter an applicant which it considers meets the charity test.

6 Applications: further procedure

(1) The Scottish Ministers may by regulations make such further provision in relation to the procedure for applying and determining applications for entry in the Register (including applications under section 54(1), 56(1) and 58(1)) as they think fit.

(2) Such regulations may in particular make provision about—

(a) information and documents which must be specified in or accompany an application,

(b) the form and manner in which applications must be made,

(c) the period within which OSCR must make a decision on an application, and

(d) circumstances in which OSCR must refuse to enter a body in the Register.

The charity test

7 The charity test

(1) A body meets the charity test if—

(a) its purposes consist only of one or more of the charitable purposes, and

(b) it provides (or, in the case of an applicant, provides or intends to provide) public benefit in Scotland or elsewhere.

(2) The charitable purposes are—

(a) the prevention or relief of poverty,

(b) the advancement of education,

(c) the advancement of religion,

(d) the advancement of health,

(da) the saving of lives,

(e) the advancement of citizenship or community development,

(f) the advancement of the arts, heritage, culture or science,

(g) the advancement of public participation in sport,

(ga) the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended,
(h) the advancement of human rights, conflict resolution or reconciliation,
(ha) the promotion of religious or racial harmony,
(hb) the promotion of equality and diversity,
(i) the advancement of environmental protection or improvement,
(ia) the relief of those in need by reason of age, ill-health, disability, financial hardship or other disadvantage,
(l) the advancement of animal welfare,
(m) any other purpose that may reasonably be regarded as analogous to any of the preceding purposes.

(2A) In subsection (2)—

(a) in paragraph (d), “the advancement of health” includes the prevention or relief of sickness, disease or human suffering,

(aa) paragraph (e) includes—

(i) rural or urban regeneration, and
(ii) the promotion of civic responsibility, volunteering, the voluntary sector or the effectiveness or efficiency of charities,

(b) in paragraph (g), “sport” means sport which involves physical skill and exertion,

(c) paragraph (ga) applies only in relation to recreational facilities or activities which are—

(i) primarily intended for persons who have need of them by reason of their age, ill-health, disability, financial hardship or other disadvantage, or
(ii) available to members of the public at large or to male or female members of the public at large,

(d) paragraph (ia) includes relief given by the provision of accommodation or care,

(e) for the purposes of paragraph (m), the advancement of any philosophical belief (whether or not involving belief in a god) is analogous to the purpose set out in paragraph (c).

(3) A body which falls within paragraphs (a) and (b) of subsection (1) does not, despite that subsection, meet the charity test if—

(a) its constitution allows it to distribute or otherwise apply any of its property (on being wound up or at any other time) for a purpose which is not a charitable purpose,

(b) its constitution expressly permits the Scottish Ministers or a Minister of the Crown to direct or otherwise control its activities, or

(c) it is, or one of its purposes is to advance, a political party.

(4A) The Scottish Ministers may by order disapply either or both of paragraphs (a) and (b) of subsection (3) in relation to any body or type of body specified in the order.
8 Public benefit

(1) No particular purpose is, for the purposes of establishing whether the charity test has been met, to be presumed to be for the public benefit.

(2) In determining whether a body provides or intends to provide public benefit, regard must be had to—

(a) how any—

(i) benefit gained or likely to be gained by members of the body or any other persons (other than as members of the public), and

(ii) disbenefit incurred or likely to be incurred by the public,

in consequence of the body exercising its functions compares with the benefit gained or likely to be gained by the public in that consequence, and

(b) where benefit is, or is likely to be, provided to a section of the public only, whether any condition on obtaining that benefit (including any charge or fee) is unduly restrictive.

9 Guidance on charity test

OSCR must, after consulting representatives of the charitable sector and such other persons as it thinks fit, issue guidance on how it determines whether a body meets the charity test.

Charity names

10 Objectionable names

(1) A body’s name falls within this section if it is—

(a) the same as, or too like, the name of a charity,

(b) likely to mislead the public as to the true nature of the purposes of the body or of the activities which it carries on, or intends to carry on, in pursuit of those purposes,

(c) likely to give the impression that the body is connected in some way to the Scottish Administration, Her Majesty’s Government in the United Kingdom or any local authority, or with any other person, when it is not so connected, or

(d) offensive.

(2) The reference in subsection (1)(b) to a body’s purposes are—

(a) in the case of an applicant, the purposes set out in the statement accompanying its application,

(b) in the case of a charity, the purposes set out in its entry in the Register, and

(c) in the case of an SCIO proposed in an application under section 54(1), 56(1) or 58(1), the purposes set out in the SCIO’s proposed constitution accompanying the application.

11 Change of name

(1) A charity may change its name only with OSCR’s consent.
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Chapter 2—Scottish Charity Register

(2) A charity which proposes to change its name must, not less than 42 days before doing so, give notice to OSCR specifying its proposed new name.

(3) Unless OSCR, within 28 days of the date on which a notice is given under subsection (2), directs the charity not to change its name, OSCR is to be taken as having given its consent.

(4) OSCR may refuse to consent to a charity changing its name only where it considers that the proposed new name falls within section 10.

12 Power of OSCR to require charity to change name

(1) A charity may, if it considers that the name of another charity is too like its name, request OSCR to review the names.

(2) OSCR must, if satisfied following such a review that the names of two charities are too alike, direct either one or both of the charities to change its name.

(3) OSCR must, where at any other time it considers that a charity’s name falls within section 10, direct the charity to change its name.

(4) Section 11 applies in relation to a change of name in compliance with a direction under this section (and the charity directed must give notice of its proposed new name under subsection (2) of that section within such period as may be specified in the direction).

(5) OSCR must remove from the Register any charity which fails to comply with a direction under this section.

References to charitable status

13 References to charitable status

(1) A body entered in the Register may refer to itself as a “charity”, a “charitable body”, a “registered charity” or a “charity registered in Scotland”.

(2) If such a body is established under the law of Scotland, or is managed or controlled wholly or mainly in or from Scotland, it may also refer to itself as a “Scottish charity” or a “registered Scottish charity”.

(3) A body which refers to itself in any of the ways described in subsection (1) is to be treated as representing itself as a body entered in the Register.

(4) A body which refers to itself in any of the ways described in subsection (2) is to be treated as representing itself—

(a) as a body entered in the Register, and

(b) as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland.

14 Exception for certain bodies not in Register

A body which is not entered in the Register may, despite section 13, refer to itself as a “charity” without being treated as representing itself as a charity if, and only if—

(a) it is—

(i) established under the law of a country or territory other than Scotland,
(ii) entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(iii) managed or controlled wholly or mainly outwith Scotland,

(b) it does not—

(i) occupy any land or premises in Scotland, or

(ii) carry out activities in any office, shop or similar premises in Scotland, and

(c) in making that reference, it also refers to being established under the law of a country or territory other than Scotland.

15 References in documents

(1) The Scottish Ministers may by regulations require each body entered in the Register to state, in legible characters—

(a) that it is a charity,

(b) such other information as may be specified in the regulations,

on such documents issued or signed on behalf of the charity as may be so specified.

(2) Such regulations may—

(a) exempt charities, or charities of a particular type, from any of the requirements imposed by the regulations,

(b) provide that any statement required by them may, in the case of documents which are otherwise wholly or mainly in a language other than English, be made in that other language.

Changes

16 Changes which require OSCR’s consent

(1) A charity may take any action set out in subsection (2) only with OSCR’s consent and in accordance with any conditions attached to any such consent.

(2) Those actions are—

(a) amending its constitution so far as it relates to its purposes,

(b) amalgamating with another body,

(c) winding itself up or dissolving itself,

(d) applying to the court in relation to any action set out in paragraphs (a) to (c).

(3) Subsection (1) does not apply in relation to any action—

(a) in pursuance of an approved reorganisation scheme, or

(b) for which OSCR’s consent is required by virtue of any other enactment.

(4) Where a charity proposes to take any action set out in subsection (2) it must, not less than 42 days before the date on which the action is to be taken, give notice to OSCR of the proposal specifying that date.

(5) In the case of an action set out in subsection (2)(a), the charity must not proceed unless and until OSCR has given its consent.
(6) In any other case, unless OSCR, within 28 days of the date on which notice is given under subsection (4)—
   (a) refuses its consent, or
   (b) directs the charity not to take the action for a period of not more than 6 months specified in the direction,

OSCR is to be taken as having consented to it.

(7) A direction under subsection (6)(b)—
   (a) may be revoked at any time,
   (b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(8) Where OSCR gives such a direction it must, after making such inquiries as it thinks fit—
   (a) give its consent, whether or not subject to conditions, or
   (b) refuse its consent.

17 Notification of other changes

(1) A charity must give OSCR notice of—
   (a) any change in—
      (i) the principal office of the charity, or
      (ii) where it does not have such an office, the name or address of the charity trustee specified in the Register (or which would, but for section 3(4), be so specified),
   (b) any change in any other details set out in its entry in the Register,
   (c) any change to its constitution,
   (d) any action set out in section 16(2)(b) to (d) which the charity has taken,
   (e) any administration order or an order for winding up made by the court in respect of the charity,
   (f) the appointment of a receiver in respect of any of the charity’s property, setting out the date on which the change, action, order or appointment took effect.

(2) Subsection (1) does not apply in relation to any action which requires OSCR’s consent under section 16.

(3) A notice under any of paragraphs (a) to (d) of subsection (1) must be given within 3 months of the date of the change or action to which it relates.

(4) A notice under paragraph (e) or (f) of subsection (1) must be given within 1 month of the date of the order or appointment to which it relates.
Removal from Register

18 **Removal from Register**

OSCR must, within 28 days of the date on which it receives an application from a charity for removal from the Register—

(a) remove the charity from the Register, and

(b) give it notice of the date on which it is removed.

19 **Removal from Register: protection of assets**

(1) A body removed from the Register (under section 18 or otherwise) continues to be under a duty to apply—

(a) any property previously acquired, or any property representing property previously acquired,

(b) any property representing income which has previously accrued, and

(c) the income from any such property,

in accordance with its purposes as set out in its entry in the Register immediately before its removal.

(2) Despite the removal of a body from the Register, the provisions of this Part set out in subsection (3) continue to apply to the body, but only so far as they relate to property and income referred to in subsection (1).

(3) Those provisions are—

(a) in Chapter 4—

   sections 28 and 29,

   section 31(1) to (3) and (5) to (9),

   section 32,

   section 33(2) to (4),

   section 34(1) to (3), (4)(a) to (c) and (f) to (h), (6) and (9)(b), and

   section 37, and

(b) in Chapter 6, sections 45 and 46.

(4) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any property or income which a body removed from the Register is required to apply in accordance with subsection (1).

(5) The court may approve such a scheme only if it is satisfied—

(a) that it is necessary or desirable to act for the purpose of protecting the property or income to which the scheme relates or securing a proper application of such property or income for the purposes which were set out in the body’s entry in the Register immediately before its removal, and

(b) that those purposes would be better achieved by transferring the property and income to a charity.
(6) The court may approve a scheme under subsection (5) subject to modifications.

(7) A charity receiving property or income in pursuance of a scheme approved under subsection (5) may apply that property or income for its purposes as it thinks fit.

(8) The Scottish Ministers may by order disapply subsections (1) to (7) in relation to any property specified in the order.

(9) An order under subsection (8) may make provision in relation to particular items or types of property or in relation to property owned by particular persons.

(10) It is not competent for such order to make provision in relation to property which is not owned by a charity on the day the order takes effect.

CHAPTER 3
CO-OPERATION AND INFORMATION

Co-operation

(1) OSCR must, so far as consistent with the proper exercise of its functions, seek to secure co-operation between it and other relevant regulators.

(2) A “relevant regulator” is a public body or office-holder with functions (whether exercisable in the United Kingdom or elsewhere) which are—
   (a) similar to those of OSCR, or
   (b) conferred by any enactment and designed to allow the body or office-holder to regulate persons for other purposes.

(3) OSCR and any person authorised by virtue of section 38(1) or (2) to exercise functions under this Act must, so far as consistent with the proper exercise of their respective functions, co-operate with each other for the purpose of enabling or assisting the person to exercise those functions under this Act.

(4) Co-operation does not include the sharing of information which OSCR or any person with whom it is co-operating is prevented by law from disclosing.

Information about charities

Public access to Register

(1) OSCR must make the Register available for public inspection—
   (a) at all reasonable times at its principal office,
   (b) at such other places as it thinks fit, and
   (c) otherwise as it thinks fit.

(2) It is for OSCR to determine the form and manner in which the Register is made available; but in doing so OSCR must ensure that the information in the Register is made reasonably obtainable.

(3) OSCR must publicise the arrangements which it makes in pursuance of subsection (1).

(4) OSCR may charge such fee (not exceeding the cost of supply) as it thinks fit for providing information under any arrangements it makes under subsection (1)(b) and (c).
22 **Power of OSCR to obtain information from charities**

(1) OSCR may by notice require any charity to provide to it—

(a) any document, or a copy of or extract from any document,

(b) documents of any type, or copies of or extracts from such documents,

(c) other information or explanation,

which OSCR requires in relation to the charity’s entry in the Register.

(2) The notice must specify—

(a) the documents, type of documents, copies, extracts, information or explanation which the charity is to provide to OSCR, and

(b) the date (which must be at least 14 days after the date on which the notice is given) by which the charity must do so.

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a charity would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

23 **Entitlement to information about charities**

(1) A person who requests a charity to provide a copy of its—

(a) constitution,

(b) latest statement of account prepared under section 45,

is, if the request is reasonable, entitled to be given that copy constitution or copy statement of account (if any) by the charity in such form as the person may reasonably request.

(2) A charity may charge such fee as it thinks fit for complying with such a request; but such a fee must not exceed the cost of supplying the document requested or, if less, any maximum fee which the Scottish Ministers may by order prescribe.

(3) The Scottish Ministers may by order exempt from the duty set out in subsection (1) any charities which meet such criteria as may be specified in the order.

**Sharing information**

24 **Disclosure of information by and to OSCR**

(1) OSCR may disclose any information to any public body or office-holder (in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom)—

(a) for any purpose connected with the exercise of OSCR’s functions, or

(b) for the purpose of enabling or assisting the public body or office-holder to exercise any functions.

(2) Any person to whom this subsection applies may disclose any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions.

(3) Subsection (2) applies to—
(a) any office-holder in the Scottish Administration,
(b) the Scottish Parliamentary Corporate Body,
(c) any local authority,
(d) any constable, and
(e) any other Scottish public authority with mixed functions or no reserved functions.

(4) A power to disclose information under subsection (1) or (2) is, unless section 25 otherwise provides, subject to any obligation as to secrecy or other restriction on disclosure of the information however imposed.

25 Removal of restrictions on disclosure of certain information

(2) No obligation as to secrecy or other restriction on disclosure of information however imposed prevents—

(a) OSCR from disclosing any information to a designated body for—

(i) any purpose connected with the exercise of OSCR’s functions,
(ii) the purpose of enabling or assisting that body to exercise any functions,

(b) a designated body from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(c) a charity trustee of a charity from disclosing any information about that charity to OSCR for the purpose of enabling or assisting OSCR to exercise any functions,

(da) any person from disclosing any information to OSCR about any matter in respect of which the person is required or authorised by section 46A to make a report to OSCR, or

(e) a relevant financial institution from disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions under section 47.

