COMMUNITIES COMMITTEE

Wednesday 15 December 2004

Session 2

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COMMUNITIES COMMITTEE
31st Meeting 2004, Session 2

CONVENER

*Karen Whitefield (Airdrie and Shotts) (Lab)

DEPUTY CONVENER

*Donald Gorrie (Central Scotland) (LD)

COMMITTEE MEMBERS

*Scott Barrie (Dunfermline West) (Lab)
*Cathie Craigie (Cumbernauld and Kilsyth) (Lab)
*Linda Fabiani (Central Scotland) (SNP)
*Christine Grahame (South of Scotland) (SNP)
*Patrick Harvie (Glasgow) (Green)
*Mr John Home Robertson (East Lothian) (Lab)
*Mary Scanlon (Highlands and Islands) (Con)

COMMITTEE SUBSTITUTES

Shiona Baird (North East Scotland) (Green)
Christine May (Central Fife) (Lab)
Mike Rumbles (West Aberdeenshire and Kincardine) (LD)
John Scott (Ayr) (Con)
Ms Sandra White (Glasgow) (SNP)

*attended

THE FOLLOWING GAVE EVIDENCE:

Douglas Connell (Turcan Connell)
Dr Patrick Ford (University of Dundee)
Maureen Harrison (Institute of Fundraising Scotland)
Simon Mackintosh (Charity Law Association)
Norrie Murray (Volunteer Development Scotland)
Stephen Phillips (Law Society of Scotland)
Martin Sime (Scottish Council for Voluntary Organisations)
Anne Swarbrick (Anderson Strathern)
Margaret Wilson (CVS Scotland)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 5

Scottish Parliament

Communities Committee

Wednesday 15 December 2004

[THE CONVENER *opened the meeting at 09:30*]

Subordinate Legislation

Building Standards Advisory Committee (Scotland) Regulations 2004 (SSI 2004/506)

The Convener (Karen Whitefield): Good morning. I welcome members to the 31st meeting of the Communities Committee in 2004.

Agenda item 1 is consideration of two items of subordinate legislation, the first of which is the Building Standards Advisory Committee (Scotland) Regulations 2004 (SSI 2004/506). Members have been provided with copies of the regulations and the accompanying documentation. The regulations make provision for the constitution and procedures of the building standards advisory committee that Scottish ministers are required to appoint under section 31 of the Building (Scotland) Act 2003. The regulations replace and revoke the Building Standards Advisory Committee (Scotland) Regulations 1959.

The Subordinate Legislation Committee considered the regulations at its meeting on 7 December and was concerned about the apparent lack of time limits for appointments to the building standards advisory committee. The Subordinate Legislation Committee agreed to determine who has responsibility for deciding the period of office of BSAC members. At its meeting on 14 December, the Subordinate Legislation Committee considered the response from the Executive on the issue and will report formally on the instrument later this week. I understand that the Subordinate Legislation Committee is now broadly content with the regulations and has no substantive points to make on them.

Do members have any comments?

Members: No.

The Convener: Is the committee content with the regulations?

Members: Yes.

The Convener: In that case, I ask the committee to agree that we report to the Parliament that the committee has no recommendations to make on the instrument, subject to the Subordinate Legislation Committee's report. I also propose that the Subordinate Legislation Committee's comments are noted in our report and that that report be circulated to committee members for approval before its publication. Is that agreed?

Members *indicated agreement*.

Building (Fees) (Scotland) Regulations 2004 (SSI 2004/508)

The Convener: Members have been provided with copies of the Building (Fees) (Scotland) Regulations 2004 (SSI 2004/508) and the accompanying documentation. The policy intention of the instrument is to set the fees structure for applications for building warrants and submissions for completion certificates for the new building standards system in Scotland under the Building (Scotland) Act 2003. The Executive consulted on the instrument in May and June and there was a positive response to the new system. The Executive made some changes to the regulations to take on board the comments of local authorities. The Subordinate Legislation Committee considered the regulations at its meeting on 7 December and agreed that no points arose in relation to the instrument.

Do members have any comments?

Scott Barrie (Dunfermline West) (Lab): Annex A of the clerk's paper tells us that there were very few respondents to the 317 consultation documents that were sent out to local authorities and other agencies. I hope that that reflects the fact that people were broadly in agreement with the proposals and that people who did not respond are not going to come back and say that they do not like what has been proposed.

The Convener: Other members of the committee, including the deputy convener, Donald Gorrie, raised that matter with the clerks yesterday. Our clerks contacted the Convention of Scottish Local Authorities, which got back to the committee to say that it was broadly content with the new regulations.

Is the committee content with the regulations?

Members *indicated agreement*.

The Convener: Therefore, the committee will not comment on the regulations in its report to the Parliament. Do members agree to report to the Parliament our decision on the regulations that we have considered today?

Members *indicated agreement*.

Charities and Trustee Investment (Scotland) Bill: Stage 1

09:35

The Convener: Agenda item 2 is stage 1 of the Charities and Trustee Investment (Scotland) Bill.

