

# **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL**

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## **POLICY MEMORANDUM**

### **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 Commission<sup>1</sup> 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 paper<sup>2</sup> 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 website<sup>3</sup>. 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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<sup>1</sup> The Scottish Charity Law Review Commission: report published May 2001

<sup>2</sup> Draft Charities and Trustee Investment (Scotland) Bill: Consultation ( <http://www.scotland.gov.uk/consultations> )

<sup>3</sup> 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<sup>4</sup> and at the Executive's library. A summary analysis of the responses is being prepared and will be published shortly<sup>5</sup>.

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<sup>6</sup>.

## **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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<sup>4</sup> <http://www.scotland.gov.uk/library5/social/ctisb-00.asp>

<sup>5</sup> 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> )

<sup>6</sup> *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<sup>7</sup> 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<sup>8</sup> 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.

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<sup>7</sup> Report for the Commission on the Future of the Voluntary Sector in Scotland, SCVO 1997

<sup>8</sup> Charity Regulation in Scotland response to Scottish Charity Law Review Commission report (McFadden) ([http://www.scotland.gov.uk/library5/justice/mcfadden\\_response.pdf](http://www.scotland.gov.uk/library5/justice/mcfadden_response.pdf))

## **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.<sup>9</sup> 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

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<sup>9</sup> Independent Regulators, Better Regulation Task Force Report, October 2003 ([www.brtf.gov.uk](http://www.brtf.gov.uk))

Bill<sup>10</sup>. 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<sup>11</sup>) 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) 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
- (b) 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,

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<sup>10</sup> Such an order is required because non-Ministerial officeholders of the Scottish Administration are designated by section 126 of the Scotland Act 1998.

<sup>11</sup> "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 trustees' 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<sup>12</sup>. 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

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<sup>12</sup> [www.scotland.gov.uk/viu](http://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)

- 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<sup>13</sup> 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<sup>14</sup> 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.

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<sup>13</sup> [http://www.homeoffice.gov.uk/docs3/charitiesbill\\_foreward040527.pdf](http://www.homeoffice.gov.uk/docs3/charitiesbill_foreward040527.pdf)

<sup>14</sup> 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 respondents 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 respondents 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 respondents 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 respondents 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 respondents 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 respondents who expressed a view welcomed the new form as an addition to the range of options currently open to charities. Two respondents 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 respondents 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<sup>15</sup>. 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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<sup>15</sup> <http://www.busecommission.org.uk/public/docs/Buse%20Commission%20Phase%202%20Report.pdf>

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,

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 respondents 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 Bill<sup>16</sup> 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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<sup>16</sup> 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.

*This document relates to the Charities and Trustee Investments (Scotland) Bill (SP Bill 32) as introduced in the Scottish Parliament on 15 November 2004*

# **CHARITIES AND TRUSTEE INVESTMENT (SCOTLAND) BILL**

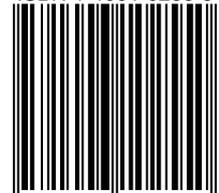
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