(3) The Scottish Ministers may, by order, designate—

(a) for the purposes of paragraph (a) of subsection (2), any public body or office-holder in Scotland, in any other part of the United Kingdom or in a country or territory outside the United Kingdom,

(b) for the purposes of paragraph (b) of that subsection, any Scottish public authority with mixed functions or no reserved functions,

and references in that subsection to a “designated body” are to be construed accordingly.

Supplemental

26 False or misleading information etc.

(1) It is an offence for a person to provide any information or explanation to OSCR or any other person if—

(a) the person providing the information or explanation knows it to be, or is reckless as to whether it is, false or misleading in a material respect, and

(b) the information or explanation is provided—

(i) in purported compliance with a requirement by or under this Act, or
(ii) in other circumstances in which the person providing it knows, or could reasonably be expected to know, that it would be used by OSCR, or provided to OSCR for use, in connection with the exercise of its functions.

(2) It is an offence for a person deliberately to alter, suppress, conceal or destroy any document (or any part of a document) which the person is, or which that person knows any other person is, required by or under this Act to provide to OSCR.

(3) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

27 Disclosure of information: entitlement under other enactments etc.

Sections 21 to 25 are without prejudice to any entitlement to receive or disclose information under any enactment or otherwise.

CHAPTER 4
SUPERVISION OF CHARITIES ETC.

Inquiries

28 Inquiries about charities etc.

(1) OSCR may at any time make inquiries, either generally or for particular purposes, with regard to—

(a) a charity,

(b) a body controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not entered in the Register which appears to OSCR to represent itself as a charity (or which would, but for section 14, so appear),

(d) a person not falling within paragraph (a) to (c) who appears to OSCR to act, or to represent itself as acting, for or on behalf of—

(i) a charity, or

(ii) a body falling within paragraph (b) or (c),

(e) a person who appears to OSCR to represent a body which is not entered in the Register as a charity,

(f) any particular type of charity, of body falling within paragraph (b) or (c), or of person falling within paragraph (d) or (e).

(1A) OSCR may make inquiries under subsection (1) of its own accord or on the representation of any person.

(2) OSCR may direct any charity, body or person with regard to which it is making inquiries under subsection (1) not to undertake activities specified in the direction for such period of not more than 6 months as is specified in the direction.

(3) A direction under subsection (2) given to a person falling within paragraph (d) or (e) of subsection (1) may be given only in relation to activities which that person undertakes for or on behalf of the charity or body to which the inquiries relate.

(4) A direction under subsection (2)—
(a) may be revoked at any time,
(b) may be varied, but not so as to have effect for a period of more than 6 months from the date on which it is given.

(5) A person who, without reasonable excuse, refuses or fails to comply with a direction under subsection (2) is guilty of an offence.

(6) A person guilty of an offence under subsection (5) is liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.

29 **Power of OSCR to obtain information for inquiries**

(1) OSCR may by notice require any person to provide to it—

(a) any document, or a copy of or extract from any document,
(b) documents of any type, or copies of or extracts from such documents,
(c) any information or explanation,

which OSCR considers necessary for the purposes of inquiries under section 28.

(2) The notice must specify—

(a) the documents, type of documents, copies, extracts, information or explanation which the person is to provide to OSCR,
(b) the date (which must be at least 14 days after the date on which the notice is given) by which the person must do so, and
(c) the effect of subsection (6).

(3) Subsection (1) does not authorise OSCR to require the disclosure of anything which a person would be entitled to refuse to disclose on grounds of confidentiality in proceedings in the Court of Session.

(4) OSCR must not disclose any document, information or explanation provided in response to a requirement under subsection (1) except for the purposes of the inquiries in connection with which the requirement was made.

(5) OSCR may pay to any person a sum in respect of expenses reasonably incurred by the person in complying with a requirement under subsection (1).

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement under subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding level 4 on the standard scale or imprisonment for a period not exceeding 3 months, or to both.

30 **Removal from Register of charity which no longer meets charity test**

(1) Where it appears to OSCR, as a result of inquiries under section 28, that a charity no longer meets the charity test it must—

(a) direct the charity to take, within such period as may be specified in the direction, such steps as OSCR considers necessary for the purposes of meeting the charity test, or

(b) remove the charity from the Register.
(2) Steps specified in a direction under subsection (1)(a) may include applying to OSCR for approval under section 40 of a reorganisation scheme in relation to the charity’s constitution.

(3) OSCR must, if a charity fails to comply with a direction under subsection (1)(a), remove the charity from the Register.

31 Powers of OSCR following inquiries

(1) Subsections (4), (6) and (7) apply where it appears to OSCR, as a result of inquiries under section 28—

(a) that there has been misconduct in the administration of—

(i) a charity, or

(ii) a body controlled by a charity, or

(b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes.

(2) Subsections (5) to (7) apply where it appears to OSCR, as a result of inquiries under section 28—

(a) that a body which is not a charity is being or has been represented as a charity, or

(b) that a charity which is not entitled to refer to itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland.

(3) Subsections (8) and (9) apply where it appears to OSCR, as a result of inquiries under section 28, that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(4) OSCR may, by notice, suspend any person concerned in the management or control of the charity or body who appears to it to—

(a) have been responsible for or privy to the misconduct,

(b) have contributed to, or facilitated, the misconduct, or

(c) be unable or unfit to perform that person’s functions in relation to the property of the charity or body.

(5) OSCR may direct—

(a) the body representing itself as a charity,

(b) the person representing the body as a charity,

(c) the charity representing itself as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, or, as the case may be

(d) the person representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland,

to stop doing so.
(6) OSCR may give a direction restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without OSCR’s consent.

(7) OSCR may direct any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without OSCR’s consent.

(8) OSCR may direct the person—
(a) to cease acting, or representing itself as acting, for or on behalf of the charity or body in any activity specified in the direction,
(b) to pay to the charity or body, within such period as the direction may specify, any sums which it has collected for the charity or body and which are held by it or by any relevant financial institution or other person on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body.

(9) OSCR may direct any relevant financial institution or other person holding property which OSCR considers to be, or to represent, sums collected for the charity or body not to part with the property without OSCR’s consent.

(10) OSCR’s power to suspend a person by giving notice under subsection (4)(a) or (b) does not apply if OSCR considers that the person has acted honestly and reasonably in relation to the misconduct concerned and ought fairly to be excused.

32 Suspensions and directions: procedure

(1) A suspension under subsection (4) and a direction under any of subsections (5) to (9) of section 31—
(a) has effect for such period of not more than 6 months as is specified in the suspension or direction,
(b) may be revoked at any time,
(c) may be varied, but not so as to have effect for a period of more than 6 months from the date on which the suspension or direction first has effect.

(2) Where such a suspension has been made or direction has been given, a further suspension or direction may be made or given under section 31 but the further suspension or direction ceases to have effect on the same date as the original suspension or direction (unless stated to cease to have effect earlier).

(3) A copy of the notice given under section 71 in respect of a—
(a) suspension under subsection (4) of section 31, or
(b) direction under subsection (5)(b) or (d) or (8) of that section, must be given to the charity or body in question.

(4) A copy of the notice given under section 71 in respect of a direction under subsection (7) or (9) of that section must be given to the person directed.

(5) A person who, without reasonable excuse—
(a) contravenes a suspension under subsection (4) of section 31, or
(b) refuses or fails to comply with a direction under any of subsections (5) to (9) of that section,

is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale or imprisonment for a period not exceeding 6 months, or to both.

33 Reports on inquiries

(1) OSCR must prepare a report of the subject matter of inquiries made under section 28 if—

(a) as a result of the inquiries it—

(i) gives a direction, or removes a charity from the Register, under section 30,

(ii) suspends a person under subsection (4) of section 31, or

(iii) gives a direction under any of subsections (5) to (9) of that section, or

(b) in any other case, it is requested to do so by the person in respect of whom the inquiries were made and it has not previously prepared a report of the subject matter of those inquiries under this subsection or subsection (2).

(2) OSCR may prepare a report of the subject matter of any other inquiries under section 28.

(2A) A report prepared under this section may relate to two or more inquiries.

(3) Apart from identifying the person in respect of whom inquiries were made, a report under this section must not—

(a) mention the name of any person, or

(b) contain any particulars which, in OSCR’s opinion—

(i) are likely to identify any person, and

(ii) can be omitted without impairing the effectiveness of the report,

unless OSCR considers it is necessary to do so.

(4) OSCR must—

(a) send a copy of a report prepared under subsection (1) to the person in respect of whom the inquiries were made, and

(b) publish a report prepared under this section or such other statement of the result of inquiries made under section 28 as OSCR thinks fit in such manner as OSCR thinks fit.

Powers of Court of Session

34 Powers of Court of Session

(1) Where, on an application by OSCR, it appears to the Court of Session—

(a) that there is or has been misconduct in the administration of—

(i) a charity, or

(ii) a body controlled by a charity (or by two or more charities, when taken together), or
(b) that it is necessary or desirable to act for the purpose of protecting the property of a charity or securing a proper application of such property for its purposes,

the court may exercise any of the powers set out in subsection (4)(a) and (c) to (g).

(2) Where, on an application by OSCR, it appears to the Court of Session that a body which is not a charity is or has been representing itself as a charity, the court may exercise any of the powers set out in subsection (4)(b) to (g).

(3) Where, on an application by OSCR, it appears to the Court of Session that a person is or has been representing a body which is not a charity as a charity, the court may exercise any of the powers set out in subsection (4)(f) to (h).

(3A) Where, on an application by OSCR, it appears to the Court of Session that a charity which is not entitled to refer to itself in either of the ways described in section 13(2) is being or has been represented as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland, the court may exercise any of the powers set out in subsections (4)(f), (g) and (ha).

(4) Those powers are power to—

(a) interdict (whether temporarily or permanently) the charity or body from such action as the court thinks fit,

(b) interdict (whether temporarily or permanently) the body from representing itself as a charity or from such other action as the court thinks fit,

(c) appoint a judicial factor (whether temporarily or permanently) to manage the affairs of the charity or body,

(d) where the charity or body is a trust, appoint a trustee,

(e) suspend or remove any person concerned in the management or control of the charity or body,

(f) order any relevant financial institution or other person holding property on behalf of the charity or body or of any person concerned in its management or control not to part with the property without the court’s consent,

(g) make an order restricting the transactions which may be entered into, or the nature or amount of the payments which may be made, in the administration of the charity or body without the court’s consent,

(h) interdict (whether temporarily or permanently) the person from representing the body as a charity or from such other action as the court thinks fit,

(ha) interdict (whether temporarily or permanently) the charity or, as the case may be, the person from representing the charity as being established under the law of Scotland or managed or controlled wholly or mainly in or from Scotland or from such other action as the court thinks fit.

(5) Where the court appoints a trustee in pursuance of subsection (4)(d), section 22 of the Trusts (Scotland) Act 1921 (c.58) applies as if the trustee had been appointed under that section.

(6) The power in subsection (4)(g) applies despite anything in the constitution of the charity or body.
(7) Subsection (8) applies where, on an application by OSCR, it appears to the Court of Session that there is or has been misconduct by a person falling within section 28(1)(d) in any activity which the person undertakes for or on behalf of the charity or body referred to in that provision.

(8) The court may—

(a) interdict (whether temporarily or permanently) the person from acting, or representing itself as acting, on behalf of the charity or body,

(b) order the person to pay to the charity or body any sums which it has collected for the charity or body and which are held by it, any relevant financial institution or other person holding money on its behalf, after deducting any sums payable to the person or any other person under an agreement with the charity or body,

(c) order any relevant financial institution or other person holding property which the court considers to be, or to represent, sums collected for the charity or body not to part with the property without the court’s consent.

(9) The court may—

(a) recall the suspension of a person in pursuance of subsection (4)(e),

(b) vary or recall an order in pursuance of subsection (4)(f) or (g) or under subsection (8)(b) or (c).

35 Transfer schemes

(1) The Court of Session may, on an application by OSCR, approve a scheme prepared by OSCR in accordance with regulations made by the Scottish Ministers for the transfer to a charity specified in the scheme of any assets of—

(a) another charity,

(b) a body which is controlled by a charity (or by two or more charities, when taken together),

(c) a body which is not a charity but which is or has been representing itself as a charity.

(2) The court may approve a scheme in relation to a charity only if it is satisfied—

(a) that there is or has been misconduct in the administration of the charity,

(b) that 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) that the charity’s purposes would be better achieved by transferring its assets to another charity.

(3) The court may approve a scheme in relation to a body falling with paragraph (b) of subsection (1) only if it is satisfied—

(a) that there is or has been misconduct in the administration of the body or any of the charities which control it,

(b) that it is necessary or desirable to act for the purpose of protecting the property of the body or any such charity, and

(c) that the transfer provided for by the scheme is reasonable.
The court may approve a scheme in relation to a body falling within paragraph (c) of subsection (1) only if it is satisfied—

(a) that the body falls within that paragraph, and

(b) that the transfer provided for by the scheme is reasonable.

The court may approve a scheme under this section subject to modifications.

A charity receiving property in pursuance of a scheme approved under this section may apply that property for its purposes as it thinks fit.

Powers in relation to English and Welsh charities

Subsection (2) applies where the Charity Commissioners for England and Wales inform OSCR that a relevant financial institution or other person in Scotland holds moveable property on behalf of a body—

(a) which is registered as a charity in England and Wales under section 3 of the Charities Act 1993 (c.10), or

(b) which, by virtue of section 3(5) of that Act, is not required to register as a charity under that section.

The Court of Session may, on an application by OSCR, make an order requiring the relevant financial institution or other person not to part with the property without the court’s consent.

An order under subsection (2) may be made subject to conditions and may be varied or recalled.

Where the court has made an order under subsection (2) and, on an application by OSCR, it is satisfied as to the matters set out in subsection (5) it may transfer the property to a charity specified in the application—

(a) which has purposes which are the same as or which resemble closely the purposes of the body whose property is transferred, and

(b) which has intimated that it is prepared to receive the property.

Those matters are—

(a) that there has been misconduct in the administration of the body, and

(b) that it is necessary or desirable to transfer the property for the purpose of protecting it or securing a proper application of it for the purposes of the body from which it is to be transferred.

Expenses

In proceedings before it under sections 34 to 36 in relation to a charity, the Court of Session may, instead of awarding expenses against the charity, award expenses against a charity trustee of the charity or against any two or more of its charity trustees jointly and severally.
### 38 Delegation of functions

(1) It is for the Scottish Ministers to exercise OSCR’s functions under sections 28 to 35 (other than section 30), and any of its general functions relating to those provisions, in so far as they are exercisable in relation to—

(a) charities which are registered social landlords,

(b) bodies controlled by any such charity (or by two or more such charities, when taken together), and

(c) persons acting for or on behalf of any such charity or body.

(2) OSCR may authorise any Scottish public authority with mixed functions or no reserved functions to exercise any of the functions referred to in subsection (1) in so far as they are exercisable in relation to—

(a) such charities or bodies, or types of charity or body, as OSCR may specify in the authorisation, and

(b) persons acting for or on behalf of those charities or bodies.