On behalf of the committee, I welcome the first panel of witnesses this morning: Simon Mackintosh of the Charity Law Association; Douglas Connell, joint senior partner of Turcan Connell; Anne Swarbrick of Anderson Strathern; Stephen Phillips, a member of the charity law sub-committee of the Law Society of Scotland; and Dr Patrick Ford, a lecturer in law and member of the charity law research unit at the University of Dundee.

I am grateful to you all for taking the time to provide full written submissions, which committee members have had the opportunity to read prior to today's evidence session.

I will ask a question about consultation. The Executive received a number of responses—250 in total—to its consultation. Are you satisfied with the Executive's consultation process? Was it fully inclusive and comprehensive?

Anne Swarbrick (Anderson Strathern): Yes, I think that it was a full exercise.

Stephen Phillips (Law Society of Scotland): I endorse that.

The Convener: You are satisfied.

I will move on to the Office of the Scottish Charity Regulator, which is the body that will regulate charities. Will the model that is laid down in the bill ensure that OSCR has sufficient independence?

Simon Mackintosh (Charity Law Association): There is concern that certain of the powers that Scottish ministers have taken will lead to some restriction on OSCR's independence of action. For example, the powers of Scottish ministers to determine the terms and conditions of the chief executive and other staff, the number of employees that the body has and the form and content of its annual report suggest that ministers will have quite a lot of control over the way in which OSCR discharges its functions and reports to Parliament. The Charity Law Association's submission raises the concern that there is perhaps too much ministerial control over how OSCR will go about its business.

Anne Swarbrick I am much more concerned about the content of section 97, which I covered in section 3 of my submission. Section 97 allows Scottish ministers to appoint that a body may be called a charity without appearing on the charity register. The issue is not really about the form that OSCR will take, but about the powers that Scottish ministers will have to override OSCR's decisions. I am much more concerned about that provision possibly interfering with OSCR's independence.

Stephen Phillips: The Law Society of Scotland's charity law sub-committee has no particular concerns about OSCR's independence.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Part 1 of the bill establishes OSCR as a body with statutory duties and outlines the general functions of OSCR and how it will operate. The bill does not include objectives for OSCR, but I understand that the equivalent English legislation does. Should the Scottish bill do the same?

Douglas Connell (Turcan Connell): It would be immensely helpful if one of the stated objectives was the promotion and nourishment of philanthropic giving in Scotland. We are beginning to see some seed corns of that happening and it would be unfortunate if the operation of OSCR in any way inhibited that growth. As members know, we have seen huge initiatives recently from people such as Tom Hunter, Tom Farmer, Ann Gloag, Brian Souter and, on a slightly smaller scale, many others.

There is some concern among wealthier business people in Scotland that an over-zealous OSCR could interfere with the corporate governance of some grant-making charities—not operational charities, but grant-making charities. It would be immensely helpful to that area of Scottish life if one of OSCR's objectives were to promote and encourage the formation of grant-making charities and philanthropic giving in general, and it would be good to see that objective in the bill.

Dr Patrick Ford (University of Dundee): I will put a contrary view to the committee and say that the primary role of OSCR should be regulatory and that creating initiatives to encourage the voluntary sector, in particular the charities sector, should be the role of some other body, primarily the Scottish Executive. That is another view. It is not the way in which the English bill is going.

Anne Swarbrick: As members will see from my biography, I used to be with the Scottish Charities Office. I was a civil servant then, but now I am back in private practice. One of the difficulties that OSCR faces is in treading the line between being a regulator and an adviser. I think that that is what Patrick Ford is talking about.

At the same time, I see Douglas Connell's point about the encouragement of charity. Another way to consider the matter might be to say that OSCR's role is to act in the public interest, which would encompass all those concerns. The manner

in which OSCR intends to go about its business, openly and transparently, might also dovetail nicely with that approach. I would prefer to leave it that OSCR's business can be seen to be done publicly rather than imposing certain criteria.

Simon Mackintosh: One of the points that the Charity Law Association has made is that the job of giving advice and guidance on best practice, in addition to advising ministers on issues that affect charities—charity law and so on—should be built into OSCR's remit. That would go beyond assistance with compliance with the terms of the legislation, into the advice and guidance function.

I was a member of the Scottish Charity Law Review Commission—the McFadden commission—part of whose vision included a rounded system of both regulation of and support for charities. So far, the specific duty to support and advise charities has been missing from the draft bill, the consultation and the bill as introduced that we are considering. I accept that there is a debate about whether that is a proper function of a regulator, but the regulator is the body that will see where things are going wrong and which will be in the best position to advise on avoiding problems as well as on best practice.

The Charity Commission for England and Wales provides many helpful booklets and leaflets and guidance for charities on issues as diverse as ethical investment policy and the independence of trustees. That is needed somewhere in the Scottish charitable sector; the question is whether it should fall within OSCR's remit.

