COMMUNITIES COMMITTEE

Wednesday 9 June 2004
(*Morning*)

Session 2

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COMMUNITIES COMMITTEE
22nd Meeting 2004, Session 2

CONVENER

*Johann Lamont (Glasgow Pollok) (Lab)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Patrick Harvie (Glasgow) (Green)
*Mary Scanlon (Highlands and Islands) (Con)
*Elaine Smith (Coatbridge and Chryston) (Lab)
*Stewart Stevenson (Banff and Buchan) (SNP)
Ms Sandra White (Glasgow) (SNP)

COMMITTEE SUBSTITUTES

Shiona Baird (North East Scotland) (Green)
Christine May (Central Fife) (Lab)
Shona Robison (Dundee East) (SNP)
Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
John Scott (Ayr) (Con)

*attended

THE FOLLOWING ALSO ATTENDED:

Tricia Marwick (Mid Scotland and Fife) (SNP)
Mrs Mary Mulligan (Deputy Minister for Communities)

THE FOLLOWING GAVE EVIDENCE:

Richard Arnott (Scottish Executive Development Department)
Philippa Bonella (Scottish Executive Development Department)
Quentin Fisher (Scottish Executive Development Department)
Catriona Hardman (Scottish Executive Legal and Parliamentary Services)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Gerry McInally

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

The Chamber

Scottish Parliament

Communities Committee

Wednesday 9 June 2004

(*Morning*)

[THE CONVENER *opened the meeting at 10:33*]

Charity Law

The Convener (Johann Lamont): I welcome members to the Communities Committee's 22nd meeting in 2004. We have received apologies from Sandra White and we welcome Tricia Marwick for this agenda item.

Under agenda item 1, we will take evidence on the proposals on charity law reform. I welcome the officials Richard Arnott, Quentin Fisher, Philippa Bonella and Sian Ledger from the Executive's charity law team and Catriona Hardman from the office of the solicitor to the Scottish Executive. I invite you to make some opening comments.

Richard Arnott (Scottish Executive Development Department): Thank you for inviting us to discuss the draft Charities and Trustee Investment (Scotland) Bill, which was published for consultation last Wednesday. We will be happy to answer any questions that the committee has, but first I will introduce the bill team. I am the bill team leader and Quentin Fisher is the deputy. Sian Ledger deals mostly with fundraising issues and Philippa Bonella, who is on secondment from the Scottish Council for Voluntary Organisations, has been arranging our consultation meetings and events. Catriona Hardman, who is from the office of the solicitor to the Scottish Executive, provides our legal advice.

I thought that it would be helpful to set out a little of the background to the draft bill. The Scottish public provide enormous support for charity activity. Around one million individuals volunteer for charities and it is estimated that the public donate £250 million to Scottish charities each year. The public deserve to be sure that charities in Scotland are effective, transparent and trustworthy. There are more than 25,000 charities in Scotland, of which it is estimated that 67 per cent have an annual income of less than £25,000. The sector is highly diverse.

In September of last year, Margaret Curran, the Minister for Communities, announced that, as the first step towards meeting the partnership's commitment to legislate on charity law reform, she would publish a draft bill to provide the regulatory framework that charities need. Last week, the minister announced the publication of that draft bill. We are looking forward to developing the bill further in the light of the responses that we receive to the consultation.

Our aim is that the draft bill should set out the basis for a comprehensive, consistent and effective regulatory system for charities in Scotland and should modernise and simplify the framework within which charities work. To ensure that the draft bill was prepared in an effective and consultative way, we established a reference group of key experts. The bill team has also held more than 40 consultation meetings on particular aspects of the bill. We would like to thank all those people involved with the sector who have provided assistance and comments over recent months; I suspect that some of them are in the public gallery today.

The publication of the bill in draft form will allow a wide range of stakeholders to respond to our proposals before the bill comes to Parliament. In partnership with the SCVO, we have organised a series of local and national events to allow the issues that are raised in the bill to be debated. We look forward to hearing a range of views in the coming months.

The draft bill is motivated by the belief that there is a clear public interest in the effective regulation of charities in Scotland. For regulation to be effective, it must promote five key principles; it must be independent, proportionate, accountable, transparent and consistent.

The draft bill is a wide-ranging piece of legislation that seeks to bring together Scottish charity law requirements in one place. It aims to repeal existing charity law and to create a single, modern framework for charity regulation in Scotland that is based on the five principles that I have mentioned. The new bill will create a Scottish definition of charity, with a public benefit test, and will provide for the newly established Office of the Scottish Charity Regulator—OSCR—to become an independent statutory body with an enhanced range of powers, which will include the ability to grant charitable status and to maintain a statutory register of all charities that operate in Scotland.

To ease the transition, all existing recognised Scottish charities will be transferred automatically to the new Scottish charities register. They will continue to receive United Kingdom tax relief and other benefits, such as rates relief. OSCR will then systematically review the register and seek information from the charities to ensure that they fit the new definition and are complying with the regulatory system.

The bill will modernise the regulation of fundraising to ensure that public collections are

monitored more effectively and that professional fundraising companies inform the public how much of their donations will go to charity. In addition, it will implement a number of measures for which charities have called for some time, such as the creation of the new Scottish charitable incorporated organisation and the widening of trustees' investment powers; it will also make charity reorganisation easier.

The bill will tackle key issues of principle concerning what we expect of charities in modern Scotland. During the preparation of the draft bill, our consultation with stakeholders led to a number of wide-ranging policy debates about charities' place in Scottish society. We do not feel that focusing on particular parts of the charity sector, or on individual characteristics of charities, is a good way to create appropriate law for a highly diverse sector. The approach that we have taken is to set out core principles for the regulation of charities, which the regulator can interpret flexibly and proportionately over time. However, nothing within the draft bill is set in stone and we look forward to continuing those debates over the course of the summer.

The Convener: Thank you.

Scott Barrie (Dunfermline West) (Lab): Before we get into the meat of the draft bill, I wonder whether we can go back to anchor it in the consultation process to which Richard Arnott alluded in his introductory remarks. Who was involved in the 40 meetings over the past few months and what main themes arose?

Philippa Bonella (Scottish Executive Development Department): As members know, I was seconded from the Scottish Council for Voluntary Organisations to set out the consultation process while we were drafting the bill. The first thing that I did was to think about how the consultation should take place at that stage in the policy debate. There had been a fair amount of consultation on the big policy issues and we felt that it was important to start taking that forward towards action. Everyone was well aware that there was a need to involve the charity sector if regulation was to be effective.

We set up a three-pronged strategy. We had a formal reference group for the bill, which involved all the main stakeholders, such as the SCVO, OSCR and the Institute of Fundraising. We also set up, on a more ad hoc basis, a number of focused, specialist meetings on particular issues in the bill. We considered fundraising, issues of trust law and what the bill would mean for co-operatives and mutuals, and for charities that were already registered in England and Wales. We invited specific groups to the meetings to discuss the issues with us.

There is a full list at the back of the consultation document of all the meetings and who attended them. The issues that were raised were largely around balancing the need for effective regulation to ensure that the bad apples in the sector are weeded out with the need to ensure that we do not over-regulate the entire sector as a result. Much of the bill's drafting work has been on that interesting balance.