(3) Such an authorisation may be made only if the authorised person has other regulatory functions conferred on it by an enactment in relation to the charities or types of charity in respect of which the authorisation is made.

(4) OSCR must send a copy of such an authorisation to each charity to which it relates.

(5) OSCR must, before making such an authorisation, consult such persons (including the person it proposes to authorise) as it thinks fit.

(6) OSCR may, at any time, withdraw an authorisation under subsection (2) (and subsections (4) and (5) apply in relation to such a withdrawal as they apply in relation to an authorisation).

(7) Subsection (1) does not prevent OSCR from authorising, under subsection (2), the Scottish Ministers to exercise functions in relation to a person other than a registered social landlord.

(8) It is not competent for OSCR to exercise any of its functions which are, by virtue of subsection (1) or (2), delegated to another public body or office-holder (unless it considers it necessary or expedient to do so in relation to its functions under section 30).

(8A) Sections 24 to 26 apply in relation to a public body or office-holder to whom OSCR’s functions are delegated by virtue of subsection (1) or (2) as they apply to OSCR, but subject to the following modifications—

(a) references in those sections to OSCR and to OSCR’s functions are to be read as references to the public body or office-holder and to the functions delegated to it, and

(b) the reference in section 25(da) to section 46A is to be read as a reference to subsection (8B).

(8B) Where any of OSCR’s functions are delegated to another public body or office-holder by virtue of subsection (1) or (2), a person to whom section 46A applies—

(a) must report to the body or office-holder on any matter which the person would, but for that delegation, be required by section 46A(2) to report on to OSCR,
(b) may report to the body or office-holder on any matter which the person would, but for that delegation, be authorised by subsection 46A(3) to report on to OSCR.

(8C) A duty or power which arises under subsection (8B) is not affected if the person in relation to whom it arises subsequently stops acting in the capacity mentioned in section 46A(1).

(9) In this section “registered social landlord” means a body registered in the register maintained under section 57(1) of the Housing (Scotland) Act 2001 (asp 10).

CHAPTER 5

REORGANISATION OF CHARITIES

40 Reorganisation of charities: applications by charity

(1) OSCR may, on the application of a charity, approve a reorganisation scheme proposed by the charity if it considers—

(a) that any of the reorganisation conditions is satisfied in relation to the charity, and

(b) that the proposed reorganisation scheme will—

(i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or

(ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.

(2) The Scottish Ministers may by regulations make such provision as they think fit in relation to the procedure for applying for and determining applications under this section.

(3) Such regulations may in particular make provision about—

(a) the form and manner in which applications must be made,

(b) the period within which OSCR must make a decision on an application,

(c) publication of proposed reorganisation schemes,

and may make different provision in relation to different types of charity.

41 Reorganisation of charities: applications by OSCR

(1) Where OSCR considers—

(a) that any of the reorganisation conditions is satisfied in relation to a charity, and

(b) that a reorganisation scheme proposed by it or by the charity trustees of the charity will—

(i) where the condition satisfied is that set out in paragraph (a) or (b) of section 43(2), enable the resources of the charity to be applied to better effect for charitable purposes consistently with the spirit of its constitution, having regard to changes in social and economic conditions since it was constituted, or
(ii) where the condition satisfied is that set out in paragraph (c) of that section, enable the charity to be administered more effectively.

OSCR may, of its own accord or on the application of the charity trustees of the charity, apply to the Court of Session for approval of the scheme.

(2) The Court of Session may, on an application under subsection (1), approve the proposed reorganisation scheme if it considers that the matters set out in paragraphs (a) and (b) of that subsection are satisfied in relation to the charity to which the application relates.

(3) The charity trustees of a charity may enter appearance as a party in proceedings on an application under subsection (1) in relation to the charity.

(4) OSCR must, not less than 28 days before making an application under subsection (1), notify the charity in question of its intention to do so.

42 Approved schemes

A charity may, despite any provision of its constitution having contrary effect, proceed with any variation, transfer or amalgamation for which an approved reorganisation scheme makes provision.

43 Reorganisation: supplementary

(1) This section applies for the interpretation of Chapter 5.

(2) The “reorganisation conditions” are—

(a) that some or all of the purposes of the charity—

(i) have been fulfilled as far as possible or adequately provided for by other means,

(ii) can no longer be given effect to (whether or not in accordance with the directions or spirit of its constitution),

(iii) have ceased to be charitable purposes, or

(iv) have ceased in any other way to provide a suitable and effective method of using its property, having regard to the spirit of its constitution,

(b) that the purposes of the charity provide a use for only part of its property, and

(c) that a provision of the charity’s constitution (other than a provision setting out the charity’s purposes) can no longer be given effect to or is otherwise no longer desirable.

(3) A “reorganisation scheme” is a scheme for—

(a) variation of the constitution of the charity (whether or not in relation to its purposes),

(b) transfer of the property of the charity (after satisfaction of any liabilities) to another charity (whether or not involving a change to the purposes of the other charity), or

(c) amalgamation of the charity with another charity.

(4) Nothing in section 41 affects the power of the Court of Session to approve a cy près scheme in relation to a charity.
(5) Sections 40 and 41 do not apply to any charity constituted under a Royal charter or warrant or under any enactment.

(6) But, despite subsection (5), those sections do apply to an endowment if its governing body is a charity.

(7) In subsection (6), “endowment” and “governing body” have the same meaning as in Part 6 (reorganisation of endowments) of the Education (Scotland) Act 1980 (c.44).

44 Endowments

In section 122 (interpretation of Part 6) of the Education (Scotland) Act 1980 (c.44), after subsection (3) insert—

“(4) This Part, apart from section 104, does not apply in relation to any endowment the governing body of which is a charity within the meaning of section 103 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

CHAPTER 6
Charity accounts

45 Accounts

(1) A charity must—

(a) keep proper accounting records,

(b) prepare for each financial year of the charity a statement of account, including a report on its activities in the financial year,

(c) have the statement of account independently examined or audited, and

(d) after such examination or audit, send a copy of the statement of account to OSCR, in accordance with regulations under subsection (4).

(2) Accounting records kept in pursuance of subsection (1)(a) must be preserved by the charity for 6 years from the end of the financial year in which they are made.

(3) Subsection (2) is without prejudice to any other enactment or rule of law.

(4) The Scottish Ministers may by regulations make provision about the matters referred to in subsection (1) including—

(a) the meaning of “financial year”,

(b) the information to be contained in the accounting records and statement of account,

(c) the manner in which that information is to be presented,

(d) the keeping and preservation of the accounting records,

(e) the methods and principles according to which, and the time by which, the statement of account is to be prepared,

(f) the time by which the copy statement of account is to be sent to OSCR,

(g) examination or audit of the statement of account,
(h) such other matters in relation to the accounts of a charity as the Scottish Ministers think necessary or expedient.

(5) Regulations under subsection (4) may make different provision in relation to different types of charity, including provision exempting charities of a particular type from some or all of the requirements of this section.

46 Failure to provide statement of account

(1) This section applies where a charity fails, within such period as is specified in regulations under section 45(4), to send a copy of a statement of account to OSCR in pursuance of subsection (1)(d) of that section.

(2) OSCR may, after notifying the charity of its intention to do so, appoint a suitably qualified person (an “appointed person”) to prepare such a statement of account.

(3) An appointed person is entitled—

(a) on giving reasonable notice, to enter premises occupied by the charity at all reasonable times,

(b) to have access to, and take possession of, any document appearing to the appointed person to relate to the financial affairs of the charity, and

(c) to require any charity trustee, or agent or employee, of the charity to give the person such assistance, information or explanation as the appointed person may reasonably require.

(4) The charity trustees of the charity are personally liable jointly and severally for—

(a) any costs incurred by OSCR in relation to the appointment of the appointed person, and

(b) the expenses of the appointed person in performing that person’s functions under this section.

(5) The appointed person must—

(a) send to OSCR the statement of account prepared in pursuance of subsection (2),

(b) submit to OSCR a report on the affairs and accounting records of the charity, and

(c) send a copy of the statement of account and report to each person appearing to the appointed person to be a charity trustee of the charity.

(6) A person who, without reasonable excuse, refuses or fails to comply with a requirement of an appointed person under subsection (3) is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

Duty to report matters to OSCR

46A Duty of auditors etc. to report matters to OSCR

(1) This section applies to—

(a) any person appointed to carry out an independent examination or audit of a charity’s statement of account (including, in the case of a charity which is a company, any person appointed as auditor under Chapter 5 of Part 11 of the Companies Act 1985 (c.6)), and
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(b) any person appointed for the purposes of section 249A(2) of that Act to prepare a report on the accounts of a charity which is a company, who is acting in the appointed capacity.

(2) A person to whom this section applies who becomes aware of any matter—

(a) which relates to the activities or affairs of—

(i) the charity, or
(ii) any institution or body corporate connected to that charity, and
(b) which the person has reasonable cause to believe is likely to be of material significance for the purposes of the exercise by OSCR of its functions under section 28, 30 or 31,

must immediately report on the matter to OSCR.

(3) A person to whom this section applies who becomes aware of any matter—

(a) which does not appear to the person to be one which the person is required to report under subsection (2), but

(b) which the person has reasonable cause to believe is likely to be relevant for the purposes of the exercise by OSCR of any of its functions,

may report on the matter to OSCR.

(4) A duty or power which arises under subsection (2) or (3) is not affected if the person in relation to whom it arises subsequently stops acting in the capacity mentioned in subsection (1).

(5) An institution or body corporate is connected to a charity if—

(a) it is an institution which is controlled (whether directly or through one or more nominees) by, or, as the case may be

(b) it is a body corporate in which a substantial interest is held by,

the charity or any one or more of the charity trustees acting in that capacity.

(6) Section 102A sets out when a person is to be treated as controlling an institution or as having a substantial interest in a body corporate.

Dormant charity accounts

47 Dormant accounts of charities

(1) Subsection (3) applies where—

(a) a relevant financial institution (whether or not in response to a request from OSCR) informs OSCR that every account held by the institution in the name of or on behalf of a body appearing to the institution to be a relevant body is dormant,

(b) OSCR is satisfied that the body is a relevant body, and

(c) OSCR is unable, after making reasonable inquiries, to locate any person concerned in the management or control of the body.

(2) A relevant body is one which is, has at any time been or, in the case of a body which has ceased to exist, was prior to such cessation—
(a) a charity, or
(b) entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

(3) OSCR must transfer the amount standing to the credit of the relevant body in the dormant accounts (less any amount which it is authorised by regulations under section 48(1) to retain) to—

(a) such charity as OSCR may determine, having regard to the purposes of the relevant body and the purposes of the charity, or
(b) where OSCR is unable to ascertain the purposes of the relevant body, to such charity as OSCR considers appropriate.

(4) For the purposes of subsection (3), OSCR may effect any transaction in relation to the dormant accounts (including a transaction closing any such account).

(5) Where under subsection (3) OSCR transfers an amount to 2 or more charities, it may divide the amount among those charities as it thinks fit.

(6) A charity to which an amount is transferred under this section may apply the amount for its purposes as it thinks fit.

(7) The receipt by—

(a) OSCR of an amount withdrawn or transferred from an account by virtue of this section is a complete discharge of the relevant financial institution, or
(b) a charity of an amount received from OSCR by virtue of this section is a complete discharge of OSCR, in respect of the amount.

(8) OSCR’s power under subsection (3) ceases—

(a) if the relevant financial institution by which the accounts are held informs OSCR that the accounts (or any of them) are no longer dormant, or
(b) if OSCR becomes aware of the identity of a person concerned in the management or control of the relevant body and informs the relevant financial institution of that fact.

48 Dormant accounts of charities: procedure and interpretation

(1) The Scottish Ministers may, by regulations, make provision as to—

(a) the procedure to be followed by OSCR under section 47,
(b) the extent to which OSCR, in transferring an amount under subsection (3) of that section, may retain a sum in respect of its expenses in exercising its functions under that section.

(2) An account is dormant for the purposes of section 47 if no transaction other than—

(a) a payment into the account, or
(b) a transaction effected by the relevant financial institution holding the account, has been effected in relation to the account within the period of 5 years immediately preceding the dormancy date.
(3) An account is no longer dormant for the purposes of that section if a transaction other than—
   (a) a payment into the account,
   (b) a transaction effected by the relevant financial institution holding the account, or
   (c) a transaction effected by OSCR in pursuance of subsection (3) of that section, is effected after the dormancy date.

(4) The dormancy date is the date on which the institution informs OSCR as mentioned in section 47(1)(a).

CHAPTER 7
SCOTTISH CHARITABLE INCORPORATED ORGANISATIONS

Nature and constitution

49 Scottish charitable incorporated organisations

(1) A charity may be constituted as a Scottish charitable incorporated organisation (a “SCIO”).

(2) A SCIO is a body corporate having—
   (a) a constitution,
   (b) a principal office in Scotland,
   (c) 2 or more members.

(3) Its membership may, but need not, consist of or include some or all of its charity trustees.

(4) The members are not liable to contribute to the assets of the SCIO if it is wound up.

50 Constitution and powers

(1) A SCIO’s constitution must state its name and its purposes.

(2) A SCIO’s constitution must make provision—
   (a) about who is eligible for membership, and how a person becomes a member, and
   (b) for the appointment of 3 or more persons (“charity trustees”) who are to be charged with the general control of the SCIO’s administration, and about any conditions of eligibility for becoming a charity trustee.

(3) A SCIO’s constitution must also provide for such other matters, and comply with such requirements, as are specified in regulations made by the Scottish Ministers.

(4) A SCIO must use and apply its property in furtherance of its purposes and in accordance with its constitution.

(5) Subject to anything in its constitution, a SCIO has power to do anything which is calculated to further its purposes or is conducive or incidental to doing so.

(6) For the purposes of managing the affairs of a SCIO, its charity trustees may exercise all the SCIO’s powers.
51 General duty of members of SCIO
Subsections (1)(a), (3) and (4) of section 65 apply to the members of a SCIO who are not charity trustees as they apply to its charity trustees.

52 Name and status

(1) The name of a SCIO must appear in legible characters on—
   (a) such documents issued by or on behalf of the SCIO,
   (b) such documents signed by or on behalf of the SCIO,
   as may be specified in regulations made by the Scottish Ministers.

(2) Subsection (3) applies where the name of a SCIO does not include—
   (a) “Scottish charitable incorporated organisation”, or
   (b) “SCIO” (with or without a full stop after each letter),
   whether or not capital letters are used.

(3) Where this subsection applies, the fact that a SCIO is a SCIO must be stated in legible characters in all the documents referred to in subsection (1).

(4) Section 15 does not apply in relation to a SCIO.

53 Offences etc.

(1) A charity trustee of a SCIO or a person on the SCIO’s behalf who—
   (a) issues, or authorises the issue of, any document referred to in subsection (1)(a) of section 52, or
   (b) signs, or authorises the signature on behalf of the SCIO of, any document referred to in subsection (1)(b) of that section,
   which does not comply with subsections (1) and (3) of that section is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

(2) OSCR may direct—
   (a) any body which is not a SCIO and which is representing itself as being a SCIO,
   (b) any person who is representing that any such body is a SCIO,
   to stop doing so by such date as OSCR may direct.