Stephen Phillips: Among OSCR's functions is facilitating charities' compliance with the provisions of the legislation. That is not a hugely stimulating objective. It would be nice to think that its remit could be extended to include a general role of guidance through consultation and liaison with umbrella bodies in the sector and other public sector agencies. After all, although OSCR might well facilitate some of that work, it will not directly implement it. Instead, it should co-ordinate matters and pick up on areas where charities require greater support.

09:45

Cathie Craigie: The committee is receiving mixed messages on this matter. Indeed, when we took soundings from charitable organisations throughout the country, they asked whether OSCR should simply be a regulator or whether it should be able to provide legal or other advice. We certainly seek answers to that.

Anne Swarbrick: The issue also has a financial element, because OSCR would require a much larger budget if it was going to carry out those functions. I am not sure, but I think that the Charity Commission's budget is in the region of £50 million, 10 per cent of which would be £5 million. From memory, I believe that OSCR's current budget is £1.73 million, which is a substantial difference. A major question is whether that is a sensible and appropriate use of funds.

Stephen Phillips: It has also been argued that bodies in the sector such as the Scottish Council for Voluntary Organisations might be best placed to deliver some of that guidance and advice. Nevertheless, it would be valuable if the bill could make a better connection between the work of SCVO, CVS Scotland and the range of other umbrella organisations in the voluntary sector and the kind of initiatives that OSCR would develop.

Christine Grahame (South of Scotland) (SNP): I might be wrong, but you appear to be proposing that OSCR should have an advisory capacity similar to that of the Scottish information commissioner, who also provides information directly to the various bodies that report to him.

Douglas Connell: There is great danger in any regulator giving specific guidance and legal advice to anyone in the sector, but we are attracted to the suggestion that OSCR could provide general guidance or recommended codes. For example, ethical investment policy, which Simon Mackintosh mentioned, could be produced relatively easily. It would not involve major infrastructure costs, although some consultation would need to be undertaken. OSCR could also provide models for good corporate guidance. Indeed, I commend such a proposal to the committee.

Christine Grahame: I, too, am quite attracted to the proposal. Am I right in thinking that the information commissioner has such a dual role? OSCR could provide broad, general advice, which would mean that it would not be subject to conflicts of interest because it might give an organisation guidance and then pull it up for doing something wrong.

Anne Swarbrick: Yes. It is an interesting idea.

Mary Scanlon (Highlands and Islands) (Con): Anne Swarbrick said that the public must be aware of OSCR's role and responsibilities. In its written submission, the Charity Law Association says:

"We question the power of Scottish Ministers to give directions as to the content of the annual report".

The annual report is where most people would look for transparency, accountability and information. Are you concerned that Scottish ministers might be able to give guidance on its content?

Anne Swarbrick: I suppose that that would depend on what the guidance was and how detailed it became.

Mary Scanlon: I was thinking about ministerial directions.

Anne Swarbrick: Ministerial directions on the general content of the report might be in order. However, we would be worried if ministers made directions on what should not go into the report.

Simon Mackintosh: Section 2(3) says:

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

However, the Charity Law Association is concerned about Scottish ministers' control over the regulatory body if, under section 2(4), ministers can somehow forbid OSCR from reporting matters to Parliament.

Anne Swarbrick: That is exactly the point.

Mary Scanlon: The provision causes you concern.

Simon Mackintosh: Yes.

Mary Scanlon: How would you like OSCR to be accountable to the Scottish ministers? Why is it necessary for ministers to give directions as to the content of an annual report?

Simon Mackintosh: They could say that OSCR should report to Parliament annually on certain issues in such form as OSCR thinks fit, but I do not understand why they should have the power to give detailed instructions on how OSCR should discharge that function.

Mr John Home Robertson (East Lothian) (Lab): We and the Executive have received several submissions saying that it would be good for the charity test to be as near as possible the same north and south of the border. Are you content with the changes to the list of charitable purposes and with the inclusion of the broad public benefit criteria from the consultation draft of the bill to the bill as introduced?

Anne Swarbrick: Put shortly, no.

Mr Home Robertson: Will you expand on that briefly?

Anne Swarbrick: Yes. The difficulty is that the subject quickly becomes rather complicated. I covered it in quite a lot of detail in section 2 of my submission. Scotland has 13 charitable purposes in the first part of the charity test, but the Westminster bill's 12 purposes are wider. There are two reasons for that. The first arises from drafting points, which could be sorted out fairly readily, although they are quite profound. For instance, Scotland has two purposes that relate to disability, at paragraphs (j) and (k) of section 7(2). Paragraph (j) relates to the provision of accommodation for people who are disabled and paragraph (k) relates to the provision of care for those who are disabled. In contrast, one purpose in England relates to the relief of disability, and is much wider than simply the provision of accommodation or care. Relief includes training guide dogs, which provision of neither accommodation nor care covers. Relief covers disability rights advice, which the Scottish definition will not cover. The Scottish definition will not cover the provision of some specially adapted equipment, such as cars, but the English definition does. Those are drafting points, but they are important.