Scott Barrie: What discussions have taken place with the UK Government, the Inland Revenue and the Charity Commission for England and Wales about the proposed framework for south of the border?

Richard Arnott: We have had regular discussions with Home Office officials who have been developing the draft Charities Bill for England and Wales, which was published the week before our bill was published. It is important to bear in mind the fact that England and Wales are starting from a different position with regard to charity legislation. There is a well-established statutory regulator there and the bill will make amendments to the existing situation, some of which will be major amendments to the definition of charity. However, the overall system will, in effect, continue as it is.

We had several discussions with the Home Office and the Charity Commission for England and Wales to assess how our proposals and Westminster's proposals could work together. Not surprisingly, they were particularly interested in our plans for ensuring that English charities would have to register with OSCR if they wanted to operate in Scotland.

We have had several discussions with the Inland Revenue about the current system of the index of charities—the recognised Scottish charities—that it handles. We discussed how, when OSCR is a statutory body granting charitable status in Scotland, that would work with the Inland Revenue's continuing role—in theory—of granting tax relief. We hope that by OSCR, the Inland Revenue and the Charity Commission for England and Wales continuing to work together, that process can be made straightforward. Our expectation is that the Inland Revenue will accept OSCR's decisions on charity status for tax purposes as well. However, that is obviously a decision for the Inland Revenue, because tax is a reserved matter.

The Convener: I want to move on to consider the relationship between the draft bill and the McFadden commission. Obviously, the McFadden commission undertook a large consultation before making its recommendations. To what extent does the draft bill reflect the original recommendations? In which key areas is there a departure from them?

10:45

Richard Arnott: It is important to acknowledge the work of the McFadden commission. I suspect that it was the McFadden proposals for having a separate public benefit test that influenced the English strategy report on having such a test. It is because of that that we have been able to develop our proposals in conjunction and in parallel with the Home Office proposals for that definition.

We are implementing the main thrust of the McFadden report in our draft bill. McFadden recommended that there should be a statutory, independent regulator; a statutory register; a Scottish charity test with the public benefit as the main part of that definition; a system for appealing against the regulator's decisions; improvements to the way in which charities are reorganised; and that the SCIO should be the legal form for charities. A lot of the basic McFadden proposals are included in the draft bill.

There are some details that we have not included. The McFadden report made specific recommendations about the independence of charities that are established by Government. We have taken a slightly different line on that, because we believe that the framework should be for all charities and should not necessarily specify different rules for different sorts of charities. We have proposed that all charity trustees should be well aware of their responsibilities to act in the best interests of the charity for which they are working, and that charity trustees should be called "charity stewards", to avoid any conflict or confusion between general trust law in Scotland and the draft bill. We have also proposed that some of the details of the way in which the public collection system is organised be slightly different from the McFadden recommendations.

However, the general thrust is that most of the McFadden commission's recommendations are being implemented.

The Convener: We will explore why the definition of the public benefit test is to be left to OSCR. The McFadden report includes a definition of the public benefit test, which says:

"To meet the public benefit test, we believe that a Scottish Charity should have as its purpose the relief of need, and the sustenance or enhancement of the lives of people in the community in which they live. Benefit to the public should mean net benefit to the general public - by this we mean that it should not be enough for an organisation to show that some benefit would result from acting in a particular way, if there were also some disadvantage, or some harm caused to another section of the community."

You will not define public benefit in the bill—OSCR will do that—but does the Scottish Executive have a view on the McFadden definition of the public benefit test? Is that generally what you would expect the guidance to say?

Quentin Fisher (Scottish Executive Development Department): We have covered all the bases of the definition that was proposed by McFadden, but we have covered them in different parts of the bill. The idea of the net public benefit is inherent in the definition in the draft bill. McFadden included a suggestion of independence in its definition and, as Richard Arnott explained earlier, we have covered that elsewhere in the bill.

The Convener: What I am trying to get at is that it is very clear what McFadden would expect from a public benefit test. From your perspective, would that definition prevent organisations that are, in effect, of private interest from bolting on a bit of public benefit to the edge of their enterprise and redefining themselves as existing for the public benefit? Would the bolting on of good works to private enterprises enable organisations to pass a public benefit test?

Quentin Fisher: The other part of the test—that the body has to have only charitable purposes—assists us in that regard. If an organisation were to have a purpose such as the distribution of profit among shareholders, that is clearly not a charitable purpose. The organisation would fall at that hurdle and would not get through to the public benefit part of the test.

Stewart Stevenson (Banff and Buchan) (SNP): It was suggested that charity stewards exist to promote the benefit of the charity. I feel slightly uneasy about that, because it would put stewards in the same relationship to the charity as a company director is in to a company—a fiduciary duty would exist. Would it not be more proper, in the charitable domain, that the charity steward's prime responsibility should be to the charitable purposes that are being served by the charity? If that were the case, one of the things that the charity steward or stewards might do would be to say, "We can best serve the charitable purposes of this charity by closing the charity down."

In other words, I wonder whether the phrase that you used was an appropriate definition, and what your thinking was in laying that particular phrase before us. What alternatives have you considered for the duties and responsibilities of charity stewards? I have not yet read exhaustively all the papers on this, so I would be perfectly content if you were to point out something that I have not yet reached in my reading.

Quentin Fisher: I confess that, in setting out the duties for charity stewards, we have largely tended to consider the equivalent in trust law; that is to say, the trustees of trusts. In many ways, the relationship that charity stewards have to the essence of the charity mimics the relationship that

trustees have to the essence of the trust. There is the sense of duty owed in that respect, and we have tried to mimic that duty.

Stewart Stevenson: But you are saying that the primary duty is to the organisation, not to the purposes of the organisation.

Richard Arnott: It is not quite as strong as that. We are saying that charity stewards must act in the best interests of the charity to ensure that it follows its charitable purposes. We are not aiming to move away from the charitable purposes—the best interest of the charity is to fulfil those purposes.

Stewart Stevenson: I do not want to make a meal of it—we are just trying to pick out your thinking in supporting the Executive. What I am really getting at is whether, in respect of the public benefit from charities, what the charity does is much more important than the charity. That is quite different from the company position. Could the situation be expressed in an alternative way that would articulate it more clearly? Have you thought about and dismissed any such alternatives?

Richard Arnott: No. There are no other reasons, and we have not chosen the wording with the intention of avoiding charitable purposes. I would welcome hearing suggestions for better ways of setting it out.

Patrick Harvie (Glasgow) (Green): The SCVO has argued that the independence of charities should be part of the bill, and you have explained that you have not taken that approach. The SCVO stated:

"The reference to this issue in the Executive's response statement is confused and opaque."

How do you respond to that? Has your thinking on the issue developed since you read that?

Richard Arnott: I do not think that it has developed in the past few days, since we read that. We have attempted to set out a framework that will apply to all charities. Much of the current case law on public benefit—most of which is English case law, although there have been Scottish cases—covers the fact that the trustees of a charity must act for the interests of the charity and, as Mr Stevenson pointed out, its purposes. It is important that we recognise that charity stewards should be free to act for the charity and that is what we mean by independence—freedom to act for the charity and its purposes.