(3) The Court of Session may, on an application by OSCR, interdict—
   (a) any body which is not a SCIO from representing itself as a SCIO,
   (b) a person who is representing that such a body is a SCIO from doing so.

(4) OSCR may not apply for such an interdict against a body or person unless the body or person has failed to comply with a direction under subsection (2).
Creation of SCIO and entry in Register

54 Application for creation of SCIO

(1) Any 2 or more individuals may apply to OSCR for a SCIO to be constituted and for its entry in the Register.

(2) The application must—
   (a) state the name of the SCIO,
   (b) state the proposed principal office of the SCIO,
   (c) be accompanied by a copy of the SCIO’s proposed constitution,
   (d) contain such other information, and be accompanied by such other documents, as may be—
      (i) required by regulations under section 6(1), or
      (ii) otherwise required by OSCR.

(3) OSCR may grant the application only if it considers that the SCIO, if constituted, would meet the charity test.

(4) OSCR must refuse the application if—
   (a) it considers that the SCIO’s proposed name falls within section 10,
   (b) the SCIO’s proposed constitution does not comply with one or more of the requirements of section 50 and any regulations made under that section, or
   (c) the application must, by virtue of regulations under section 6(1), be refused,

   but must not otherwise refuse an application if it considers that the SCIO, if constituted, would meet the charity test.

(5) Sections 4 and 5 do not apply in relation to an application under subsection (1).

55 Entry in Register

(1) If OSCR grants an application under section 54(1) it must enter the SCIO to which the application relates in the Register.

(2) On the entry in the Register being made in accordance with subsection (5), subsections (3) and (4) apply.

(3) The SCIO becomes by virtue of this subsection a body corporate—
   (a) whose constitution is that proposed in the application,
   (b) whose name is that specified in the constitution, and
   (c) whose first members are the individuals who made the application.

(4) All property for the time being vested in those individuals (or any of them) on trust for the charitable purposes of the SCIO (when constituted) vests by virtue of this subsection in the SCIO.

(5) The entry for the SCIO in the Register must (in addition to the matters required by section 3(3)) include—
   (a) the date when the entry was made, and
   (b) a note stating that the charity is constituted as a SCIO.
(6) OSCR must send a copy of the entry in the Register to the SCIO at its principal office.

(7) If a SCIO ceases to be a charity, it ceases to be a SCIO.

Conversion, amalgamation and transfer

Conversion of charity which is a company or registered friendly society: applications

(1) The following may apply to OSCR to be converted into a SCIO, and for the SCIO’s entry in the Register—
   (a) a charity which is a company,
   (b) a charity which is a registered society within the meaning of the Industrial and Provident Societies Act 1965 (c.12).

(2) But such an application may not be made—
   (a) by a company or registered society having a share capital if any of the shares are not fully paid up,
   (b) by a company having only a single member.

(3) Such an application is referred to in this section and sections 56A and 57 as an “application for conversion”.

(4) Section 54(2) applies in relation to an application for conversion as it applies to an application for a SCIO to be constituted (but sections 4 and 5 do not apply in relation to an application for conversion).

(5) In addition to the documents referred to in section 54(2), the application for conversion must be accompanied by—
   (a) a copy of the resolution of the company or registered society that it be converted into a SCIO, and
   (b) a copy of the resolution of the company or registered society adopting the proposed constitution of the SCIO.

(6) The resolution referred to in subsection (5)(a) must be—
   (a) a special resolution of the company or registered society, or
   (b) a unanimous written resolution signed by or on behalf of all the members of the company or registered society who would be entitled to vote on a special resolution.

(7) In the case of a registered society, “special resolution” has the meaning given in section 52(3) of the Industrial and Provident Societies Act 1965 (c.12).

Determination of application for conversion

(1) Before determining an application for conversion, OSCR must consult—
   (a) the appropriate registrar, and
   (b) such other persons as it thinks fit, about whether the application should be granted.
Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002 (S.S.I 2002/167)

15 In regulation 2(1) of the Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002, in paragraph (i) of the definition of “net annual income”, for the words from “Scottish” to “1990” substitute “body entered in the Scottish Charity Register”.

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004 (S.S.I. 2004/115)

16 In the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 5(2)(k)(i), and
(b) paragraph 101(2)(m)(i) of schedule 5,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 (S.S.I. 2004/116)

17 In the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 3(2)(k)(i),
(b) paragraph 66(3)(l)(i) of schedule 1,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.
In section 56A and in this section, the “appropriate registrar” means—
(a) in the case of an application for conversion by a company, the registrar of companies (within the meaning of the Companies Act 1985 (c.6)),
(b) in the case of an application for conversion by a registered society, the Financial Services Authority.

58 Amalgamation of SCIOs

(1) Any 2 or more SCIOs (“the old SCIOs”) may, in accordance with this section, apply to OSCR to be amalgamated, and for a new SCIO (“the new SCIO”) to be constituted and entered in the Register as their successor.

(2) Such an application is referred to in this section and section 59 as an “application for amalgamation”.

(3) Subsections (2) to (4) of section 54 apply in relation to an application for amalgamation as they apply to an application for a SCIO to be constituted, but with references to the SCIO being read as references to the new SCIO (but sections 4 and 5 do not apply in relation to an application for amalgamation).

(4) In addition to the documents and information referred to in section 54(2), the application for amalgamation must be accompanied by—
(a) a copy of a resolution of each of the old SCIOs approving the proposed amalgamation, and
(b) a copy of a resolution of each of the old SCIOs adopting the proposed constitution of the new SCIO.

(5) The resolutions must be passed—
(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or
(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

59 Amalgamation: supplementary

(1) If OSCR grants an application for amalgamation, it must—
(a) enter the new SCIO in the Register, and
(b) remove from the Register the entries for the old SCIOs.

(2) On the new SCIO being entered in the Register it becomes by virtue of this section a body corporate—
(a) whose constitution is that proposed in the application for amalgamation,
(b) whose name is that specified in the constitution, and
(c) whose first members are the members of the old SCIOs immediately before the new SCIO was entered in the Register.

(3) On the removal of the old SCIOs from the Register—
(a) all the property, rights and liabilities of each of the old SCIOs become by virtue of this subsection the property, rights and liabilities of the new SCIO, and
(b) each of the old SCIOs is dissolved.
(4) The entry for the new SCIO in the Register must include—
   (a) a note stating that it is constituted as a SCIO,
   (b) the date on which it became so constituted, and
   (c) a note that it was constituted following amalgamation, and of the name of each of
   the old SCIOs.

(5) OSCR must send a copy of the entry in the Register to the new SCIO at its principal
   office.

60 Transfer of SCIO's undertaking

(1) A SCIO may resolve that all its property, rights and liabilities should be transferred to
   another SCIO specified in the resolution.

(2) Where a SCIO has passed such a resolution, it must send to OSCR—
   (a) a copy of the resolution, and
   (b) a copy of a resolution of the transferee SCIO agreeing to the transfer to it.

(3) A resolution referred to in subsection (1) and (2)(b) must be passed—
   (a) by a two-thirds majority of those voting at a general meeting of the SCIO
      (including those voting by proxy or by post, if voting that way is permitted), or
   (b) unanimously by the SCIO's members, otherwise than at a general meeting.

(4) The resolution referred to in subsection (1) does not take effect until confirmed by
   OSCR.

(5) If OSCR confirms the resolution—
   (a) all the property, rights and liabilities of the transferor SCIO become by virtue of
      this subsection the property, rights and liabilities of the transferee SCIO in
      accordance with the resolution,
   (b) the transferor SCIO is dissolved, and
   (c) OSCR must remove from the Register the entry for the transferor SCIO.

General

61 Third parties

(1) A person dealing with a SCIO in good faith and for value is not concerned to inquire
   whether—
   (a) anything in the SCIO's constitution prevents it acting in the way that it is, or
   (b) any constitutional limitations on the powers of the SCIO's charity trustees prevent
      them from binding the SCIO or authorising others to do so.

(2) Nothing in subsection (1) prevents a person from bringing proceedings for interdict in
   respect of the doing of an act which—
   (a) the SCIO, because of anything in its constitution, does not have power to do, or
   (b) the SCIO's charity trustees, because of any constitutional limitations on their
      powers, do not have power to do.
(3) But no such proceedings may be brought in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the SCIO.

(4) Subsection (3) does not prevent OSCR from exercising any of its powers.

(5) Nothing in subsection (1)(b) affects any liability incurred by the SCIO’s charity trustees (or any of them) for doing anything which, because of any constitutional limitations on their powers, the trustees (or that trustee) do not have power to do.

(6) Nothing in subsection (1) absolves the SCIO’s charity trustees from their duty to act within the SCIO’s constitution and in accordance with any constitutional limitations on their powers.

(7) In this section “constitutional limitations” on the powers of a SCIO’s charity trustees are limitations on their powers under its constitution, including limitations deriving from a resolution of the SCIO in general meeting, or from an agreement between the SCIO’s members.

62 Amendment of constitution

(1) A SCIO may by resolution of its members amend its constitution (and a single resolution may provide for more than one amendment).

(2) Such a resolution must be passed—

(a) by a two-thirds majority of those voting at a general meeting of the SCIO (including those voting by proxy or by post, if voting that way is permitted), or

(b) unanimously by the SCIO’s members, otherwise than at a general meeting.

(3) The date of passing of such a resolution is—

(a) the date of the general meeting at which it was passed, or

(b) if it was passed otherwise than at a general meeting, the date on which the last member agreed to it.

63 Regulations relating to SCIOs

The Scottish Ministers may by regulations make further provision in relation to SCIOs including, in particular, provision about—

(a) applications for constitution as, or conversion into, a SCIO, the determination of applications, entry in the Register and the effect of such entry,

(b) the administration of a SCIO,

(c) amalgamation of SCIOs and transfer of a SCIO’s property, rights and liabilities to another SCIO,

(d) the winding up, insolvency or dissolution of a SCIO,

(da) the maintenance of registers of information about SCIOs (for example, registers of members, of charity trustees or of charges over the SCIO’s assets),

(e) such other matters in connection with the provision made by this Chapter as they think fit.
CHAPTER 8
RELIGIOUS CHARITIES

64 Designated religious charities

(1) OSCR may designate as a designated religious charity a charity which appears to it to have—

(a) the advancement of religion as its principal purpose,
(b) the regular holding of public worship as its principal activity,
(c) been established in Scotland for at least 10 years,
(d) a membership of at least 3,000 persons who are—

(i) resident in Scotland, and
(ii) at least 16 years of age, and
(e) an internal organisation such that—

(i) one or more authorities in Scotland exercise supervisory and disciplinary functions in respect of the component elements of the charity, and
(ii) those elements are subject to requirements as to keeping accounting records and audit of accounts which appear to OSCR to correspond to those required by section 45.

(2) OSCR may determine that subsection (1)(c) need not be satisfied in the case of a charity—

(a) created by the amalgamation of 2 or more charities each of which, immediately before the amalgamation—

(i) was a designated religious charity, or
(ii) was, in OSCR’s opinion, eligible for designation as such, or
(b) constituted by persons who have removed themselves from membership of a charity which, immediately before the removal—

(i) was a designated religious charity, or
(ii) was, in OSCR’s opinion, eligible for designation as such.

(3) The provisions set out in subsection (4) do not apply to—

(a) a designated religious charity,
(b) any component element of a designated religious charity which is itself a charity (whether or not having as its principal purpose the advancement of religion).

(4) Those provisions are—

subsections (1) and (6) of 16 (in so far as those subsections relate to any action set out in subsection (2)(b) to (d) of that section),
section 28(2),
section 31(4) and (6),
section 34(4)(c) to (e),
section 68.
(5) OSCR may, by notice served on a designated religious charity, withdraw the designation of the charity as such where—

(a) it appears to OSCR that one or more of paragraphs (a) to (e) of subsection (1) is no longer satisfied in relation to the charity, or

(b) in consequence of an investigation of any component element of the charity under section 28, OSCR has given a direction under section 31(5) in relation to the component element and considers that it is no longer appropriate for the charity to be a designated religious charity.

CHAPTER 9

CHARITY TRUSTEES

General duties

65 Charity trustees: general duties

(1) A charity trustee must, in exercising functions in that capacity, act in the interests of the charity and must, in particular—

(a) seek, in good faith, to ensure that the charity acts in a manner which is consistent with its purposes,

(b) act with the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person, and

(c) in circumstances capable of giving rise to a conflict of interest between the charity and any person responsible for the appointment of the charity trustee—

(i) put the interests of the charity before those of the other person, or

(ii) where any other duty prevents the charity trustee from doing so, disclose the conflicting interest to the charity and refrain from participating in any deliberation or decision of the other charity trustees with respect to the matter in question.

(2) The charity trustees of a charity must ensure that the charity complies with any direction, requirement, notice or duty imposed on it by virtue of this Act.

(3) Subsections (1) and (2) are without prejudice to any other duty imposed by enactment or otherwise on a charity trustee in relation to the exercise of functions in that capacity.

(4) Any breach of the duty under subsection (1) or (2) is to be treated as being misconduct in the administration of the charity.

(5) All charity trustees must take such steps as are reasonably practicable for the purposes of ensuring—

(a) that any breach of a duty under subsection (1) or (2) is corrected by the trustee concerned and not repeated, and

(b) that any trustee who has been in serious or persistent breach of either or both of those duties is removed as a trustee.
Remuneration

66 Remuneration for services

(A1) A charity trustee may not be remunerated for services provided to the charity (including services provided in the capacity as a charity trustee or under a contract of employment) unless subsection (1) entitles the trustee to be so remunerated.

(1) Where a charity trustee of a charity—

(a) provides services to or on behalf of the charity, or

(b) might benefit from any remuneration for the provision of such services by a person with whom the trustee is connected,

the person providing the services (the “service provider”) is entitled to be remunerated from the charity’s funds for doing so only if the conditions set out in subsection (2) are met.

(2) Those conditions are—

(a) that the maximum amount of the remuneration—

(i) is set out in a written agreement between the service provider and the charity (or, as the case may be, its charity trustees) under which the service provider is to provide the services in question, and

(ii) is reasonable in the circumstances,

(b) that, before entering into the agreement, the charity trustees were satisfied that it would be in the interests of the charity for those services to be provided by the service provider for that maximum amount,

(c) that, immediately after entering into the agreement, less than half of the total number of charity trustees of the charity fall within subsection (4), and

(d) that the charity’s constitution does not contain any provision which expressly prohibits the service provider from receiving the remuneration.

(4) A charity trustee falls within this subsection if the trustee is—

(a) party (in the capacity of a service provider) to a written agreement of the type described in subsection (2)(a)(i) under which any obligation is still to be fully discharged,

(b) entitled to receive remuneration from the charity’s funds otherwise than by virtue of such an agreement, or

(c) connected with any other charity trustee who falls within sub-paragraph (a) or (b).

(5) Nothing in subsections (A1) or (1) prevents a charity trustee or other service provider from receiving any remuneration from a charity’s funds which that service provider is entitled to receive by virtue of—

(a) any authorising provision of the charity’s constitution which was in force on 15 November 2004,

(b) an order made by the Court of Session, or

(c) any enactment.