Mr Home Robertson: They could not be more important. The committee should consider those matters. I hope that the message is being sent out that now is the time to flag up such issues.

Anne Swarbrick: The second point is slightly more difficult, because it concerns the common law. The common law that has decided what is charitable is rather far-reaching and complex. Part of the common law defines public benefit. There are two strands. The first is public benefit tests, some of which are in section 8. The second defines types of charities, such as those for promoting the charitable sector and the relief of unemployment.

If we swept away the common law, as the Scottish bill proposes to do, we could jettison such types of charities, unless they are specifically covered by the 13 purposes in the first part of the Scottish charity test. I am afraid that the answer to whether such charities are covered is that that is, at best, uncertain. In many cases, the problem is not that they definitely would not be covered by the Scottish charity test, but that the whole thing is uncertain, which potentially leaves many charities in Scotland uncertain as to whether they are covered. That is not good enough.

Dr Ford: I agree with Anne Swarbrick's criticisms of the detail, but I ask you to step back and ask: what is the point of having a separate Scottish definition? At the moment, there is a United Kingdom-wide definition of charity. It has its origin in English charity law, but it is a UK definition and has been so, through the tax system, for more than 100 years. Now the proposal is that there will be a departure from that, along the lines that Anne Swarbrick has laid out, but the question is why we should step out of line at all. What are the advantages of doing so?

Mr Home Robertson: That is something about which we will have to make up our minds in the light of the representations that we receive.

If, at the end of the day, distinctions between the UK definitions of charitable purposes and the definitions in Scotland come to pass, what legal difficulties might arise?

Simon Mackintosh: I will give one or two examples. A grant-giving trust based in Scotland

that wanted to give grants to charities that operate in England whose activities were not covered by the Scottish definition but were covered by the English one might find itself unable to assist the cause that it wanted to help. That might also work the other way around, with English grant-giving bodies being unable to assist particular Scottish bodies that would qualify under the Scottish test, but not the English one.

The other cross-border issue concerns tax. The policy memorandum says that it is expected that the Inland Revenue would follow OSCR's decisions about charitable status based on the Scottish test, but I have not yet seen anything from the Inland Revenue saying that it would definitely do so. That raises the spectre of a body that OSCR recognises as a charity in Scotland not qualifying as a charity for UK tax relief, which could mean severe difficulties for Scottish and English taxpayers who support charities in the other jurisdiction.

That only scratches at the surface of possible difficulties.

Douglas Connell: I will give an example of one important area in which Scotland would be seriously disadvantaged in comparison with England and Wales. As the bill is drafted, there is a serious threat to some of our most important national institutions. The charity test would not be passed if there is some form of third-party control, which, it is thought, could have the effect of removing charitable status from the National Galleries of Scotland, the National Museums of Scotland, the National Library of Scotland, the Royal Commission on the Ancient and Historical Monuments of Scotland and the Royal Botanic Garden Edinburgh. Those are immensely important national institutions, because they are the custodians of collections of huge international importance. The main issue with the removal of charitable status from those bodies is that they would be placed at a severe disadvantage compared with their counterparts in England and Wales. For example, the National Galleries of Scotland could lose charitable status, but the National Gallery in England would have it, and that could have a major effect on fundraising and the gift of works of art. It is important that the committee be aware of that major threat to some of our national institutions.

The National Galleries of Scotland recently completed the Playfair project at a cost of £30 million, £13 million of which was raised from a combination of private donors and grant-making charitable trusts. The tax breaks for private donors that encouraged such giving would not apply if the National Galleries of Scotland were not a charity. Many of the grant-making charitable trusts would be completely unable to give money to such projects, because they give money only to charitable organisations. The matter is of great importance.

10:00

Mr Home Robertson: I am sure that everyone would agree with you on that. That is precisely what we need to know about and what we need to find a way of addressing.

Your reading is that a body would not qualify under the Scottish charity test if, as stated in section 7(3)(b),

"its constitution expressly permits a third party to direct or otherwise control its activities,"

therefore the prospects of bodies such as those that you just described getting the benefits that you were talking about would be jeopardised.

Douglas Connell: There is a severe risk that that would happen. There are, of course, other related issues to do with rates relief and the benefits of gift aid, but the issue of losing charitable status and not being eligible for grants from grant-making charities is major.

Mr Home Robertson: We have a constellation of legal expertise in front of us. Can anyone suggest an amendment to the bill that would get round that problem?

Anne Swarbrick: The answer to that is that we would be happy to do so, but not on the hoof.

Mr Home Robertson: And not for free, I suspect. Thank you—the issue is important. We will want to return to it.

The Convener: Linda Fabiani has a follow-up point.

Linda Fabiani (Central Scotland) (SNP): You paint a horrendous picture. Can you explain in layman's terms why what you describe would happen?