Patrick Harvie: So there was no thought in your mind to go along with the McFadden idea of limiting the number of trustees or stewards who could be appointed by a public body, for example, to charities that had been set up by the state?

Quentin Fisher: We have chosen to rely on the principle rather than on a rigid formula for testing. For one matter, the principle is more flexible and it allows development over time. The principle that underpins the need for charities to be independent of Government is a suggestion that ministers have already accepted, so we do not have a difficulty with that.

However, the underlying principle and foundation of that belief is that the charity stewards should be acting only in the interests of the charity or to further its charitable purposes and that they should not act in the interests of some third party. That is what we are trying to lay out. If we were to stick to a rigid formula that referred only to local authorities or to the Executive's appointment of trustees, we might find ourselves fossilised at a later point. However, this is a consultation, we have asked for views on that point and we are happy to take those views on board.

Tricia Marwick (Mid Scotland and Fife) (SNP): I return to the point about public benefit. You say on page 11 of the consultation document:

"Because of the complexity of what constitutes public benefit, an attempted definition may in practice only serve to confuse. The detail of the current legal position is already very developed in case law and we could lose access to and alignment with established thinking in trying to set this out in legislation."

First, can you give examples of the case law that is well established? Secondly, will you confirm that it is your belief that, when OSCR defines what it considers to be public benefit, the established case law will be the defining feature?

Richard Arnott: I will deal with those questions in reverse order. We expect OSCR to prepare guidance on how it will interpret public benefit tests and other parts of the legislation and to consult on that guidance before finalising it. In considering how it should interpret the legislation, OSCR will need to consider previous case law and to set out and justify its proposals. We feel that OSCR will be expected, and required, at least to justify that it is following previous case law or even why it is not.

You sought examples of case law. I am not sure whether we are in a position to suggest any at the moment, but perhaps we could look them up and write to you with more details.

Tricia Marwick: If you were to bring to the attention of the committee and others what that existing case law was, that would be very useful, given your argument that we do not need a definition in the bill because case law already exists.

The McFadden report sets out the test for what a Scottish charity should be:

"A Scottish Charity should be an organisation:

- whose overriding purpose is for the public benefit
- which is non-profit distributing
- which is independent
- which is non-party political."

Does that chime with existing case law or is it different?

Richard Arnott: It chimes very much with existing case law.

Tricia Marwick: I would like to make one final point on public benefit. There are two arms to the proposed legislation—one concerns the charitable purpose for which you have set out 13 different criteria and the second concerns public benefit. Can you explain in words of one syllable why the charitable purpose is so important that it is included in the bill, but the public benefit test will be left to the regulator?

11:00

Richard Arnott: I do not think that the matter is as clear cut as that, in that the 13 charitable purposes are merely examples of currently accepted charitable purposes. They are set out in that way partly to ensure that existing charities are already accepted as having charitable purposes and that that can continue. The 13th head—the 13th charitable purpose—which refers to other purposes for public benefit, is in effect a catch-all to allow other charitable purposes to be added. Therefore, the list of purposes is perhaps not as closed as it seems. There is scope for additional purposes to be accepted in the future, but bodies with those purposes will be able to become charities only if those purposes also have public benefit.

The Convener: I would like clarification. Am I right that you are not saying that organisations that are currently regarded as charities will—because they are already regarded as charitable—be regarded for all time as charitable?

Richard Arnott: Such organisations will probably be regarded as charitable, but the question whether they provide public benefit would be asked. They need to do both those things to continue to be a charity.

Mary Scanlon (Highlands and Islands) (Con): On the point that Patrick Harvie raised about independence, page 18 of the consultation document mentions that Jim Wallace pointed out that there is a divergence between charity law requirements on independence and existing Executive policy on ministerial direction of public bodies. Given that you said that the stewards will always have to act in the interests of the charity, what have you done to ensure that charities are independent of ministerial direction? How can charities be independent when they are pursuing Government policy, for example on social inclusion? Is not there scope for their independence to be questioned?

Quentin Fisher: There is scope for that. That is one of the reasons why an undertaking was given in Jim Wallace's announcement in December 2002 that non-departmental public bodies—which we can, of course, speak for—would consider the issue in their then quinquennial reviews, although the way those are conducted has changed slightly. To our knowledge, that was done.

Richard Arnott: That continues as part of the review of NDPBs.

Quentin Fisher: I should add that there being a parallel between Executive policy and the charitable purpose of a body that has been set up by Government would not in itself be fatal in relation to the question of whether charity stewards are acting in the interests of the charity or its charitable purposes. It is imaginable that a charity steward could be focused entirely on the charity and its purposes despite there being a parallel with Government policy. Such a parallel is not problematic.

Mary Scanlon: Many charities are funded from the public purse to carry out duties and to provide public benefit. If a charity is being paid by the Executive and is carrying out ministerial directions—which can change over time depending on the Government—it could be argued that it is not independent.

Richard Arnott: That is exactly why the Executive has undertaken to review the status of NDPBs that are charities. It wants to consider whether it is appropriate for them to continue to be NDPBs and charities.

Mary Scanlon: The point is important. How will OSCR decide whether a charity is independent or whether it is pursuing a ministerial directive, which may call its independence into question?

Richard Arnott: Our hope is that, before OSCR has to make such a decision, the Executive and the NDPB will consider as part of the review of the NDPB whether the trustees are free to act for the charitable purposes for which the body was set up. If they are not, the body will have to consider its status.

Mary Scanlon: Has that been a concern for you in drafting the bill?

Richard Arnott: It has not caused us concern. We accept that the Executive has agreed that

charities should be independent and we have set out the rules for charity stewards so that those rules are concurrent with that aim. All charities should come under the same framework, whether or not they were set up by the Executive.

Stewart Stevenson: I have questions on the role of charities, although I suspect that we have already explored the issue fairly fully. Given that the Executive states that the reform of charity law forms a core part of a wide-ranging programme on charities and the wider voluntary sector, what other proposals might be produced in due course as part of the Executive's reforms?

Richard Arnott: We deal mostly with the draft bill, but obviously that fits in with other parts of the voluntary issues unit's work. It is important to bear it in mind that the Executive supports voluntary work, not just by charities but by other organisations. Every year, £360 million goes to the voluntary sector from Executive departments, agencies and NDPBs. In the past few months, the Executive has relaunched, in conjunction with the sector, the Scottish compact, which revisits and reaffirms the way of working with the voluntary sector.

The social economy review is under way and the strategic review of voluntary sector funding is intended to improve the sustainability and effectiveness of voluntary organisations. The Executive has been working with voluntary organisations to help them become more sustainable. The volunteering strategy, which was published last month, sets out how the Executive intends to work with the voluntary sector. The project Scotland youth volunteering programme, which was launched last month, is another way in which the Executive supports the voluntary sector. We see the draft bill as being another part of support for, and work with, the sector.

Stewart Stevenson: Is the implication of what you say that there are no further issues to be dealt with?

Richard Arnott: The answer is probably no. I am sure that there is scope for further improvement and discussion with the sector, and that the Executive will continue to work with the sector to improve things.