(5A) For the purposes of subsection (5)(a), an “authorising provision” is a provision which refers specifically to the payment of remuneration—
(a) to the service provider concerned,
(b) where that service provider is a charity trustee, to a charity trustee, or
(c) where that service provider is connected to a charity trustee, to any person so connected.

(6) Where a charity trustee or other service provider is remunerated in contravention of this section, the charity may recover the amount of remuneration; and proceedings for its recovery must be taken if OSCR so directs.

67 Remuneration: supplementary

(1) In section 66—

“benefit” means any direct or indirect benefit,
“maximum amount”, in relation to remuneration, means the maximum amount of the remuneration whether specified in or ascertainable under the terms of the agreement in question,
“remuneration” includes any benefit in kind (and “remunerated” is to be construed accordingly),
“services” includes goods that are supplied in connection with the provision of services.

(2) For the purposes of that section, the following persons are “connected” with a charity trustee—

(a) any person—

(i) to whom the trustee is married,
(ii) who is the civil partner of the trustee, or
(ii) with whom the trustee is living as husband and wife or, where the trustee and the other person are of the same sex, in an equivalent relationship,

(b) any child, parent, grandchild, grandparent, brother or sister of the trustee (and any spouse of any such person),

(c) any institution which is controlled (whether directly or through one or more nominees) by—

(i) the charity trustee,
(ii) any person with whom the charity trustee is connected by virtue of paragraph (a), (b), (d) or (e), or
(iii) two or more persons falling within sub-paragraph (i) or (ii), when taken together,

(d) a body corporate in which—

(i) the charity trustee has a substantial interest,
(ii) any person with whom the charity trustee is connected by virtue of paragraph (a), (b), (c) or (e) has a substantial interest, or
(iii) two or more persons falling within sub-paragraph (i) or (ii), when taken together, have a substantial interest,
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(e) a Scottish partnership in which one or more of the partners is—
   (i) the charity trustee, or
   (ii) a person with whom the charity trustee is, by virtue of paragraph (a) or (b),
       connected.

(3) For the purposes of subsection (2) a person who is—
   (i) another person’s stepchild, or
   (ii) brought up or treated by another person as if the person were a child of the other
       person,

is to be treated as that other person’s child.

(4) Section 102A sets out when a person is to be treated as being in control of an institution
     or as having a substantial interest in a body corporate.

Disqualification

68 Disqualification from being charity trustee

(1) The persons specified in subsection (2) are disqualified from being charity trustees.

(2) Those persons are any person who—
   (a) has been convicted of—
       (i) an offence involving dishonesty,
       (ii) an offence under this Act,
   (b) is an undischarged bankrupt,
   (c) has been removed, under section 7 of the Law Reform (Miscellaneous Provisions)
       (Scotland) Act 1990 (c.40) or section 34 of this Act, from being concerned in the
       management or control of any body,
   (d) has been removed from the office of charity trustee or trustee for a charity by an
       order made—
       (i) by the Charity Commissioners for England and Wales under section
           18(2)(i) of the Charities Act 1993 (c.10), section 20(1A)(i) of the Charities
           Act 1960 (c.58) or section 20(1) of that Act (as in force before the
           commencement of section 8 of the Charities Act 1992 (c.41)), or
       (ii) by Her Majesty’s High Court of Justice in England,
   (e) is subject to a disqualification order or disqualification undertaking under the
       Company Directors Disqualification Act 1986 (c.46) or the Company Directors

(3) A person referred to in subsection (2)(a) is not disqualified under subsection (1) if the
     conviction is spent by virtue of the Rehabilitation of Offenders Act 1974 (c.53).

(4) OSCR may, on the application of a person disqualified under subsection (1), waive the
     disqualification either generally or in relation to a particular charity or type of charity.
(5) OSCR must notify a waiver under subsection (4) to the person concerned.

(6) OSCR must not grant a waiver under subsection (4) if to do so would prejudice the operation of the Company Directors Disqualification Act 1986 (c.46) or the Company Directors Disqualification (Northern Ireland) Order 2002 (S.I.2002/3150).

69 Disqualification: supplementary

(1) A person who acts as a charity trustee while disqualified by virtue of section 68 is guilty of an offence and liable—

(a) on summary conviction, to imprisonment for a period not exceeding 6 months or a fine not exceeding level 5 on the standard scale or both,

(b) on conviction on indictment, to imprisonment for a period not exceeding 2 years or a fine or both.

(2) Any acts done as a charity trustee by a person disqualified by virtue of section 68 from being a charity trustee are not invalid by reason only of the disqualification.

(3) In section 68(2)(b), “undischarged bankrupt” means a person—

(a) whose estate has been sequestrated, who has been adjudged bankrupt or who has granted a trust deed for or entered into an arrangement with creditors, and

(b) who has not been discharged under or by virtue of—

(i) section 54 or 75(4) of the Bankruptcy (Scotland) Act 1985 (c.66),

(ii) an order under paragraph 11 of Schedule 4 to that Act,

(iii) section 279 or 280 of the Insolvency Act 1986 (c.45), or

(iv) any other enactment or rule of law subsisting at the time of the person’s discharge.

CHAPTER 10

DECISIONS: NOTICES, REVIEWS AND APPEALS

Preliminary

70 Decisions

This Chapter applies to any decision by OSCR (or by a person to whom OSCR’s functions are delegated by virtue of section 38) to—

(a) refuse an application for entry in the Register, including entry as a SCIO under section 55, 57 or 59,

(b) refuse to disapply section 3(3)(b) in relation to a charity,

(c) give a direction under section 11(3),

(d) give a direction under section 12(2) or (3),

(e) refuse to give a direction under section 12(2),

(f) refuse to consent to a charity taking any action set out in section 16(2),

(g) give a direction under section 28(2),

(h) make a requirement under section 29(1),
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(i) remove a charity from the Register under section 30(1) or (3),
(j) suspend a person under section 31(4),
(k) give a direction under section 31(5) or (8),
(l) give a direction under section 31(6), (7) or (9),
(m) refuse an application made for the purposes of section 40(1),
(n) give a direction under section 53(2),
(o) give a direction under section 66(6),
(p) refuse to grant a waiver under section 68(4),
(q) refuse to designate a charity as a designated religious charity or designated national collector, or
(r) withdraw the designation of a charity as a designated religious charity or designated national collector.

Notice and effect of decisions

71 Notice of decisions

(1) Any person who makes a decision to which this Chapter applies must, as soon as reasonably practicable after doing so, give notice of it to the person specified in subsection (2) and, where the decision is made by a person to whom OSCR’s functions have been delegated by virtue of section 38, OSCR.

(2) That person is—

(a) in the case of a decision referred to in paragraph (a), (g), (j), (k), (n) or (p) of section 70, the person in respect of whom the decision was made,

(b) in the case of a decision referred to in paragraph (e) of that section, the charity which requested OSCR to conduct a review under section 12, and

(c) in the case of any other decision referred to in that section, the charity in respect of which the decision was made.

(3) A notice given under this section must—

(a) set out the decision,

(b) give the reasons for the decision, and

(c) where the notice is given to a person specified in subsection (2), advise the recipient of—

(i) the right to request OSCR to review the decision, and

(ii) the period within which such a request must be made.

72 Effect of decisions

(1) Unless subsection (2) or (3) provides otherwise, a decision to which this Chapter applies (and any direction, requirement, suspension or other act in pursuance of such a decision) has effect from the day on which the notice required by section 71 is given.
(2) A decision referred to in section 70(d), (i), (o) or (r) (and any direction, requirement, suspension or other act in pursuance of such a decision) is of no effect unless and until the notice required by section 71 is given and—

(a) the period within which OSCR must, on request, review the decision expires without a request being made, or

(b) where OSCR, on a request made within that period, confirms the decision (with or without variations)—

(i) the period within which that decision by OSCR may be appealed under section 75 to the Panel expires without an appeal being made, or

(ii) where such an appeal is made, it is abandoned or finally determined (by the Panel or, as the case may be, the Court of Session).

(3) A decision referred to in section 70(h) (and any corresponding requirement) is of no effect unless and until the notice required by section 71 is given and—

(a) the period within which OSCR must, on request, review the decision expires without a request being made, or

(b) where such a request is made, the date on which OSCR confirms the decision (with or without variations).

**Reviews**

73 Review of decisions

(1) OSCR must, within 21 days of being requested to do so by a person given notice under section 71 of a decision to which this Chapter applies—

(a) review the decision,

(b) confirm, vary, reverse or revoke it, and

(c) give notice of its decision under paragraph (b) to the person who requested the review.

(2) A notice under paragraph (c) of subsection (1) must set out OSCR’s reasons for its decision under paragraph (b) of that section.

(3) The duty in subsection (1) applies only if the request is made within 21 days of the notice under section 71 being given to the person making the request.

(4) OSCR must publish any further procedures in accordance with which reviews are to be conducted.

**Appeals**

74 Scottish Charity Appeals Panel

(1) The Scottish Ministers must, from time to time, constitute a panel to be known as the Scottish Charity Appeals Panel (in this Act referred to as “the Panel”) to exercise functions conferred on it by section 75.

(2) Schedule 2 makes further provision about the Panel.
Appeals to Scottish Charity Appeals Panel

(1) Where OSCR—
   (a) confirms a decision under section 73(1), or
   (b) reconfirms a decision under section 76(1),

the decision (or, where OSCR varies the decision on confirming or reconfirming it, the decision as varied) may be appealed to the Panel.

(2) A decision referred to in paragraph (g) or (h) of section 70 (whether or not confirmed with variations) may not, despite subsection (1)(a), be appealed to the Panel.

(3) It is for the person whose request or, as the case may be, earlier appeal under this section caused OSCR to confirm or reconfirm the decision to make an appeal under subsection (1).

(4) Such an appeal must be made within 28 days of the person entitled to appeal it being given notice of the confirmation or reconfirmation.

(5) The Panel may—
   (a) confirm a decision appealed to it,
   (b) quash such a decision and direct OSCR to take such other action, if any, as the Panel thinks fit by such time as may be specified in the direction, or
   (c) remit such a decision back to OSCR, together with the Panel’s reasons for doing so, for reconsideration.

Reconsideration of decision remitted to OSCR

(1) OSCR must, within 14 days of a decision being remitted to it under section 75(5)(c)—
   (a) reconsider the decision,
   (b) confirm, vary, reverse or revoke it, and
   (c) give notice of its decision under paragraph (b) to the person who appealed its earlier decision to the Panel.

(2) That notice must set out OSCR’s reasons for its decision under subsection (1)(b).

Appeals to Court of Session

(1) Any decision of the Panel under section 75(5) may be appealed by—
   (a) the person who appealed to the Panel, or
   (b) OSCR,

to the Court of Session.

(2) Any decision of OSCR (or by a person to whom OSCR’s functions are delegated by virtue of section 38) to suspend a person by notice under section 31(4) may be appealed by the person suspended to the Court of Session.

(3) The Court of Session may—
   (a) confirm the decision appealed to it, or
(b) quash the decision and direct OSCR (or the person to whom OSCR’s functions are
delegated by virtue of section 38, as the case may be) to take such action, if any,
as the Court thinks fit by such time as may be specified in the direction.

**PART 2**

**FUNDRAISING FOR BENEVOLENT BODIES**

**Preliminary**

78 **Interpretation of Part 2**

(1) In this Part—

“benevolent body” means a body (including a charity) which is established for
charitable, benevolent or philanthropic purposes,

“benevolent contributions”, in relation to a representation made by a commercial
participator or other person, means—

(a) the whole or part of—

(i) the consideration given for goods or services sold or supplied by that
person,

(ii) any proceeds (other than such consideration) of a promotional venture
undertaken by that person,

(b) sums given by that person by way of donation in connection with the sale
or supply of such goods or services,

“commercial participator” means a person who—

(a) carries on for profit a business other than a fundraising business, but

(b) in the course of that business, engages in a promotional venture in the
course of which it is represented that benevolent contributions are to be—

(i) given to or applied for the benefit of one or more particular
benevolent bodies, or

(ii) applied for charitable, benevolent or philanthropic purposes,

“fundraising business” means a business carried on for profit and wholly or
primarily engaged in soliciting or otherwise procuring money or promises of
money for one or more particular benevolent bodies or for charitable, benevolent
or philanthropic purposes,

“goods” includes all corporeal moveables except money,

“professional fundraiser” means—

(a) a person (other than a benevolent body or a company connected with it)
who carries on a fundraising business,

(b) any other person who for reward solicits money or other property for the
benefit of a benevolent body or for charitable, benevolent or philanthropic
purposes otherwise than in the course of a fundraising venture undertaken
by a person falling within paragraph (a),

“promises of money” includes standing orders, direct debits and similar
instructions and authorisations for the payment of money,
“promotional venture” means an advertising or sales campaign or any other venture undertaken for promotional purposes,

“radio or television programme” includes any item included in a programme service within the meaning of the Broadcasting Act 1990 (c.42),

“services” includes facilities, and in particular—

(a) access to any premises or event,

(b) membership of any organisation,

(c) a ticket or other entitlement to participate in a lottery or game of chance,

(d) the provision of advertising space, and

(e) the provision of any financial facilities,

and references to the supply of services are to be construed accordingly.

(2) In subsection (1), the definition of “commercial participator”, in relation to a benevolent body, does not include a company connected with the body.

(3) The following persons are excluded from paragraph (b) of the definition of “professional fundraiser” in subsection (1)—

(a) a benevolent body or a company connected with it,

(b) a person concerned in the management or control, or an employee, of any such body or company,

(c) a person who in the course of a radio or television programme during which a fundraising venture is undertaken by a benevolent body, or by a company connected with it, makes any solicitation at the instance of the body or company,

(d) a commercial participator,

(e) a person who receives no more than—

(i) such sum as may be specified by regulations under section 82 by way of remuneration in connection with soliciting money or other property for the benefit of the benevolent body, or

(ii) such sum as may be so specified by way of remuneration in connection with any fundraising venture in the course of which the person solicits money or other property for the benefit of that body.

(4) For the purposes of this Part a company is connected with a benevolent body if—

(a) the body, or

(b) the body and one or more other benevolent bodies, when taken together, is or are entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, the whole of the voting power at a general meeting of the company.

79 Representation and solicitation

(1) In this Part, references to representing and soliciting are to representing and soliciting in any manner, whether expressly or impliedly and however the representation or solicitation is communicated, and include representations and solicitations made—

(a) orally (whether or not in the presence of the person being spoken to),
(b) in writing (whether or not by means of electronic communication), or
(c) by means of a statement published in any newspaper, film or radio or television programme.

(2) In construing references to soliciting or otherwise procuring money or promises of money, it is immaterial whether any consideration by way of goods or services is, or is to be, given in return for the money or promises of money.

(3) Where—

(a) a solicitation of money or a promise of money for the benefit of a benevolent body is made in accordance with arrangements between a person and the body, and
(b) under those arrangements the person will be responsible for receiving on behalf of the body money or a promise of money given in response to the solicitation,

then (if the person would not be so regarded apart from this subsection) that person is to be regarded for the purposes of this Part as soliciting money or promises of money for the benefit of the body.

(4) Where a fundraising venture is undertaken by a professional fundraiser in the course of a radio or television programme, a solicitation which is made by a person in the course of the programme at the instance of the fundraiser is to be treated for the purposes of this Part as made by the fundraiser and not by the person (whether or not the solicitation is made by the person for any reward).