Douglas Connell: It would happen because, under the bill as I read it, it could be stated that an organisation such as the National Galleries of Scotland, whose trustees are appointed by the First Minister, is under Government control. Incidentally, that could also apply to certain local authority charitable bodies. In charitable law, there is nothing wrong with a local authority or central Government creating a charity, because quite often—

Linda Fabiani: You are saying that the First Minister could become the third party.

Douglas Connell: Exactly.

Mr Home Robertson: It is the Scottish Natural Heritage story. The problem was highlighted by

the fact that ministers directed SNH to move its headquarters.

Simon Mackintosh: That reading of the bill is encouraged by the explanatory notes and the policy memorandum.

Mr Home Robertson: Given the distinctions that we have been discussing, my final question on the charity test is whether you are concerned about the implications of a requirement for dual regulation, by both OSCR and the Charity Commission.

Douglas Connell: I will comment on that, because we look after quite a number of UK charities that happen to be registered with the Charity Commission.

Section 14 of the bill is the relevant provision. It says that charities that are registered with the Charity Commission do not require to register with OCSR if they do not—note the double negative—occupy premises or

"carry out activities in any office, shop or similar premises in Scotland".

The phrase "carry out activities" is pretty broad—it could apply to the holding of meetings and consultations and the exercising of monitoring activities, for example, which many charities do. There are many UK charities that operate in Scotland, both in collecting money and in distributing it. For example, as well as raising money in Scotland, Cancer Research UK distributes large sums for medical research here. It has office premises and carries out activities in Scotland. Under the bill, it would need to register with OSCR and perhaps meet OSCR's differing requirements as regards the paperwork that would have to be lodged and its accountability.

In my view, if all such charities that are registered with the English Charity Commission were required to reregister with OSCR, that would place an unnecessary burden on OSCR. I can see some merit in OSCR having a discretionary power to require a specific English-registered charity to submit to its registration requirements if, for example, OSCR had received a complaint about that body's activities, but I do not think that reregistration should be mandatory across the board, as it would create extra burdens on the charity sector and extra unnecessary work for OSCR.

Anne Swarbrick: I agree entirely and would go further. I do not understand the point of the provision, which is entirely new. At the moment, if a charity is registered with the Charity Commission for England and Wales, it can call itself a charity in Scotland and get on with doing what it does, without let or hindrance. The new provision will be a change and I do not really understand why it is being made. OSCR will not have jurisdiction over the management of charities, if they are managed from England, because the Scottish courts will not have jurisdiction over that management. What is the benefit of the change? We could allow OSCR to control the activities of the charities in Scotland by giving it powers to control activities on its patch. I do not understand the logic behind the proposal.

Simon Mackintosh: I support the point that Anne Swarbrick makes. The provision is wide enough to cover charities registered anywhere in the world, but we are focusing on charities that are registered with the Charity Commission for England and Wales. There is fairly easy access to information that is held on charities by the Charity Commission. Anne Swarbrick has already highlighted the fact that OSCR has a limited budget. The bill contains provision for exchange of information with other regulators and places a duty on OSCR to co-operate. It seems to me and to the Charity Law Association that, unless there are serious concerns about the activities of English charities that operate in Scotland, OSCR should concentrate on other things and not the activities of foreign charities. We recognise that those charities are adequately regulated by the Charity Commission for England and Wales. This is not a priority area for involvement by OSCR, especially given its budget.

Anne Swarbrick: There might be a halfway house. OSCR might require a charity that said that it was registered in Iceland, for example, to register with it. However, I do not understand the logic of requiring Charity Commission registered charities to do that. There could be exemption from that provision for English and Welsh-registered charities. That would take out of the equation the vast majority of foreign charities that operate in Scotland.

Simon Mackintosh: Section 36 of the bill gives OSCR the power to intervene in the affairs of English charities, at the request of the Charity Commission. If the more general registration requirement were removed, it might be necessary to extend the intervention power.

Anne Swarbrick: Simon Mackintosh is absolutely right.

Mr Home Robertson: Does everyone accept that, if OSCR has any concerns about an English-registered charity that is doing work in Scotland, it should have the opportunity and the right to intervene?

Anne Swarbrick: Absolutely.

The Convener: The issue was raised with the committee regularly as we took evidence from many charitable organisations that operate in Scotland. The voluntary sector expressed concerns that allowing a charity that is based in

England to operate in Scotland without being regulated in the same way would be inequitable. The sector thought that that was grossly unfair. I understand your point that the provision is unnecessary, because such charities would be regulated by the Charity Commission for England and Wales, but there seems to be some inequity. How do you respond to the concerns of the rank-and-file voluntary organisations that operate in Scotland?

Douglas Connell: There is something of a paradox, because the English charities have been regulated for many years, whereas there has been a vacuum in Scotland. The position is much more likely to be that English charities could say that they have been subject to regulation and intervention by the Charity Commission in a way that charities established in Scotland have not. If there were no rigorous regulation south of the border, the argument that has just been put would be sound, but that is not the case. English charities are already regulated by the Charity Commission for England and Wales, which is heavily resourced, as Anne Swarbrick has said.