Stewart Stevenson: Can you say whether any specific proposals are being worked up, even if you cannot say what they are?

Richard Arnott: Other proposals are being discussed, but I am afraid that I am not qualified to go into the detail of them.

Stewart Stevenson: Charities in the 21st century are obviously different animals from those in the 19th and 20th centuries. How has the role of charities changed and how will it change in the future? Bearing in mind that you said in your opening remarks that you are not focusing on charities' individual characteristics, how have they changed in general? I presume that they have changed, given that we have to change the regime.

Richard Arnott: Philippa Bonella is probably the expert among us on the history of charities, but I will begin.

Charity legislation goes back, I think, to 1601. Charities have changed since then; indeed, many of our discussions during consultations have been about how the role of charities has changed. In the original definition of a charity, relieving poverty, advancing religion or advancing education were automatically assumed to be public benefits and good things. I suspect that, in earlier times, if charities had not done such work, nobody would have. I think that we would all accept that the world has changed and that the state now provides many of those services—in some cases, in partnership with the voluntary sector. Charities now have a different role.

Philippa Bonella: I would add to that only that the sector has changed in two ways. First, it now often delivers services in partnership with the state and, secondly, it campaigns more and is more willing to advocate on behalf of users of its services. We have tried in the bill to acknowledge both those changes. We want to allow charities to continue to work in partnership with Government when they choose independently to do so, and we want to ensure that charities are free to put across to Government their points on policy.

Stewart Stevenson: My activities as an MSP are entirely funded from the public purse, yet I feel able to be a trenchant critic of the Executive from time to time. I take it that you are perfectly content that the devil's bargain between charities and the public purse need not impugn charities' independence in any way.

Philippa Bonella: The compact sets that out very clearly.

The Convener: I will be charitable about that question.

Donald Gorrie (Central Scotland) (LD): I want to ask about public benefit. You felt on reflection that to set out detailed criteria of public benefit in the consultation document might be too constricting. You therefore set no criteria; everything is left to OSCR. Is not that rather an extreme position?

Difficulties will arise in the grey areas, when matters of charity are related to non-charity matters. An example would be fee-paying schools. If a school offers X scholarships and allows Y children from a neighbourhood to play on its

playing field, is that good enough for it to be considered to be a charity when its main purpose is to be a fee-paying school? Another example would be if a professional football club was to set up a charitable and voluntary amateur activity. The main purpose of that activity might be to benefit the professional football club, but it might also provide an opportunity for amateur sport. Similarly, an estate owner might set up a charity that improved the estate in various environmental ways but that also helped him to bring in more money from shooters and fishers.

Would not it be better for the bill to contain clear guidance that is not too prescriptive but that sets out some principles on which OSCR could base its work? At the moment, OSCR is starting to make law on a clean sheet of paper. That, I think, is a hard task.

Quentin Fisher: We ask that question in our consultation. Two different points of view have been put to us. One is the suggestion that Mr Gorrie has just made—that we could provide greater clarity to OSCR in order to allow it to make its determinations. However, it has also been put to us that, if we attempt to codify what are extremely complex concepts that are debated in court, we might end up divorcing ourselves from the existing body of case law and we might emphasise certain aspects at the expense of others, with a resultant loss of flexibility. However, we are putting the question to consultees.

That begins to answer the question. The other issue is the role of the courts. The idea that OSCR should interpret public benefit and then either grant or refuse charitable status or registration on that basis is not the end of it all, and we should not lose sight of that.

We are providing for an appeal mechanism, so that where there is disagreement about OSCR's evaluation of public benefit, that evaluation and the decision that arises from it could be appealed, ultimately to the courts if need be. There is not a dead end. Through the proposed appeal panel, and later through the courts if need be, a decision would be reached that would, I believe, reflect the wider view of public benefit.

11:15

Donald Gorrie: The courts would, however, be starting from scratch in deciding public benefit. I would have thought that it is our job to set out principles for courts and quangos—whatever OSCR is—to follow. The idea is, "Let's have public benefit but you guys go away and decide what it is on the basis of what some judge in England said 100 years ago." I am not a lawyer, but I understood that Scots went in for principles and the English went in for case law. What about setting out a few principles?

Quentin Fisher: That is a valid suggestion, but I add that the Scottish courts would not be operating in a case-law vacuum. Catriona Hardman may wish to add to that.

Catriona Hardman (Scottish Executive Legal and Parliamentary Services): Thus far, case law has been English case law. There is a tie-in with the Inland Revenue, because it will consider definitions of charities, of what is charitable and of what constitutes public benefit as far as English law is concerned. We have considered either leaving public benefit completely undefined or putting guidelines in. I am not sure that there is much that I can add to what has been said. I hope that there will be more dialogue as part of the consultation on the bill. The issue can be approached either way. The English bill at present does not offer a definition of public benefit, either. It relies on an understanding of public benefit as it has been developed in English case law. There is a danger that to move too far away from that might cause difficulties for the Inland Revenue in its interpretation of what is charitable in both jurisdictions.

Donald Gorrie: Is it satisfactory for Scottish law on charities to be determined by the Inland Revenue in London, which is in effect what will happen?

Catriona Hardman: I am sorry if what I said sounded like that. I do not think that it will be determined by the Inland Revenue. At the moment, there is no legal interpretation of public benefit in Scotland. That will come to the fore now that we have a Scottish definition of charities. In considering matters, the courts will look at the legislation, and may still look at some of the English case law in the background. The definitions of public benefit in Scotland and England will inevitably change because there will, with the coming into force of the English provision, be no presumption of public benefit in cases of advancement of education or religion and relief of poverty. English case law and ours will develop and they will, I hope, do so roughly in tandem. It is not a particularly easy matter, given that they already have a definition of sorts and we do not.

Donald Gorrie: We are advancing, but I would like us to do so in the right direction.

Patrick Harvie: My point is fairly similar to that which Donald Gorrie raised. Given the references that have been made to English case law, it sounds as though the Executive is content for English courts to continue to make decisions that significantly affect Scottish charities. Unless you have anything else to add on that matter, I am happy to pass the questioning to another member.

Richard Arnott: It is not true to say that the Executive is content for English courts to decide on Scottish cases. During the consultation, charities felt strongly that they would find it difficult if the definitions of a charity in Scotland and a charity that would receive tax benefits were completely different. To avoid that situation, we have very much borne in mind their comments in developing the Scottish definition, and we have tried to ensure that there is no great difference between the definitions.

Stewart Stevenson: Definitions always plague any legislation or proposal. The draft bill sets out the terms of the charity test. Section 7(2) lists 13—or more properly 12—items, the last of which is

"any other purpose intended to provide community"—

not public—

"benefit".

Why does the list exist, given that that catch-all covers everything else? Indeed, the list itself gives me cause for some mild questioning. For example, section 7(2)(b) refers to "the advancement of education". Where does training, which is a distinctly different issue, come into that? I would also like philosophy to be included in section 7(2)(f), which refers to

"the advancement of arts, heritage, culture or science",

and think that mediation should be included in section 7(2)(h), which refers to

"the advancement of human rights, conflict resolution or reconciliation".