Control of fundraising

80 Prohibition on professional fundraising without formal agreement

(1) It is unlawful—

(a) for a professional fundraiser to solicit money or promises of money for the benefit of a benevolent body, or
(b) for a commercial participator to represent that benevolent contributions are to be given to, or applied for the benefit of, a benevolent body,

except in accordance with an agreement between the professional fundraiser or commercial participator and the body which satisfies the prescribed requirements.

(2) Where on the application of a benevolent body (whether or not a charity), or of OSCR in relation to a benevolent body which is a charity, the sheriff is satisfied—

(a) that a person has contravened or is contravening subsection (1) in relation to the body, and
(b) that the contravention is likely to continue or be repeated,

the sheriff may grant an interdict.

(3) Compliance with subsection (1) is enforceable only under subsection (2).

(4) Subsections (5) and (6) apply where a benevolent body makes an agreement with a professional fundraiser or a commercial participator authorising—

(a) the professional fundraiser to solicit money or promises of money, or
(b) the commercial participator to represent that benevolent contributions are to be given to or applied,

for the benefit of the body.
(5) If the agreement does not satisfy the prescribed requirements, it is not enforceable against the benevolent body except to such extent (if any) as may be provided by an order of the sheriff.

(6) The professional fundraiser or commercial participator is not entitled to receive remuneration or expenses in respect of anything done in pursuance of the agreement unless the agreement provides for such remuneration or expenses and—

(a) the agreement satisfies the prescribed requirements, or

(b) any such provision has effect by virtue of an order under subsection (5).

(7) In this section “the prescribed requirements” means such requirements as are prescribed by regulations made under section 82.

81 Prevention of unauthorised fundraising

(1) Where on the application of a benevolent body, the sheriff is satisfied—

(a) that the body has complied with subsection (3),

(b) that any person is or has been—

(i) soliciting money or promises of money for the benefit of the body, or

(ii) representing that benevolent contributions are to be given to or applied for the benefit of the body,

(c) that the person is likely to continue to do so or do so again, and

(d) as to one or more of the matters specified in subsection (2),

the sheriff may grant an interdict.

(2) Those matters are—

(a) that the person in question is using methods of fundraising to which the body objects,

(b) that that person is not a fit and proper person to raise funds for the body,

(c) where the conduct complained of is the making of such representations as are mentioned in subsection (1)(b)(ii), that the body does not wish to be associated with the particular promotional or other fundraising venture in which that person is engaged.

(3) Not less than 28 days before making an application under subsection (1) the benevolent body must serve on the person in question a notice—

(a) requesting the person immediately to cease—

(i) soliciting money or promises of money for the benefit of the body, or

(ii) representing that benevolent contributions are to be given to or applied for the benefit of the body,

as the case may be, and

(b) stating that, if the person does not comply with the notice, the body will apply for an interdict under this section.

(4) Where a person to whom a benevolent body gives such a notice—

(a) complies with the notice, but
(b) subsequently begins to carry on activities which are the same, or substantially the same, as those in respect of which the notice was given,

the body need not, for the purposes of an application under subsection (1) made by it, serve a further notice on the person in respect of any such activities carried on within 12 months of giving the notice.

(5) No application may be made under subsection (1) by a benevolent body in respect of anything done by a professional fundraiser or commercial participator in relation to the body.

82 Regulations about fundraising

(1) The Scottish Ministers may, after consulting such persons as they think fit, make regulations—

(a) about the solicitation by professional fundraisers of money or promises of money for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes,

(b) about representations made by commercial participators in relation to benevolent contributions,

(c) generally for or in connection with regulating benevolent fundraising by benevolent fundraisers.

(2) Such regulations may, in particular, make provision—

(a) specifying sums for the purposes of section 78(3)(e),

(b) about the form and content of—

(i) agreements for the purposes of section 80,

(ii) notices under section 81(3),

(c) about the information and identification to be provided by professional fundraisers or commercial participators in soliciting money or promises of money or making representations in relation to benevolent contributions,

(d) about the information and identification to be provided by benevolent fundraisers in carrying on benevolent fundraising,

(e) about circumstances in which payments or agreements made in response to—

(i) solicitations or representations of the type described in paragraph (c), or

(ii) benevolent fundraising,

may be refunded or, as the case may be, cancelled,

(f) requiring professional fundraisers or commercial participators to make available to benevolent bodies with whom they have agreements for the purposes of section 80 books, documents or other records (however kept) which relate to the bodies,

(g) about the manner in which money or promises of money acquired by professional fundraisers or commercial participators for the benefit of, or otherwise falling to be given to or applied by them for the benefit of, benevolent bodies is or are to be transmitted to the bodies,

(h) requiring benevolent fundraisers, in carrying on benevolent fundraising, to take all reasonable steps to ensure that it is carried on in such a way that it does not—
(i) unreasonably intrude on the privacy of those from whom funds are being solicited or procured,
(ii) involve the making of unreasonably persistent approaches to persons to donate funds,
(iii) result in undue pressure being placed on persons to donate funds,
(iv) involve the making of any false or misleading representation about any of the matters mentioned in subsection (3).

(3) Those matters are—
   (a) the extent or urgency of any need for funds on the part of any benevolent body or company connected with such a body,
   (b) any use to which funds donated in response to the fundraising are to be put by such a body or company, and
   (c) the activities, achievements or finances of such a body or company.

(4) In subsection (2)(g) the reference to money or promises of money includes a reference to money or promises of money which, in the case of a professional fundraiser or commercial participator—
   (a) has or have been acquired by the fundraiser or commercial participator otherwise than in accordance with an agreement with a benevolent body, but
   (b) by reason of any solicitation or representation in consequence of which it has or they have been acquired, is or are held by the fundraiser or commercial participator on trust for such a body.

(5) Regulations under this section may provide that a person who, without reasonable excuse, fails to comply with a specified requirement of the regulations is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

(6) In this section—
   “benevolent fundraising” means soliciting or otherwise procuring money or promises of money for—
   (a) the benefit of benevolent bodies or companies connected with them, or
   (b) charitable, benevolent or philanthropic purposes,
   “benevolent fundraisers” are—
   (a) benevolent bodies and companies connected with them,
   (b) persons concerned in the management or control of such bodies or companies,
   (c) employees or agents of—
      (i) such bodies or companies,
      (ii) persons concerned in the management or control of such bodies or companies, and
   (d) volunteers acting for or on behalf of such bodies or companies.
83 Meaning of “public benevolent collection”

(1) This section applies for the interpretation of sections 84 to 91.

(2) “Public benevolent collection” means a collection from the public of money or promises of money (whether or not given by them for a consideration by way of goods or services) for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes taken—

(a) in a public place, or

(b) by means of visits to two or more houses or business premises.

(3) “Public place”, in relation to a public benevolent collection, means—

(a) any road (within the meaning of the Roads (Scotland) Act 1984 (c.54)), and

(b) any other place to which, at any time when the collection is taken, members of the public have access as of right or by virtue of express or implied permission and which—

(i) is not within a building, or

(ii) if within a building, is a public area within any station, airport or shopping precinct or is any other similar public area.

(4) But subsection (3)(b) does not apply to any place to which members of the public have access—

(a) only on payment or by ticket,

(b) only by virtue of permission given for the purpose of the collection in question.

(5) In relation to a public benevolent collection—

“business premises” means any premises used for business or other commercial purposes,

“house” includes any part of a building constituting a separate dwelling.

84 Regulation of public benevolent collections

(1) Where a public benevolent collection is held in the area of a local authority without the consent of the authority under section 85, the organiser of the collection is guilty of an offence and liable, on summary conviction, to a fine not exceeding level 3 on the standard scale.

(2) Subsection (1) does not apply to a collection—

(a) by a designated national collector,

(b) which takes place in the course of a public meeting,

(c) which—

(i) takes place on land to which members of the public have access only by virtue of the express or implied permission of the occupier of the land or by virtue of any enactment, and

(ii) is organised by the occupier of the land, or

(d) which takes place by means of an unattended receptacle in a public place.
(3) In subsection (2), “occupier” means, in relation to unoccupied land, the person entitled to occupy it.

85 Local authority consents

(1) An application for the consent of a local authority to the holding of a public benevolent collection must be made to the authority, in such form as the authority may determine, by the organiser of the collection—

(a) no earlier than 18 months, and

(b) no later than 2 months (or such shorter period as the organiser and the authority may agree),

before the proposed date of the collection.

(2) Before determining such an application, the local authority must consult the chief constable of the police force for the area and may make other inquiries.

(3) On such an application the local authority may—

(a) grant its consent (whether or not subject to conditions), or

(b) refuse its consent on any of the grounds set out in subsection (6).

(4) Where the application has been made not later than 2 months before the proposed date of the collection, the local authority must give the organiser notice of its decision on the application not later than 14 days before that date.

(5) The conditions which may be imposed in pursuance of subsection (3)(a) are such conditions as the local authority thinks fit having regard to the local circumstances in which the collection is to be held, including conditions—

(a) specifying the date, time or frequency of the collection,

(b) specifying where it may take place,

(c) regulating its conduct,

(d) as to the use by collectors of any badges or certificates of authority which regulations made under section 82(1) require to be provided,

(e) specifying the form of collection boxes, other containers and any other articles which may be used for the purposes of the collection,

(f) as to any other matter relating to the local circumstances of the collection.

(6) The grounds of refusal referred to in subsection (3)(b) are—

(a) that the date, time or frequency of the collection, or that holding it at the proposed place, would cause undue public inconvenience,

(b) that another collection in respect of which consent under this section has been given by the authority or which is organised by a designated national collector is due to take place in the area of the authority on the same day or the day before or after that day,

(c) that it appears to the local authority that the amount likely to be applied for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes in consequence of the collection is inadequate having regard to the likely amount of the proceeds of the collection,
(d) where the local authority has requested the organiser of the collection to provide it with any supplementary information which it considers necessary for the purposes of determining the application, that the organiser has failed to comply with the request, and

(e) that the organiser of the collection has been convicted of—

(i) an offence under section 84(1), 89(3) or 90(3) of this Act, or

(ii) any other offence which involves dishonesty or the commission of which would be likely to be facilitated by the grant of consent under this section.

(7) Where a local authority has reason to believe that, since its consent was granted under this section, there has been a change in circumstances such that one or more of the grounds of refusal set out in subsection (6) applies in relation to the public benevolent collection, the authority may, not later than the day before the date of the collection—

(a) withdraw the consent, or

(b) vary the consent by making it subject to conditions or further conditions or varying any condition to which it is subject.

(8) Where a local authority has reason to believe that there has been, or is likely to be, a breach of any condition imposed on a consent under this section, it may, not later than the day before the date of the collection, withdraw the consent.

(9) A local authority must give the organiser of a public benevolent collection notice of a decision under this section—

(a) to grant consent subject to conditions,

(b) to refuse consent,

(c) to withdraw or vary a consent,

including the reasons for the authority’s decision and information about the organiser’s right of appeal under section 87.

(10) The Scottish Ministers may, by regulations, disapply the duty to consult under subsection (2) in relation to applications of such type as they may describe in the regulations.

86 Designated national collectors

(1) OSCR may specify criteria to be satisfied for the purposes of—

(a) obtaining, and

(b) retaining,

designation as a designated national collector under this section.

(2) Before specifying such criteria, OSCR must consult—

(a) such associations representing local authorities,

(b) such persons representing the interests of charities, and

(c) such other persons,

as it thinks fit.

(3) OSCR must publish any criteria specified under subsection (1).
(4) OSCR may designate as a designated national collector a charity which appears to it to satisfy such criteria as are for the time being specified under subsection (1)(a).

(5) OSCR may withdraw a designation under subsection (4) from a charity which appears to it not to satisfy such criteria as are for the time being specified under subsection (1)(b).

(6) Regulations under section 89 may make provision about the effect of the withdrawal of a designation in relation to public benevolent collections notice of which was, prior to the withdrawal, given under subsection (7).

(7) A designated national collector which proposes to hold a public benevolent collection in the area of a local authority must—

(a) no earlier than 18 months, and

(b) no later than 3 months,

before the proposed date of the collection, notify the authority of the proposal.

(8) The local authority may prohibit the public benevolent collection if it considers that the public benevolent collection would be likely to cause undue public inconvenience (by reason of it being held on the same date and at the same time and place as any other public benevolent collection or for any other reason).

(9) A decision under subsection (8) must be made not later than one month after the date of the notification under subsection (7).

(10) A local authority must give the designated national collector notice of a decision under subsection (8) including the reasons for the authority’s decision and information about the designated national collector’s rights of appeal under section 87.

**87 Appeals**

(1) The organiser of a public benevolent collection may, by summary application, appeal to the sheriff against a decision of a local authority under section 85—

(a) granting consent subject to conditions,

(b) refusing consent, or

(c) withdrawing or varying a consent.

(2) But no appeal is competent under subsection (1) against the decision of the local authority so far as the decision, or the reasons for it, relate to the date of the proposed collection.

(3) A designated national collector may, by summary application, appeal to the sheriff against a decision of a local authority under section 86(8).

(4) An appeal under this section must be lodged within 14 days of the date of receipt of the notice under section 85(9) or, as the case may be, 86(10).

(5) In upholding an appeal under this section the sheriff may quash the decision of the local authority and remit the case, together with reasons for the sheriff’s decision, to the authority for further consideration.

**88 Application of funds**

(1) This section applies where the court, on an application by OSCR, is satisfied that sums collected in a public benevolent collection by or on behalf of any person other than a charity cannot for any reason be applied for the purposes for which they were collected.
(2) The court may—
   (a) order any person holding such sums not to part with them without the court’s consent,
   (b) approve a scheme prepared by OSCR for the transfer of those sums to a charity specified in the scheme.

(3) The court may approve a scheme under subsection (2)(b) subject to modifications.

(4) In this section, “the court” means the sheriff.

89 Regulations relating to public benevolent collections

(1) The Scottish Ministers may, by regulations, make further provision for the purpose of regulating public benevolent collections.

(2) Such regulations may, in particular, include provision—
   (a) about keeping and publishing accounts,
   (b) for preventing public inconvenience,
   (c) specifying particular provisions of the regulations breach of which is an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 3 on the standard scale.

90 Collection of goods

(1) The Scottish Ministers may, by regulations, make provision about the collection from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

(2) Those regulations may, in particular, include provision—
   (a) requiring the organiser of such a collection to notify the local authority for the area in which it is proposed that the collection be carried out,
   (b) allowing or requiring the local authority, in such circumstances as may be specified in the regulations, to prohibit the carrying out of such a collection,
   (c) about the dates, times and places at which, and the frequency with which, such collections may be carried out,
   (d) about keeping and publishing reports on those collections,
   (e) for preventing public inconvenience,
   (f) specifying particular provisions of the regulations breach of which is to be an offence under subsection (3).

(3) Any person who contravenes a provision of such regulations breach of which is stated in the regulations to be an offence is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

91 Guidance on collections

Local authorities must have regard to any guidance issued by OSCR about the exercise of their functions in relation to—
(a) public benevolent collections, or
(b) collections from the public of goods for the benefit of benevolent bodies or for charitable, benevolent or philanthropic purposes.