Anne Swarbrick: Scottish charities operate in England without being registered with the Charity Commission. I do not understand the point that the voluntary sector is making. As a riposte to the bill, the Charity Commission might say that it wants Scottish charities to register with it, in order to create a level playing field.

Christine Grahame: I want to return to section 7(3)(b) and what has been said about third parties. If the bill stated that the minority of any such board of trustees can be appointed by a third party, would that remedy the problem?

Douglas Connell: An interesting issue is whether the mechanism for appointing charity trustees gives control or whether the way in which trustees act once they have been appointed is the important factor. Of course, charity trustees have an obligation to act in the charity's interests. If the First Minister was involved in making appointments and it was made absolutely clear when the appointments were made that the charity trustee's duty was to act in the charity's interests, that would be far more important than the mechanism that is used for finding appointees. Of course, all the people who are appointed to the public bodies in question are subject to the Nolan principles. Their positions are advertised and they go through a proper scrutiny process. I do not think that the answer is to fix a particular majority or minority.

Christine Grahame: I take it that nobody agrees with the proposal.

Anne Swarbrick: I think not.

Christine Grahame: However, that approach would be perceived as more democratic and at arm's length.

Simon Mackintosh: One recommendation in the McFadden report was that there should be a limit on the number of members who could be appointed by central Government or local government. That is a mechanistic way of approaching the problem, but it should be seen in the context of considering trustees' independence of action, which is the overriding principle. Against that background, it was said that we should certainly not want more than a particular number of members being appointed, in the expectation that other ways of finding appropriate trustees of those bodies would be found.

Douglas Connell: I simply believe that the status of national institutions with collections of international importance should be separately recognised. There should be no doubt in anybody's mind that the charitable status of institutions is secure, especially when people are about to embark on major fundraising projects for them. That matter should be urgently addressed.

Donald Gorrie (Central Scotland) (LD): I want to pursue some of the latter points that have been made and the issue of continuity. I understand that the English proposals start from the status quo and try to improve it, whereas the Scottish proposals start with a clean sheet. There is a school of thought that, if the Inland Revenue thinks that a school, trust or museum is a charity, it will carry on thinking so, whatever OSCR says. Do you think that that will happen? What would be the position if the Inland Revenue still thought that a body deserved tax relief, although it had not qualified for it? The example of guide dogs was given. It was said that, technically, a body that trained guide dogs would not qualify as a charity for OSCR. Is that a problem? Is it likely to happen? What difficulties will there be if the English continue to build on the status quo and there is a totally new system in Scotland, but many people—such as those in the Inland Revenue—do not accept the new system? I am sorry to ask such a complicated question.

Anne Swarbrick: I am afraid that the issue is complicated. The short answer is that things could easily become rather chaotic. In principle, it would be possible for the Inland Revenue to say that a body qualifies for tax relief and for OSCR to say that it does not qualify for calling itself a charity. That would be an odd result, but it is entirely possible on the basis of the current proposals. The result would be undesirable and would lead to confusion in the minds not only of potential applicants for charitable status, but of members of the public. The public fund charities to a large extent, so public confusion—or, ultimately, the

public turning off from the entire issue—would be undesirable and a very worrying way to go.

10:15

Simon Mackintosh: The follow-up point to that is that, if a body meets the Inland Revenue test but not the OSCR test, it ends up obtaining the UK tax reliefs but not having to be registered with OSCR and therefore not being regulated by OSCR. We could end up with a tax charity getting all the tax benefits without the public supervision that the bill is designed to create.

Stephen Phillips: That points to the need to have some harmony between the tests of charitable purpose that are used in an English context and those that are used in a Scottish context. However, even that does not solve the problem, because there could well be a divergence between the detailed decisions that are made at the Scottish end and those made by the Charity Commission, particularly in relation to section 7(2)(m), which mentions "any other purpose".

Donald Gorrie: Until I read your stuff over the past two days, the whole idea that we should perhaps reconsider and build on the status quo and improve it, rather than going for a new thing, had not occurred to me. Do you think that that is a serious proposition that the committee should be considering?

Dr Ford: I am afraid that I am going to challenge the idea that the bill represents a completely new start. It is heavily imitative of the English arrangements, but the charity test as it is drafted would certainly be a significant new departure within that broad context. I want to underline the problem of uncertainty about what would happen. Mr Gorrie asked whether divergences would occur and how that might happen. One can give specific examples, but it is difficult to give an overall picture, because there is insufficient direction to OSCR on how to apply the charity test. I can go into more detail than that, but in my view the greatest problem is the broad uncertainty about how the charity test would be applied.

Donald Gorrie: On any of those issues, relatively short pieces of paper are extremely helpful to the committee, as well as your oral evidence.