Such examples show that we immediately hit problems when we start drawing up lists. Richard Arnott himself said that he did not want to consider the individual characteristics of charities. In that case, what policy purpose is served by including the list? It might almost mislead people, misdirect them or lead them into cul-de-sacs, notwithstanding the catch-all in section 7(2)(m). Indeed, why not use only that catch-all?

Richard Arnott: The idea is that we will avoid misleading people. We intend to make things clear in order to allow a body to see whether it can decide for itself whether it will be successful in becoming a charity. If the bill contained only the catch-all, we would have no guidance in that respect. To state that "the advancement of education" is assumed to be a charitable purpose gives confidence to education providers that they have such a purpose.

Stewart Stevenson: Your use of the word "guidance" encapsulates my point exactly. We are putting a list in the bill when it might be more sensible, flexible and appropriate to leave such matters to OSCR. After all, when I read the list, I felt that there were significant omissions, such as the reference to education but not to training.

I realise that the bill is a consultation draft and is not set in tablets of stone. I am simply trying to find out the balance of the debate that you had when you decided to include the list in the bill, rather than leave the matter in OSCR's hands.

Richard Arnott: We were aiming to clarify as much as possible to people that the list was in the bill and would not change. With regard to your example, people would know that the legislation itself made it clear that "the advancement of education" was a charitable purpose.

Stewart Stevenson: I suspect that this discussion will continue elsewhere.

Tricia Marwick: I wonder whether I could turn to fundraising and fundraisers and in particular—

The Convener: I am sorry, Trish; I am trying to deal with this particular set of questions first. I will bring you in when we reach that part of our questioning.

Mary Scanlon: I want to be absolutely clear about the link between OSCR's role and the Inland Revenue. In your opening statement, did you say that the Inland Revenue would be expected to accept OSCR's recommendations of what constitutes public benefit and, therefore, a charity?

Richard Arnott: That is what I said. I emphasise that the decision is for the Inland Revenue, which is responsible for tax matters. However, from discussions with the Inland Revenue we are confident that, as long as the definitions do not differ greatly, it will see no reason to repeat the exercise.

Mary Scanlon: In other words, OSCR is the driver and must acknowledge that an organisation is a bona fide charity before it can receive tax relief from the Inland Revenue. Is that correct?

Richard Arnott: Yes, but there is a proviso in that we will not, until the end of the two legislative processes, know how similar the definitions will be. The Inland Revenue could end up deciding that the definition that will be used in Scotland is too different from that which will be used in the rest of the UK and will therefore not be appropriate for tax purposes. We aim to avoid that situation.

Mary Scanlon: It will be possible that an organisation could be registered as a charity by OSCR but not be recognised by the Inland Revenue. Conversely, could a charity be recognised by the Inland Revenue but not by OSCR? I will give you an example once you have answered that question.

Richard Arnott: In theory, an organisation could be recognised as a charity by OSCR, but the Inland Revenue could decide that it did not

constitute a charity for tax purposes. We hope to avoid that situation. If a body were accepted by the Inland Revenue as having charitable status for tax purposes but was not recognised by OSCR, that body would not be able to call itself a charity in Scotland.

Mary Scanlon: I return to the issue of public schools, which will be part of the debate. It would be fairly easy for a school such as the High School of Dundee to prove public benefit, as it is in the centre of Dundee and its playing fields are open to the whole population of Dundee and the surrounding area. Gordonstoun, in Morayshire, is surrounded by farms and it may be more difficult for the school to prove public benefit. Do you envisage a situation in which some private schools pass the OSCR test and get tax relief, whereas others do not but still get tax relief?

Richard Arnott: I am not sure that we are in a position to answer that question.

Mary Scanlon: It is hypothetical.

Richard Arnott: I presume that the situation that the member has described could arise.

The Convener: Executive officials are in the business of answering questions that they can answer. If witnesses are unable to answer a question, to say that that is the case is sufficient. We will pursue the matter with the minister, who can deal with hypothetical questions.

Mary Scanlon: I am asking whether all private schools will be eligible for tax relief, irrespective of whether they are registered by OSCR.

Richard Arnott: I am not able to answer that question.

The Convener: That is an interesting argument that the committee can pursue later.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The draft bill proposes that OSCR should become an independent statutory body, which will be answerable to ministers and will have to submit an annual report to Parliament. What relationships between the Parliament and OSCR will the bill introduce?

Richard Arnott: Confusion arises because the form of the non-ministerial department has not been commonly used in Scotland. It is more commonly used at Westminster, which has set up a number of such bodies. The only non-ministerial department in Scotland is the General Register Office for Scotland. That form of public body is designed in such a way that ministers do not have direct responsibility and control over it, so such bodies are more independent than, for example, a non-departmental public body, for which ministers are responsible and over which they therefore consider that they should have control.

As a non-ministerial department, OSCR will have its functions set out in legislation, which it will be expected to follow. If it does not follow the legislation and fulfil its functions, it will be answerable to the courts and to the Parliament. OSCR will be expected to provide evidence to committees such as the Communities Committee. It will not be directly responsible to ministers; it is a non-ministerial department, so it is responsible to Parliament for its actions.

11:30

Cathie Craigie: You said that OSCR will be less accountable to ministers and more independent, but it appears from part 1 of and schedule 1 to the draft bill that ministers will still have quite a bit of responsibility in the appointment of members and of the chair. Will you explain in more detail the difference between OSCR and an organisation such as Communities Scotland? How will its relationships be different?

Richard Arnott: Communities Scotland is an executive agency; it is part of the Scottish Executive and it carries out functions on behalf of ministers. Its statutory powers are held by Scottish ministers so, not unreasonably, they expect to be able to control its actions in certain ways and to ensure that its powers are exercised correctly.

Cathie Craigie: So OSCR will be required to lay its annual reports before the Parliament and parliamentary committees can expect to be able to scrutinise those reports.

Richard Arnott: Yes.

Cathie Craigie: What influence could the Parliament have on the organisation?

Richard Arnott: OSCR has to follow what is in the legislation. If the Parliament thinks that the legislation does not tell it to do the right things, Parliament should change the legislation, because that is what sets out OSCR's duties.

Cathie Craigie: What relationship do you envisage between the Parliament and OSCR in relation to recruitment processes?

Richard Arnott: That is one of the questions that we ask in the consultation paper. In non-ministerial departments, as in most public bodies, it is normal practice for Scottish ministers to appoint board members. That process is governed by the normal public appointments process. In the consultation paper, we ask whether that system is appropriate for OSCR or whether there should be another form of appointment process. We suggest that there could be a role for the Parliament; it would be interesting to hear views on whether a parliamentary committee should appoint members to OSCR or whether the Parliament should set up an appointments panel. It is true to say that the

Scottish Parliamentary Corporate Body was not immediately enamoured of the idea because, I think, of the resources that would be required. One can imagine that a week might have to be set aside to interview candidates for the board of OSCR. The Parliament needs to consider whether it wishes to be involved in that, and that is why we ask the question in the consultation.

Cathie Craigie: It will be interesting to see the responses. I am sure that committee members have experience of making appointments to outside organisations.