**PART 3**

**INVESTMENT POWERS OF TRUSTEES**

92 Extension of general powers of trustees

(1) Section 4 (general powers of trustees) of the Trusts (Scotland) Act 1921 (c.58) is amended as follows.

(2) In subsection (1)—

(a) after paragraph (e) insert—

“(ea) To make any kind of investment of the trust estate (including an investment in heritable property).

(eb) To acquire heritable property for any other reason.”,

(b) paragraph (ee) is repealed.

(3) After subsection (1) insert—

“(1A) The power to act under subsection (1)(ea) or (eb) above is subject to any restriction or exclusion imposed by or under any enactment.

(1B) The power to act under subsection (1)(ea) or (eb) above is not conferred on any trustees who are—

(a) the trustees of a pension scheme,

(b) the trustees of an authorised unit trust, or

(c) trustees under any other trust who are entitled by or under any other enactment to make investments of the trust estate.

(1C) No term relating to the powers of a trustee contained in a trust deed executed before 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1D) No term restricting the powers of investment of a trustee to those conferred by the Trustee Investments Act 1961 (c.62) contained in a trust deed executed on or after 3rd August 1961 is to be treated as restricting or excluding the power to act under subsection (1)(ea) above.

(1E) The reference in subsection (1D) above to a trustee does not include a reference to a trustee under a trust constituted by a private or local Act of Parliament or a private Act of the Scottish Parliament; and “trust deed” shall be construed accordingly.

(1F) In this section—

“authorised unit trust” means a unit trust scheme in the case of which an order under section 243 of the Financial Services and Markets Act 2000 (c.8) is in force,

“enactment” has the same meaning as in the Scotland Act 1998 (c.46),
“pension scheme” means an occupational pension scheme (within the meaning of the Pension Schemes Act 1993 (c.48)) established under a trust and subject to the law of Scotland.”

93 Exercise of power of investment

After section 4 of the Trusts (Scotland) Act 1921 (c.58) insert—

4A Exercise of power of investment: duties of trustee

(1) Before exercising the power of investment under section 4(1)(ea) of this Act, a trustee shall have regard to—

(a) the suitability to the trust of the proposed investment, and

(b) the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust.

(2) Before exercising that power of investment, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about the way in which the power should be exercised.

(3) When reviewing the investments of the trust, a trustee shall (except where subsection (4) applies) obtain and consider proper advice about whether the investments should be varied.

(4) If a trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to obtain such advice, the trustee need not obtain it.

(5) In this section, “proper advice” means the advice of a person who is reasonably believed by the trustee to be qualified by the person’s ability and practical experience of financial and other matters relating to the proposed investment.

4B Exercise of power of investment: power to appoint nominees

(1) The trustees of a trust may, for the purpose of exercising the power of investment under section 4(1)(ea) of this Act—

(a) appoint a person to act as their nominee in relation to such of the trust estate, heritable as well as moveable, as they may determine, and

(b) take such steps as are necessary to secure the transfer of title to that property to their nominee.

(2) A person may not be appointed as a nominee unless the trustees reasonably believe—

(a) that the appointment is appropriate in the circumstances of the trust, and

(b) that the proposed nominee has the skills, knowledge and expertise that it is reasonable to expect of a person acting as a nominee.

(3) The power to appoint a nominee is subject to any restriction or exclusion imposed by or under—

(a) the trust deed, or

(b) any enactment (within the meaning of the Scotland Act 1998 (c.46)).

(4) An appointment as a nominee shall—

(a) be made in writing,

(b) be subject to the trustees’ retaining power to—
(i) direct the nominee, and
(ii) revoke the nominee’s appointment, and
(c) subject to subsection (4), otherwise be on such terms as to suitable
remuneration and other matters as the trustees may determine.

5  (5) The trustees may not appoint a nominee on any of the following terms unless it
is reasonably necessary for them to do so—
(a) a term permitting the nominee to appoint a substitute,
(b) a term restricting the liability of the nominee, or of any substitute, to the
trustees or to any beneficiary,
(c) a term permitting the nominee, or any substitute, to act in circumstances
capable of giving rise to a conflict of interest.

10  (6) While a nominee continues to act for the trust, the trustees shall—
(a) keep under review the arrangements under which the nominee acts and
how those arrangements are being put into effect,
(b) if circumstances make it appropriate to do so, consider whether there is a
need to exercise their power—
(i) to direct the nominee, or
(ii) to revoke the nominee’s appointment, and
(c) exercise either or both of those powers if they consider that there is a
need to do so.

4C  Declaration of power to delegate investment management functions
(1) It is declared that the trustees of a trust have and have always had the power,
subject to any restriction or exclusion imposed by or under the trust deed or
any enactment, to authorise an agent to exercise any of their investment
management functions at the agent’s discretion or in such other manner as the
trustees may direct.

25  (2) In this section—
“enactment” has the same meaning as in the Scotland Act 1998 (c.46),
and
“investment management functions” means functions relating to the
management of investments of the trust estate, heritable as well as
moveable.”

94  Amendments consequential on Part 3
(3) Schedule 3 makes amendments consequential on sections 92 and 93.

35  PART 4
GENERAL AND SUPPLEMENTARY

94A  Power of charity to participate in certain financial schemes
(1) Every charity has power to participate in common investment schemes and common
deposit schemes.
Charities and Trustee Investment (Scotland) Bill
Part 4—General and supplementary

(2) Subsection (1) does not apply where a charity’s constitution excludes such participation by referring specifically to common investment schemes or, as the case may be, common deposit schemes.

(3) In this section, “common investment scheme” and “common deposit scheme” have the meanings given to those expressions in sections 24 and 25 of the Charities Act 1993 (c.10).

95 Financial assistance for benevolent bodies

(1) The Scottish Ministers may make such payments as they think fit to—

(a) any benevolent body, in connection with its activities,

(b) any person, in connection with anything done by that person with a view to enabling one or more benevolent bodies, benevolent bodies of a particular type or benevolent bodies generally to implement their purposes to better effect.

(2) Such payments may include payments in relation to the costs of establishing, dissolving or winding up a benevolent body.

(3) A payment under subsection (1) may be made by way of grant, loan or otherwise.

(4) A payment under subsection (1) may be made subject to conditions, including conditions requiring repayment in specified circumstances.

(5) No payment may be made under subsection (1) to a local authority or any other public body or office-holder.

(6) The power to make a payment under subsection (1) may be exercised whether or not there is power to make the payment under any other enactment.

96 Rate relief for registered community amateur sports clubs

(1) Section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9) is amended as follows.

(2) In subsection (2)—

(a) for the word “or” which follows paragraph (a) substitute—

“(aa) are occupied by a registered community amateur sports club and are wholly or mainly used for the purposes of that club (or for the purposes of that and of other clubs which are, or are entitled to be registered as, such clubs);”,

(b) for “either paragraph (a) or paragraph (b)” substitute “any of paragraphs (a), (aa) and (b)”.

(3) In subsection (5), for “paragraph (a), (b) or (c)” substitute “any of paragraphs (a) to (c)”.

(4) In subsection (10), after paragraph (b) insert—

“(c) “registered community amateur sports club” means a registered club for the purposes of Schedule 18 to the Finance Act 2002 (c.23); and the period during which a club is a registered club for those purposes is to be taken to begin with the date on which its registration takes effect and end on the date with effect from which its registration is terminated (whether
(5) After subsection (12) insert—

“(13) The amendments to this section made by section 96 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00) (which extend mandatory relief to, and allow discretionary relief to be given to, registered community amateur sports clubs) have effect only as respects the year 2006-7 and subsequent years.”

97 Population of Register etc.

(1) OSCR must enter in the Register each body which was, immediately prior to the commencement of paragraph 5(a)(ii) of Schedule 4 to this Act, entitled by virtue of section 1(7) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40) to describe itself as a “Scottish charity”.

(1A) Subsection (1) does not affect OSCR’s power to remove a charity from the Register under section 30.

(2A) The Scottish Ministers may by order—

(a) disapply section 3(3) in so far as it would otherwise apply to any body entered in the Register under subsection (1) for such period ending no later than 18 months after the commencement of this section as may be specified in the order,

(b) provide—

(i) that any unregistered charitable body (or any such body of a particular type) may, despite any contrary provision in this Act, refer to itself as a “charity” for such period ending no later than 12 months after the commencement of this section as may be so specified, and

(ii) that any provision of this Act or of any other enactment is to apply (with such modifications, if any, as may be so specified) to any such body as if it were entered in the Register for so long as it refers to itself as a “charity”.

(2B) In subsection (2A), “unregistered charitable body” means a body which—

(a) is established under the law of a country or territory other than Scotland,

(b) is entitled to refer to itself as a “charity” (by any means or in any language) in that country or territory, and

(c) does not require to be entered in the Register under subsection (1).

98 Notices, applications etc.

(1) In this section, “formal communication” means—

(a) any notice, notification, direction or consent given, or

(b) any request for review, proposal, application (other than an application to a court), report or decision made,

under or for the purposes of this Act.

(2) A formal communication must be made in writing.
A formal communication which is sent by electronic means is to be treated as being in writing if it is received in a form which is legible and capable of being used for subsequent reference.

A formal communication is given to or made to a person if it is—

(a) delivered to the person,

(b) sent by post in a prepaid registered letter, or by the recorded delivery service, addressed—

(i) where the person is a charity, to the charity at the principal office set out in its entry in the Register or to the charity trustee whose name is so set out at the address so set out,

(ii) where the person is an incorporated company or body (other than a charity), to the secretary, chief clerk or chief executive of the company or body at its registered or principal office,

(iii) where the person is a public office-holder, to the office-holder at the office-holder’s principal office,

(iv) in any other case, to the person at that person’s usual or last known place of abode, or

(c) sent to the person in some other manner (including by electronic means) which the sender considers likely to cause it to be delivered on the same or next day.

Where a charity’s entry in the Register does not, because of subsection (4) of section 3, include the information specified in subsection (3)(b) of that section, a formal communication may also be given to or made to the charity if it is sent by post in a prepaid registered letter, or by the recorded delivery service, addressed—

(a) to the charity care of OSCR, or

(b) where OSCR is the sender—

(i) to the charity at its principal office, or

(ii) to the charity trustee whose name is, because of section 3(4), excluded from the Register at the address which is so excluded.

A formal communication sent under subsection (4)(c) is, unless the contrary is proved, to be deemed to be delivered on the next working day which follows the day on which it is sent.

In subsection (6), “working day” means any day other than a Saturday, a Sunday or a day which, under the Banking and Financial Dealings Act 1971 (c.80), is a bank holiday in Scotland.

Offences by bodies corporate etc.

Where an offence under this Act committed—

(a) by a body corporate, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a director, manager or secretary of the body corporate, or

(ii) purports to act in any such capacity,
(b) by a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is a partner, or

(ii) purports to act in that capacity,

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(c) by an unincorporated association other than a Scottish partnership, is committed with the consent or connivance of, or is attributable to any neglect on the part of, a person who—

(i) is concerned in the management or control of the association, or

(ii) purports to act in the capacity of a person so concerned,

the individual (as well as the body corporate, Scottish partnership or, as the case may be, unincorporated association) is guilty of the offence and is liable to be proceeded against and punished accordingly.

(2) Where the affairs of a body corporate are managed by its members, subsection (1) applies in relation to the acts and defaults of a member in connection with the member’s functions of management as if the member were a director of the body corporate.

100 Ancillary provision
The Scottish Ministers may by order—

(a) modify any enactment for the purposes of preventing a body established by enactment from failing the charity test by reason of either or both of paragraphs (a) and (b) of section 7(3),

(b) make such other incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient for the purposes or in consequence of this Act.

101 Orders, regulations and rules

(1) Any power of the Scottish Ministers under this Act to make orders, regulations or rules is exercisable by statutory instrument.

(2) Any such power includes power to make—

(a) such incidental, supplemental, consequential, transitional, transitory or saving provision as the Scottish Ministers think necessary or expedient,

(b) different provision for different purposes.

(3) An order under section 100 may modify any enactment, instrument or document.

(4) A statutory instrument containing an order, regulations or rules under this Act except—

(z) an order under section 7(4A),

(za) an order under section 19(8),

(aa) regulations under section 63(d),

(a) regulations under section 82(1) containing provisions of the type described in section 82(2)(h),

(b) where subsection (5) applies, an order under section 100,

(c) an order under section 104(2),
is subject to annulment in pursuance of a resolution of the Scottish Parliament.

(5) No—

(za) order under section 7(4A),

(zb) order under section 19(8),

(a) regulations made by virtue of section 63(d),

(aa) regulations under section 82(1) containing provisions of the type described in section 82(2)(h), or

(b) order under section 100 containing provisions which add to, replace or omit any part of the text of an Act,

may be made unless a draft of the statutory instrument containing the regulations or, as the case may be, order has been laid before, and approved by resolution of, the Parliament.

102 Minor and consequential amendments and repeals

Schedule 4 sets out minor amendments and amendments and repeals consequential on the provisions of this Act.

102A Meaning of “control” etc.

(1) A charity which is able (whether directly or through one or more nominees) to secure that the affairs of a body are conducted in accordance with the charity’s wishes is, for the purposes of sections 28 to 35, to be treated as being in control of that body.

(2) For the purposes of sections 46A(5) and 67(2)—

(a) a person who is able to secure that the affairs of an institution are conducted in accordance with the person’s wishes is to be treated as being in control of the institution,

(b) a person who—

(i) is interested in shares comprised in the equity share capital of a body corporate of a nominal value of more than one-fifth of that share capital, or

(ii) is entitled (whether directly or through one or more nominees) to exercise, or control the exercise of, more than one-fifth of the voting power at any general meeting of a body corporate,

is to be treated as having a substantial interest in the body corporate.

(3) The rules set out in Part 1 of Schedule 13 to the Companies Act 1985 (c.6) apply for the purposes of subsection (2) as they apply for the purposes of section 346(4) (connected persons etc.) of that Act (and “equity share capital” and “share” have the same meanings in subsection (2) as they have in that Act).

103 General interpretation

In this Act, unless the context otherwise requires—

“applicant” has the meaning given in section 4(a),

“benevolent body” has the meaning given in section 78,

“charitable purposes” means the purposes set out in section 7(2),
“charity” means a body entered in the Register,
“charity test” is to be construed in accordance with section 7,
“charity trustees” means the persons having the general control and management of the administration of a charity,
“company” means a company formed and registered under the Companies Act 1985 (c.6) or to which that Act applies as it applies to such a company,
“constitution”—
(a) in relation to a charity or other body established under the Companies Acts, means its memorandum and articles of association,
(b) in relation to a charity or other body which is a body of trustees, means the trust deed,
(c) in relation to a SCIO, has the meaning given in section 50,
(d) in relation to a charity or other body established by enactment, means the enactment which establishes it and states its purposes,
(e) in relation to charity or other body established by a Royal charter or warrant, means the Royal charter or warrant, and
(f) in the case of any other charity or body, means the instrument which establishes it and states its purposes,
“designated national collector” means a charity designated as such under section 86(4),
“designated religious charity” means a charity designated as such under section 64(1),
“equal opportunities” and “equal opportunity requirements” have the meaning given in Section L2 of Part 2 of Schedule 5 to the Scotland Act 1998 (c.46),
“local authority” means a council constituted under section 2 of the Local Government etc. (Scotland) Act 1994 (c.39),
“misconduct” includes mismanagement,
“OSCR” means the holder of the Office of the Scottish Charity Regulator,
“the Panel” mean a Scottish Charity Appeals Panel constituted in accordance with section 74(1) of this Act,
“the Register” means the Scottish Charity Register,
“relevant financial institution” means—
(a) a person who has permission under Part 4 of the Financial Services and Markets Act 2000 (c.8) to accept deposits,
(b) an EEA firm of the kind mentioned in paragraph 5(b) of Schedule 3 to that Act which has permission under paragraph 15 of that Schedule (as a result of qualifying for authorisation under paragraph 12(1) of that Schedule) to accept deposits,
and this definition must be read with section 22 of and Schedule 2 to that Act and any relevant order under that section,
“reorganisation scheme” has the meaning given in section 43(3) and references to “approved reorganisation schemes” are references to schemes approved under section 40 or 41.