Stephen Phillips: One point has not been raised as yet. The charity law sub-committee had a concern about the way in which section 7(2)(m) is drafted, particularly the reference to a

"purpose that may reasonably be regarded as analogous".

One of the features of the charity sector in Scotland is the diversity of aims and objectives, which evolve over time. I think that the concept of being analogous is probably too tight and restrictive. That may be a lawyer's concern, but it needs to be looked at. We need to go for a much broader test by reference to the kind of benefits that are achieved through pursuit of those particular purposes, or something along those lines. Otherwise, scope for innovation in the charity sector could be stultified.

Anne Swarbrick: I am afraid that that brings us back to the common law, because the common law provides that flexibility to expand the definition. I have covered that in the paper that I submitted to the committee. I agree that we need to start with the status quo and go out from there. I think that that is the right approach and it is broadly the approach that Westminster is taking—that we keep what we have and expand it.

Mary Scanlon: Before going on to chapter 3 of the bill, on co-operation and information, I have a question relating to section 16, which many witnesses have mentioned. The written evidence states:

"We continue to be concerned about the need for OSCR to give consent to amalgamations and dissolutions".

I think that the Charity Law Association—if my papers are not mixed up—cites the example of a Scottish company that was on the point of liquidation when the Charity Commission for England and Wales got involved, under the Companies Act 1989, to help to bail it out. You are probably the only people of whom we can ask this question. Will the bill override the Companies Act 1989? The scenario that is painted in the written evidence is of considerable concern. Can you elaborate on that point before we discuss chapter 3?

Simon Mackintosh: The point of concern relates to section 16(2). It is perfectly reasonable that, if a charity wants to amend its constitution

"so far as it relates to its purposes",

OSCR, which is the custodian of charitable purposes, should have to consent to that, as that sort of thing can be quite complex and easy to get wrong, although it is absolutely fundamental to the status of a charity. If we accept that OSCR should have to consent to that, there is concern about the other activities that are listed in section 16(2). A charity's constitution might provide for its amalgamation with another body that is a charity or for its winding itself up or dissolving itself, perhaps by making over its funds to another charity. Why should OSCR have to consent to that, if the trustees are merely implementing powers that they have in the deed? Why, specifically, should the charity have to wait six weeks for OSCR to give a decision?

Perhaps the most worrying concern is that, if a charity's trustees want to apply to a court in

relation to any of those matters, they have to get OSCR to consent to that. If the trustees who are in charge of a charity are not talking about amending the purposes of the charity, why is it felt necessary that OSCR should get involved by looking over the shoulder of the trustees as they do something that they are entitled to do anyway? OSCR can always enter an appearance in the courts if it feels strongly about what the trustees are doing. That is the concern.

A member of the Charity Law Association has said that, in the absence of that sort of power, the association can take fairly rapid action to support a Scottish charity that is failing. We have concerns that the bill, as drafted, would stop that rapid action being taken. The question is whether OSCR should get involved to that degree in activities of Scottish charities that do not relate specifically to their purposes.

Mary Scanlon: That is a matter of significant concern, which we will probably have to discuss beyond today. Is it your understanding that the bill will override the Companies Act 1989?

Simon Mackintosh: That seems to be the case. The bill states what any charity must do in addition to any requirements on the body under the Companies Act 1989, if it happens to be a company.

Stephen Phillips: In the context of a charitable company having to wind up on the ground of insolvency, it seems anomalous that the board should have to wait for OSCR's consent before initiating procedures that were invented to address that situation.

Mary Scanlon: So the bill could be detrimental to charities that are at the point of liquidation but could be saved. The procedures under the bill are more bureaucratic and could have an adverse effect on charities in the long term.

Simon Mackintosh: The bill would add a layer of control and delay, which could be fatal to a charity's ability to continue with its activities.

Anne Swarbrick: The proposal is an undesirable English import. The Charity Commission would be required to give its consent to such things in England, in general terms, but, hitherto, OSCR has not been required to do that in Scotland. I do not see why we need to go down that road at all. As Simon Mackintosh said, if the trustees of the charity already have the powers, we should let them get on with it.

Mary Scanlon: Thank you for explaining that.

Let us move on to chapter 3. Under section 20, OSCR will be obliged to

"seek to secure co-operation between it and other relevant regulators."

As we have gone around Scotland doing our consultation, that has been raised as a matter of concern among charities, which think that they are going to have to produce different pieces of paper and information for different regulators. Do you think that other regulators should be placed under the same obligations to co-operate with OSCR, both in Scotland and in the UK as a whole? Can you explain any problems that you feel could arise should that not happen?

Anne Swarbrick: In principle, co-operation is a two-way street, so the answer to your first question is yes.

Simon Mackintosh: I very much agree. There is no point in requiring one body to co-operate if the others do not have that duty.

Mary Scanlon: The issue is straightforward.