The Convener: It seems to me that the Parliament would take on a huge responsibility if it were to scrutinise the work of an organisation such as OSCR, which will have such a central role in many issues. That would be a complex and difficult task. You said that such arrangements are not unusual elsewhere. Are there examples of the Westminster Parliament taking on responsibility for something so big and complex? My anxiety is that something that becomes the responsibility of everybody could end up being the responsibility of nobody. We might then lack the consistency and clarity that people seek from charity law reform.

Richard Arnott: To be honest, there is no example of Westminster taking on such responsibility for appointments. The normal, accepted practice is that ministers follow a transparent process of public appointments that is overseen by a commissioner who is appointed by Parliament.

The Convener: The issue concerns not just the public appointments process but the scrutiny arrangements. As we go through our consideration of the draft bill, I suspect that we will hear a lot of discussion about the definition of public benefit. It would be a hugely significant task for the Parliament to scrutinise the regulatory body, given that our role is to scrutinise the work of the Executive. Are there any examples of Parliaments taking on such responsibility? It might be easy enough to deal with the public appointments issue because all sorts of structures are involved, but the rest of the task seems very complicated.

Richard Arnott: I am not aware of any such examples. Many would say that the Executive should do the donkey work for the Parliament.

The Convener: I will resist the temptation to comment on that.

Stewart Stevenson: Who would answer parliamentary questions about the activities of OSCR?

Richard Arnott: The normal process would be for a Scottish minister to answer questions on behalf of OSCR.

Stewart Stevenson: So questions would not be answered by a member of the Scottish Parliamentary Corporate Body. SPCB members already answer certain categories of question.

Richard Arnott: I may be wrong, but I suspect that SPCB members answer questions about the parliamentary bodies—the commissioners—for which Parliament is responsible.

Stewart Stevenson: So, notwithstanding the fact that Scottish ministers will have no political responsibility of any kind for OSCR, a minister would answer such parliamentary questions.

Richard Arnott: That is how the model works in Westminster.

Stewart Stevenson: Which minister would answer? Sorry, that is perhaps an unfair question to put to an official, so I shall not pursue it.

The Convener: Let us move on to the proposed self-regulation of fundraising, which we have already started to consider. The Executive proposes a self-regulation scheme for the fundraising activities of charities and voluntary organisations. Given recent public disquiet over charities such as Breast Cancer Research (Scotland), why does the Executive propose self-regulation rather than a statutory regulatory system? To which criteria will the scheme be required to adhere?

Richard Arnott: Let me start by saying that we will not rely merely on self-regulation of fundraising. The draft bill proposes immediate regulation of professional fundraisers, who will be required to have a contract that sets out the work that they do for the charity in question. No such requirement exists in Scotland at the moment, but we feel that it must be emphasised to charities that they need to control the agents and fundraisers who work for them. That proposal may help charities to ensure that they have adequate contracts with professional fundraisers and is designed partly to try to avoid cases such as those that have arisen in the past year or so.

The proposal to widen the monitoring of the public collections system is another issue that relates to fundraising. Much of the public concern about fundraising has arisen because, at the moment, there is no regulation of fundraising that involves asking people to commit to promises of money, such as direct debits. We intend to regulate that sort of fundraising in the same way as cash collections are regulated just now. Therefore, we intend to introduce some fundraising regulations immediately.

The wider regulation of fundraising is really a way of trying to ensure, step by step and without over-regulating, that we have adequate controls over the fundraising industry, which already has

codes of practice that its members follow. The industry has undertaken to set up a self-regulating system, which I understand will be introduced later this year. That is much sooner than we would be able to introduce any new legislation. We feel that it would be worth seeing how that system works but having in the legislation the power for ministers to set statutory regulation to oversee all fundraising if the system is not satisfactorily implemented.

Tricia Marwick: I have several fairly specific questions on the issue of fundraising concerning circumstances that I cannot find covered anywhere in the draft bill. Perhaps you can direct me to where they are covered or, if they are not, give me your thoughts about why they have been omitted.

You say that you are not going to regulate the door-to-door collection of goods, as the existing system works quite well. I accept that. You also intend to give local authorities greater powers in relation to public benefit collections. However, I cannot see anything in the draft bill that specifically regulates people going from door to door with scratch cards, for example. They might be collecting money for the scratch cards, saying that it is for, say, the homeless. How will such collections be regulated? The people who go round the doors are not charities and have not registered. How will you stop door-to-door collections, whether for goods, scratch cards or small household items?

Richard Arnott: I may be wrong, but I suspect that the selling of scratch cards would be governed by existing gambling legislation. We will check that, but I think that it would be.

Tricia Marwick: What about people selling small household goods—little brushes, for example—for the homeless or the disabled? Where is that covered in the bill?

Richard Arnott: Selling brushes amounts to trading and is covered by existing legislation.

Tricia Marwick: Okay. So you do not think that there is a problem with people collecting allegedly for the homeless, the disabled or the dog society. You think that such collections are adequately covered in trading legislation and that they should not be addressed in the bill.

Richard Arnott: There is no requirement to do so in charity legislation. However, there is an overriding provision in the bill that, if OSCR suspects that people hold themselves out to be a charity, whether or not they call themselves a charity, it can investigate that and take action to protect any funds that are raised.

Tricia Marwick: Let us turn to the issue of professional fundraisers, whom you say will be self-regulated. The consultation document states:

"Professional fundraisers and commercial participators will be required in regulations to make a statement to potential donors about the amount of the funds they will receive and commercial participators about the amount that will go to the charity or cause."

However, it may be difficult to regulate somebody who is rattling a can in a high street and saying that 60 per cent of all that people give them will go to a charity. How can we know that that will be done? Why have you not included in the bill any requirement on the charity to state in its annual accounts that it employs a professional fundraiser; that it is costing £X to do that; and that it is getting £X back from them? There are two aspects to the issue: one is about the professional fundraiser and the other is about cover for the charity and the need for the people who donate to a charity to know that it employs professional fundraisers.

11:45

Richard Arnott: There are two parts to your question. First, what information should the public receive at the point of donation? We propose to require professional fundraisers to provide a statement, although the draft bill does not contain exact details about that. The matter would be best dealt with in regulations because the statement might be very detailed and there are various different ways in which charity fundraising would be described as providing a revenue over different periods of time.

Secondly, you suggest that charities' accounts should set out their outgoings on and income from fundraising. We propose to address that matter in the regulations that will set out the detail of charities' accounts.

Elaine Smith (Coatbridge and Chryston) (Lab): I have some technical questions about sections 65 and 66 of the draft bill. Section 65(2) defines a public benevolent collection as one that is undertaken in a public place or

"by means of visits to two or more houses or business premises."

Section 65(3)(b)(ii) includes in the definition of a public place an area that is within

"any station, airport or shopping precinct or is any other similar public area."

However, a lot of collections take place in supermarkets, rather than in shopping precincts. Would such collections be covered?

Richard Arnott: Perhaps it would be best if I explained the policy intent, as we would welcome views on whether the draft bill would fulfil it.