“SCIO” has the meaning given in section 49.

104 Short title and commencement

(1) This Act may be cited as the Charities and Trustee Investment (Scotland) Act 2005.

(2) This Act (except sections 100 and 101 and this section) comes into force on such day as the Scottish Ministers may by order appoint.
SCHEDULE 1
(introduced by section 1)

THE SCOTTISH CHARITY REGULATOR

Membership

1 (1) The Scottish Charity Regulator (in this schedule referred to as “the Regulator”) is to consist of such number of members (but not fewer than 4) as the Scottish Ministers think fit.

(2) It is for the Scottish Ministers to appoint those members from amongst those persons appearing to them to have knowledge and skills relevant to the functions of OSCR.

(3) An individual is disqualified from appointment as, and from being, a member of the Regulator if the individual is—

(a) a member of the Scottish Parliament,
(b) a member of the House of Commons,
(c) a member of the European Parliament,
(d) an office-holder in the Scottish Administration,
(e) an individual of such other description as may be prescribed by order by the Scottish Ministers.

Tenure and removal from office

2 (1) Each member of the Regulator—

(a) is to be appointed for such period as is specified in the appointment,
(b) may, by notice to the Scottish Ministers, resign as a member,
(c) in other respects, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
(d) after ceasing to hold office, may be reappointed as a member.

(2) The Scottish Ministers may remove a member from office if satisfied—

(a) that the member’s estate has been sequestrated or the member has been adjudged bankrupt, has made an arrangement with creditors or has granted a trust deed for creditors or a composition contract,
(b) that the member—

(i) has been absent from meetings of the Regulator for a period longer than 6 consecutive months without the permission of the Regulator, or
(ii) is unable to discharge the member’s functions as a member or is unsuitable to continue as a member, or
(c) that it is necessary or expedient to do so in connection with the management of the affairs of the Regulator.

Chairing

3 (1) The Scottish Ministers must appoint—
Schedule 1—The Scottish Charity Regulator

4 (1) The Regulator—

(a) must appoint a chief executive, and

(b) may appoint such other employees as it considers appropriate.

(2) The terms and conditions of the chief executive and any other employees, and the number of any other employees, require the approval of the Scottish Ministers.

5 The quorum of the Regulator and the arrangements for its meetings are for the Regulator to determine.

Delegation of powers

6 (1) Anything authorised or required under any enactment to be done by the Regulator, whether or not as the holder of the Office of the Scottish Charity Regulator, may be done by any member or employee of the Regulator who is authorised (whether generally or specifically) for the purpose by it.

(2) Nothing in sub-paragraph (1) prevents the Regulator from doing anything that any of its members or employees has been authorised or required to do.

Validity of proceedings and acts

7 The validity of any proceedings or acts of the Regulator is not affected by any—

(a) vacancy in its membership, or

(b) defect in the appointment of a member.
Panel members

1 (1) The Scottish Ministers must appoint such number of persons as they think fit to be eligible (for such period, not exceeding 5 years, as the Scottish Ministers may specify) to serve as members of a Panel constituted under section 74(1).

(2) At least one of the persons so appointed must be, and have been for at least 5 years—
   (a) a solicitor holding a practising certificate issued in accordance with Part 2 of the Solicitors (Scotland) Act 1980 (c.46), or
   (b) an advocate.

(3) An individual is disqualified from being so appointed, and from being appointed as or being a Panel member, if the individual is—
   (a) a Lord of Appeal in Ordinary or holds any of the judicial offices specified in Part 1 of schedule 1 to the House of Commons Disqualification Act 1975 (c.24),
   (b) a member of the Scottish Parliament,
   (c) an office-holder in the Scottish Administration,
   (d) an individual of such other description as may be prescribed by order by the Scottish Ministers.

(4) Each Panel is to consist of 3 of the persons appointed under paragraph 1(1) (one of whom is to be appointed by the Scottish Ministers to chair the Panel).

(5) A person appointed to chair a Panel must fall within paragraph 1(2).

Tenure and removal from office

2 (1) Each person appointed under paragraph 1(1)—
   (a) is to be appointed for such period as is specified in the appointment,
   (b) if appointed to serve as a Panel member, holds and vacates office on such terms and conditions (including remuneration and allowances) as the Scottish Ministers may determine,
   (c) may, by notice to the Scottish Ministers, resign from being eligible to be, or from being, a Panel member,
   (d) after ceasing to be eligible to serve as a Panel member, may be reappointed as a person eligible to serve as a Panel member.

(2) A person appointed under paragraph 1(1) ceases to be eligible to serve as, and may not be, a Panel member if the Scottish Ministers are satisfied that the person is unable to discharge the functions of a Panel member or is unsuitable to serve, or to continue to serve, as a Panel member.
Staff, property and services

3 The Scottish Ministers may provide the Panel, or ensure that it is provided, with such property, staff and services as they consider necessary or expedient in connection with the exercise of its functions.

Rules of procedure

4 (1) The Scottish Ministers may make rules as to the practice and procedure of the Panel.

22 (2) Such rules may, in particular, include provision for or in connection with—

(a) the form and manner in which appeals to the Panel are to be made,

(b) the time within which such appeals are to be made,

(c) the lodging of documents before the Panel,

(d) the notification of matters specified in the rules to OSCR and any appellant,

(e) the periods within which proceedings must be held and decided on,

(f) the notification of the Panel’s decisions to OSCR and appellants,

(g) the time within which a decision of the Panel may be appealed to the Court of Session,

(h) the payment of expenses.

SCHEDULE 3
(introduced by section 94)

POWERS OF TRUSTEES: CONSEQUENTIAL AMENDMENTS

Judicial Factors Act 1849 (c.51)

1 In section 5 (judicial factor’s duty to lodge in bank money held by factor etc.) of the Judicial Factors Act 1849, subsection (4) is repealed.

Trusts (Scotland) Act 1921 (c.58)

2 In the Trusts (Scotland) Act 1921, sections 12 and 14 are repealed.

Trusts (Scotland) Act 1961 (c.57)

3 In section 2(1) (validity of certain transactions by trustees etc.) of the Trusts (Scotland) Act 1961—

(a) for “(ee)” substitute “(eb)”,

(b) in the proviso, after “transaction” where it first occurs insert “(other than a transaction such as is specified in paragraph (ea) of that subsection)”.

Trustee Investments Act 1961 (c.62)

4 (1) The Trustee Investments Act 1961 is amended as follows.

(2) Sections 1, 2, 5, 6, 12, 13 and 15 are repealed except in so far as they are applied by or under any other enactment.
(3) Section 3 and Schedules 2 and 3 are repealed, except in so far as they relate to a trustee having a power of investment conferred under an enactment—
   (a) which was passed before the passing of the Trustee Investments Act 1961, and
   (b) which is not amended by this schedule.

(4) Section 8 and paragraph 1(2) of Schedule 4 are repealed.

National Health Service (Scotland) Act 1978 (c.29)

5 In Schedule 7 (the Research Trust) to the National Health Service (Scotland) Act 1978, paragraph 4 is repealed.

Education (Scotland) Act 1980 (c.44)

6 In section 105 (schemes for reorganisation of educational endowments) of the Education (Scotland) Act 1980, subsection (4D) is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 (c.73)

7 Section 54 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 is repealed.

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

8 In Schedule 8 (amendments of enactments) to the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, in paragraph 21, sub-paragraph (1)(b) and the preceding “and” are repealed.

Charities Act 1993 (c.10)

9 In the Charities Act 1993, the following provisions are repealed—
   sections 70 and 71,
   in section 86(2), the word “70” in paragraph (a), and paragraph (b),
   section 100(5).

SCHEDULE 4
(introduced by section 102)

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

PART 1

ACTS

Recreational Charities Act 1958 (c.17)

A1 In section 6(2) of the Recreational Charities Act 1958, the words from “or”, where second occurring, to “1962” are repealed.
**Local Government (Financial Provisions etc.) (Scotland) Act 1962 (c.9)**

1. (1) In section 4 (reduction and remission of rates payable by charitable and other organisations) of the Local Government (Financial Provisions etc.) (Scotland) Act 1962, for paragraph (a) of subsection (10) substitute—

   “(a) “charity” means a body entered in the Scottish Charity Register,”.

2. (2) Paragraph 5 of Schedule 2 to that Act of 1962 is repealed.

**Sex Discrimination Act 1975 (c.65)**

2. (1) In section 79(1) of the Sex Discrimination Act 1975—

   (a) for “Part VI” substitute “section 104”,

   (aa) in paragraph (a), for “that Part” substitute “Part VI”,

   (b) after paragraph (a), insert—

   “(aa) in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”,

   (c) in paragraph (b)—

   (i) for “that Act” substitute “the Education (Scotland) Act 1980”,

   (ii) after “endowment”, where second occurring, insert “(or which would, but for the disapplication of that section by section 122(4) of that Act, be so dealt with)”.

2. (2) At the end of section 79(5) of that Act insert “or, in the case of an endowment the governing body of which is entered in the Scottish Charity Register, a scheme approved for that endowment under section 40 or 41 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

**Education (Scotland) Act 1980 (c.44)**

3. In section 122(1) of the Education (Scotland) Act 1980, for the definition of “charitable purposes” substitute—

   ““charitable purposes” has the same meaning as in the Charities and Trustee Investment (Scotland) Act 2005 (asp 00);”

**Civic Government (Scotland) Act 1982 (c.45)**

4. In the Civic Government (Scotland) Act 1982—

   (a) in section 24(3), for paragraph (c) substitute—

   ““(c) the business of a charity (that is to say, a body which is entered in the Scottish Charity Register);”,”

   (b) in section 39(3)(f), for the words from “charitable” to the end of that paragraph substitute “benevolent collection (within the meaning of section 83 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)).”,”
(c) section 119 (regulation of charitable collections) is repealed.

Companies Act 1985 (c.6)

4A In section 380 of the Companies Act 1985, after subsection (4) insert—

“(4ZA) This section does not, despite paragraphs (a) to (c) of subsection (4), apply to any resolution of a company which is—

(a) registered as a company in Scotland, and

(b) entered in the Scottish Charity Register,

where that resolution is of either of the types mentioned in section 56(5) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (c.40)

5 In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990—

(a) in section 1—

(i) subsections (4) to (6), and

(ii) the words which follow paragraph (b) in subsection (7),

are repealed,

(b) sections 2 to 8, 12 to 14 and 15(1) to (8) are repealed,

(c) in section 9(1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

(d) in section 10—

(i) in subsection (1)(d)(ii), for “become a recognised body” substitute “be entered in the Scottish Charity Register”,

(ii) subsections (6), (9)(b) and (11)(b) are repealed,

(e) in section 15(9)—

(i) after “affect” insert “—

(a),

(ii) at the end insert “; or

(b) any body entered in the Scottish Charity Register.”

Charities Act 1992 (c.41)

6 In Schedule 6 to the Charities Act 1992, paragraph 10 is repealed.

Further and Higher Education (Scotland) Act 1992 (c.37)

7 In section 19(3) of the Further and Higher Education (Scotland) Act 1992, for “within the meaning of the Income Tax Acts” substitute “(within the meaning of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.
Charities and Trustee Investment (Scotland) Bill
Schedule 4—Minor and consequential amendments and repeals
Part 2—Subordinate legislation

Tribunals and Inquiries Act 1992 (c.53)

8 In Part 2 of Schedule 1 to the Tribunals and Inquiries Act 1992, after paragraph 47 insert—

“Charities
47A Any Scottish Charity Appeals Panel constituted in accordance with section 74(1) of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00).”

Local Government etc. (Scotland) Act 1994 (c.39)

9 In Schedule 13 to the Local Government etc. (Scotland) Act 1994, paragraph 129(16) is repealed.

Ethical Standards in Public Life etc. (Scotland) Act 2000 (asp 7)

10 In schedule 3 to the Ethical Standards in Public Life etc. (Scotland) Act 2000, before the entry relating to “Scottish Children’s Reporter Administration” insert—

“The Scottish Charity Regulator”.

Land Reform (Scotland) Act 2003 (asp 2)

11 In the Land Reform (Scotland) Act 2003—

(a) in section 34(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”,

(b) in section 71(8), for the words from “which” to the end of that subsection substitute “entered in the Scottish Charity Register”.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

12 In schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003, before the entry relating to the “Scottish Children’s Reporter Administration” insert—

“Scottish Charity Regulator”.

Protection of Children (Scotland) Act 2003 (asp 5)

13 In paragraph 12 of schedule 2 to the Protection of Children (Scotland) Act 2003, for the definition of “charity” substitute—

““charity” means a body entered in the Scottish Charity Register;”.

PART 2
SUBORDINATE LEGISLATION

Arable Area Payments Regulations 1996 (S.I. 1996/3142)

14 In regulation 9(3)(h) of the Arable Area Payments Regulations 1996, for the words from “a”, where it second occurs, to the end of the paragraph substitute “, in relation to Scotland, a body entered in the Scottish Charity Register”.

1042
Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002 (S.S.I 2002/167)

15 In regulation 2(1) of the Water and Sewerage Charges (Exemption) (Scotland) Regulations 2002, in paragraph (i) of the definition of “net annual income”, for the words from “Scottish” to “1990” substitute “body entered in the Scottish Charity Register”.

National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004 (S.S.I. 2004/115)

16 In the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 5(2)(k)(i), and

(b) paragraph 101(2)(m)(i) of schedule 5,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)”.

National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004 (S.S.I. 2004/116)

17 In the National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004, for “section 7 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990”, where those words occur in—

(a) regulation 3(2)(k)(i),

(b) paragraph 66(3)(l)(i) of schedule 1,

substitute “section 34 of the Charities and Trustee Investment (Scotland) Act 2005 (asp 00)".
Charities and Trustee Investment (Scotland) Bill
[AS PASSED]

An Act of the Scottish Parliament to make provision about charities and other benevolent bodies; to make provision about fundraising in connection with charities and other benevolent bodies; to amend the law in relation to the investment powers of trustees; and for connected purposes.

Introduced by: Malcolm Chisholm
On: 15 November 2004
Supported by: Johann Lamont, Hugh Henry
Bill type: Executive Bill