The intention is that public collections that are carried out on the street, from door to door and on business premises would need a licence from the local authority. A collection in a shopping mall to which the public has access would also require a licence, but a collection that took place inside a shop, whether that is a supermarket or a smaller shop, would not need a licence, although it would need to be done with the permission of the shop owner. The reason for that is that a shop owner should have responsibility for controlling any collections that take place on their premises. Shop owners are quite able to control such collections. However, a collection in an area where the public mill about, rather than in a retail unit where people buy things, would need to be licensed by the local authority and controlled by the police to ensure public order.

Elaine Smith: Thank you for clarifying that. Supermarkets did not seem to be exempted—I looked for such a provision.

Section 65(3)(a) defines a public place as

"any road (within the meaning of the Roads (Scotland) Act 1984".

Strangely enough, I do not have a copy of the 1984 act with me. Does the provision include private roads?

Richard Arnott: I am afraid that I cannot answer that.

Catriona Hardman: The provision would apply to public roads, as opposed to private roads.

Richard Arnott: It would not apply to unadopted roads.

Catriona Hardman: I think that that is right, but we can check that for the committee.

Elaine Smith: A bowling club in my constituency, for example, might want to have a collection on a private road.

Finally, section 66(2)(c) states that a person would not be subject to a fine under section 66(1) if they organised

"a collection which 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 if the occupier is the organiser of the collection".

Would that provision include, for example, children who organised a collection or sold things in their garage to raise money for the local hospice? Is it correct to say that they would be okay if they were on private land but if they moved on to the pavement they would not be exempt from the provisions of section 66(1)?

Richard Arnott: That is the nub of the argument.

Elaine Smith: So children could no longer have a collection on the pavement outside their home; it would have to be done within their own grounds.

Richard Arnott: I think that, according to the law, they would have to do that within their own gate.

Elaine Smith: Okay. Thank you.

The Convener: Unfortunately, children who live in tenements do not have a gate.

Mary Scanlon: My question is on the balance between statutory regulation and self-regulation for professional fundraisers. In an article in *Third Force News*, I note that

"self-regulation should be tried with reserved powers to introduce further statutory regulation if it fails."

Under self-regulation, what are the criteria by which you would determine that a charity had succeeded or failed? Would part of the criteria for failure be the amount of money that goes to the good causes? Do you envisage a situation in which you might have to set the percentage of the money that is collected for a charity that goes to that charity?

Richard Arnott: I should perhaps point out that our intention is for the regulation of fundraising using the reserved power to be brought in across the board. It would not be used for a particular charity that might have failed; it would be used if self-regulation in Scotland had failed.

Mary Scanlon: I understand that.

Richard Arnott: We have not decided on the exact criteria that will be used to determine failure. I suppose that that is something on which all of us need to decide.

Mary Scanlon: I am sure that all of us are aware of high-profile cases such as Breast Cancer Research (Scotland) and the Moonbeams Children's Cancer Charity. The percentage of the money collected for those charities that was given over for good causes was considered inadequate. As part of self-regulation, would it be acceptable for 90 per cent of the money that was collected for a charity to be used to pay wages and so forth and for that money not to go to the charity? Is there to be a recommended level for what constitutes an acceptable percentage?

Richard Arnott: At the moment, we do not have proposals for a set formula. I agree, however, that 90 per cent does not sound acceptable.

Mary Scanlon: If self-regulation fails, is it possible that that course of action might be recommended in future?

Richard Arnott: It could be.

Mary Scanlon: Thank you.

Tricia Marwick: OSCR will be able to monitor and investigate charities and third parties will be able to contact it with their concerns. However, it seems that there is no requirement for a public body—for example, a local authority—to alert OSCR about a problem with a charity, an example of which might be that it is no longer operating as a charity. Is it a failure of the bill that it does not place a statutory duty on public bodies or public authorities to pass on their concerns to OSCR? Those public bodies might have more contact with charities and therefore be more aware of problems at a much earlier stage. That suggestion would have covered the situation of the Third Age Group in Glenrothes, which continued to be funded although it no longer operated as a charity.

Richard Arnott: The proposal for a statutory duty on public bodies to pass on such information to OSCR is not something that we have considered. Obviously, there is nothing to stop those bodies from doing that. Indeed, one would hope that they would report such occurrences to OSCR. It is a matter of debate whether a duty should be placed on them to do that.

Donald Gorrie: I have two questions, but one answer should cover both of them. First, could you explain briefly what sort of animal a Scottish charitable incorporated organisation is? Secondly, there is a lot of interest in the issue of enabling charities to set up arm's-length, non-profit-distributing companies. I am thinking of the community body that operates as a pukka charity—it gets grants, raises money and so on—which sets up a company that provides a particular service on a commercial basis in the locality and makes a profit but does not distribute it. Could what I have just described be a Scottish charitable incorporated organisation, or would we need something new for that?

Richard Arnott: Only charities can take the form of Scottish charitable incorporated organisation. An organisation has to be a charity to become an SCIO. An arm's-length body of a charity that is not part of that charity could not be an SCIO.

The benefits for a charity of being an SCIO include the fact that it is a way for the body to have a legal identity, rather than the individual stewards or trustees having personal, separate responsibilities for its actions. Being an SCIO makes it easier for bodies to employ staff, as they will be legal bodies, and it will not be necessary to get the agreement of every committee member before they take actions. It is also a way for the bodies involved, their members, their trustees and the charity stewards to have limited liability. It has what most people would view as the benefits of being a company, but without having Companies House regulating bodies' operations. The form of a limited company is designed for bodies that intend to make a profit, which is not what charities are intended for. The SCIO is intended to be a more purpose-designed charitable company form.

Donald Gorrie: Do bodies have to be charities already in order to apply to be SCIOs, or could they start from scratch?

Richard Arnott: They could start from scratch and apply at the same time to be an SCIO and a charity.

Donald Gorrie: Is there anything in the bill that would cover the business that I described of setting up an arm's-length, non-profit-distributing company that is an offshoot of a charity?

Richard Arnott: There is nothing in the bill to stop a charity setting up an arm's-length company or something else in another legal form.

Patrick Harvie: The consultation document says that the majority of charities are small, with either a local focus or a very low income, and you mentioned that yourself. Has the Executive carried out any assessment of how the regulatory framework will affect smaller charities in particular?

Richard Arnott: We are in the process of doing that. We hope that we will gain some more information from the consultation on that. The consultation paper contains an annex with a draft regulatory impact assessment. We hope that people will help us to complete that and will provide more information on how they think the proposals will affect them as smaller charities.

The bill sets out a framework; it does not set out thresholds for different forms of charity accounts or requirements for the auditing of accounts. Such matters would usually be dealt with in regulations. That is how we will set a proportionate regime, so that small charities will not have to go through the same rigours of accounting as a multimillion pound charity will. We would expect OSCR to consider that in its regulatory requests for information. I do not think that it is necessary to get the same amount of information from a small local charity as from a national charity.

Stewart Stevenson: I have some technical points to raise about the register. I cannot see any power to remove a charity from the register at all.

Richard Arnott: There is one somewhere.

Stewart Stevenson: Secondly, the only way in which it appears that a charity can be removed is on its own application. It gets removed within 28 days. Is it the intention for charities to be removed, or is it merely that they be deregistered? I would have thought that, even after a charity ceased to be registered, information should continue to be available beyond the period of 28 days that is set

out. Is that a policy intention that you think is appropriate? Have I missed something on how charities can be removed from the register?

Richard Arnott: My colleagues are looking through the bill to find the provision on removal.

12:00

Stewart Stevenson: There is no right of appeal against OSCR removing a charity from the register and there is only one way in which a charity can be removed.

Richard Arnott: You are right that if a charity is removed from the register, it is in effect deregistered and is no longer a charity. We would certainly expect OSCR to keep the information on a body that used to be a charity, because it is likely that there would be residual assets, which OSCR would want to ensure were still given to the cause.

Stewart Stevenson: All I am getting at is that it strikes me that, for a reasonable period of time, it should remain easy for the general public to have access to information about a body that has ceased to be a charity. In my humble opinion, the reasonable period of time should be five years, but that is a relatively arbitrary number. I wondered about your considerations in drawing up the bill. Is it the policy intention for a charity just to disappear from the register 28 days after OSCR has received an application for its removal, which is what the bill appears to suggest?

Richard Arnott: That is not the policy intention. The register is the list of bodies that are charities, but that does not mean to say that there cannot be a separate list of bodies that used to be charities.

Stewart Stevenson: Okay. That is fine. We have clarified the policy intention, which is all that I was after.

Richard Arnott: Section 26 sets out OSCR's powers where a charity no longer meets the charity test. Section 26(1)(c) sets out its powers to remove the charity from the register.

Stewart Stevenson: But there is no corresponding right of appeal against that. However, let us not prolong the agony.

Richard Arnott: We will consider your point.

Stewart Stevenson: My convener is looking at me anxiously, or rather imperiously.

The Convener: You mistake anxiety for something else. We have had a useful session this morning. I thank the witnesses very much for their attendance. I know that we overran a bit, but I was keen for us to explore all the issues that people were concerned about. We are aware that we are at the beginning of the process, rather than the end. If you wish to clarify points or come back to us on specifics, that is fine. We will be happy to hear further points from you.

Richard Arnott: Thank you.

12:02

Meeting suspended.

12:06

On resuming—

Subordinate Legislation

Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2004 (Draft)

The Convener: Item 2 is consideration of the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc) Order 2004. I welcome Mary Mulligan, the Deputy Minister for Communities, who has joined us for this item—it seems as though we are joined at the hip, but never mind. As members are probably aware, the order is an affirmative instrument, so the deputy minister is required under rule 10.6.2 of the standing orders to propose by motion that the draft instrument be approved. Committee members have received copies of the order and the accompanying documentation. I invite the deputy minister to speak briefly to the order, but not yet move the motion.

The Deputy Minister for Communities (Mrs Mary Mulligan): Thank you, convener. I could not bear to be apart from you, so I am back already. I am grateful to the committee for the opportunity to explain the background to the order. The Scotland Act 1998 acknowledged that in some cases it would be more appropriate for Scottish ministers to be able to exercise executive powers in areas where primary legislation continues to be a matter for Westminster.

Section 63 of the Scotland Act allows functions, so far as they are exercisable in or as regards Scotland, to be transferred to the Scottish ministers, instead of, or concurrently with, ministers of the Crown. The order authorises the transfer of functions that relate to the approval of a housing co-operative whose registered office is in Scotland in connection with a claim for tax relief purposes under section 488 of the Income and Corporation Taxes Act 1988. The United Kingdom minister of the Crown will continue to exercise those functions as regards the rest of the UK.

The order also gives Scottish ministers powers concurrent with those of the minister of the Crown to make regulations under certain sections of the Fireworks Act 2003. In effect, that will allow Scottish ministers to make regulations under those sections for Scotland while ministers at the Department of Trade and Industry will do so for England and Wales.

Members will have seen the note prepared by the Executive, which explains the entries in the order. Section 488 of the Income and Corporation Taxes Act 1988 allows housing co-operatives that meet certain criteria relating to their rules and constitution to make a claim for tax relief. The transfer of that function will enable Scottish ministers to approve the rules and constitution of a housing co-operative for the purposes of claiming tax relief. I believe that that is an appropriate function to be exercised in Scotland by Scottish ministers.

The Fireworks Act 2003 is an enabling act that allows ministers to make regulations on several specified matters to control the supply and use of fireworks, which have become a growing problem. The relevant powers are provided for in sections 4 and 6 of the act, which have a significant impact on the public. Section 4 enables the prohibition of the use of fireworks during some hours of the day and in some places and section 6 enables the regulation of public firework displays.

If the order is approved, the Executive will use those powers. On 23 April this year, my colleague Andy Kerr announced our intention to introduce a curfew on fireworks use between 11 pm and 7 am. That proposal is out for consultation. We do not intend to regulate public fireworks displays, as we do not believe that public fireworks display operators pose a danger to the public. However, we will keep that under review. The Explosives Act 1875 makes it an offence to release fireworks in a public place. To tidy fireworks regulations, that provision will be repealed in due course and we will make that prohibition under section 4 of the 2003 act.

If this order under section 63 of the Scotland Act 1998 is approved, it will go to the Privy Council on 27 July and come into force two days later. The Executive plans to lay regulations to introduce a curfew when the Parliament returns from recess in September. I therefore call on the committee to recommend approval of the transfer of functions to ministers as set out in the order.

The Convener: Does anyone have a question?

Stewart Stevenson: My question is more of an observation: I am glad that Lord Sewel is not getting it all his own way.

Mrs Mulligan: This is the second time that I have come to the committee to transfer further powers to the Parliament. That is an example of devolution operating effectively.

Patrick Harvie: Perhaps my comment will be another observation. I apologise in advance for the question, which you may not be prepared to answer. If so, perhaps you would consider writing to me later. We talked earlier about the powers of OSCR. It occurs to me that the same transfer of functions could be applied in relation to tax relief for charities. Has that been considered? Are you

interested in examining that? Such a system would simplify matters.

The Convener: That question was about charities. We will have the formal opportunity to ask the minister such questions at the appropriate stage. I am quite happy for people to gloss observations as questions, but perhaps we need to focus on questions that relate to the order.

Donald Gorrie: The Executive note refers to co-operative housing associations, so the order deals not with all housing associations but purely with those that are housing co-operatives. Is that right?

Mrs Mulligan: The order deals with housing co-operatives and not all housing associations.

Donald Gorrie: The fireworks stuff is welcome. Does the Executive intend not only to set curfews, but to make more regulations on where fireworks can be sold and so on?

Mrs Mulligan: The Department of Trade and Industry will continue to regulate that. The act was passed in 2003 and the department is now rolling out that process, so it may pick up that point.

Donald Gorrie: I see. Thank you.

Motion moved,

That the Communities Committee recommends that the draft Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2004 be approved.—[*Mrs Mary Mulligan*.]

Motion agreed to.

The Convener: I thank the minister for attending.

Do members agree to report to Parliament our decision in consideration of the order?

Members *indicated agreement*.

The Convener: I was going to ask members whether they have any concerns, but we are not interested in members' concerns now, as they would have been expressed in the debate. We agree to report to the Parliament our decision and our consideration of the order. I thank members for their attendance.

Meeting closed at 12:14.

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