We have already considered whether the bill strikes the right balance on the registration requirements for charities that are registered in England and Wales, but I want to raise a related issue. Last week, we took evidence from members of the bill team, who told us that any charity with a significant presence in Scotland—we discussed what "significant" would mean in this context—will be required to register as a Scottish charity. However, the Charity Law Association's submission raises a question about that. It states:

"We are aware of non-Scottish charities carrying out services pursuant to contracts with, for example, local authorities in Scotland. Is the carrying out of obligations under a contract caught by 'carrying out activities in any office, shop or similar premises in Scotland'"?

Will you explain that point about charities that do not have an office or shop in Scotland but carry out a contract here?

Simon Mackintosh: The question whether charities that are registered with the Charity Commission for England and Wales will be required to register with OSCR depends on what the bill means by the phrase "carrying out activities". For example, would a charity that provides services under a contract without having any other presence here be required to register? Would a medical research charity that funds a laboratory or research workers in a Scottish institution be considered to be carrying out activities? Those sorts of registration issues about where the edges of "carrying out activities" lie would need to be clarified.

Mary Scanlon: We questioned the bill team on that point last week, but the discussion will no doubt go on. In your view, will the bill cover charities that advertise on television, on the internet and in national newspapers? Charities could carry out significant activities in Scotland and collect significant amounts of money in those ways but still remain outwith the remit of OSCR. Could anything be done to address that?

Simon Mackintosh: The section to which you refer was amended after the consultation on the draft bill. The bill is clearly designed to remove the registration requirement from English charities that solicit funds in Scotland through newspapers, television and telephone. My reading of the bill is that it does not intend to force charities that are registered in England and Wales to register in Scotland just because they advertise in Scottish newspapers and newspapers that happen to circulate in Scotland, or because they have a television advertising campaign that is shown in Scotland.

Anne Swarbrick: One of the great ironies is that the bill was introduced partly because of a couple of cases concerning fundraising that the Scottish Charities Office took to court a couple of years ago. If charities can fundraise in Scotland without registering with OSCR, why are we asking charities to register at all?

Mary Scanlon: We will have a few questions on fundraising further down the line.

Section 23 provides that a person who requests a copy of a charity's constitution and accounts is entitled to it,

"if the request is reasonable".

Many people have asked in their submissions why that phrase should be included. Could it be unreasonable to ask a charity for a copy of its constitution and accounts?

Douglas Connell: That is an interesting question. The provision will place a potentially significant burden on small charities, many of which are completely run by volunteers or by one paid member who has many other responsibilities. Given that OSCR will have a central register of charities, the fact that an individual or group of individuals could send a general letter every year to each charity in Scotland to ask for a copy of its constitution and accounts could pose a completely unnecessary burden on many small charities. A far better way of operating would be for OSCR to hold information on the accounts and constitution of every regulated charity in Scotland, to which anyone could have free access—the information could be online—so that people would not have to write to every charity and we would not impose a burden on charities to supply the information.

10:30

Anne Swarbrick: The situation could be even worse, because the charity would have to supply the information

"in such form as the person may reasonably request."

If a person requested information in Icelandic, French or German—choose a language—would the charity have to bear the cost of translation?

Stephen Phillips: That would probably not be a reasonable request.

Anne Swarbrick: Well, it might—

Mary Scanlon: I notice that section 23(2) states:

"A charity may charge such fee as it thinks fit for complying with such a request".

However, we must strike the right balance. Openness, transparency and accountability cannot be achieved unless people can reasonably ask for information. Are the provisions a bit heavy handed, or are they reasonable?

Douglas Connell: It is absolutely right that there should be transparency in the charities sector; that is essential. OSCR will keep a file on every charity, which will include up-to-date copies of charities' accounts and constitutions, so it should not be difficult for OSCR gradually to scan in the items and make the information available online to anyone who wishes to conduct a search.

Stephen Phillips: I recollect that that obligation exists under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and I am not aware that people have moaned and groaned under the burden of it. However, as Douglas Connell suggests, the difference is that there will be a central registrar, who ideally will be able to disseminate the information more systematically.

Mary Scanlon: That brings us back to the earlier point about whether OSCR should have an advisory and regulatory role. As I said at last week's meeting, I am concerned that if creative accountants have done a charity's annual accounts, the accounts might not reflect whether the charity is operating excellently at grass-roots level.

Douglas Connell: We are not accountants, of course; we are just lawyers.

Mr Home Robertson: Much worse.

Patrick Harvie (Glasgow) (Green): I raise a matter that came up at last week's meeting, when we were talking about cases of suspected misconduct. The bill says that the Court of Session must be "satisfied" that misconduct has occurred, whereas the test in the existing legislation is merely that it must "appear" to the court that there has been misconduct. At last week's meeting the committee was told that the two terms mean the same thing and that, according to the "Oxford English Dictionary", if someone is "satisfied", the implication is that they have deduced a matter from evidence, and if something "appears" to be the case, the implication is that evidence exists. However, the terms seem to have different meanings in everyday language. Can you enlighten us?

Anne Swarbrick: The terms are different. Section 7(1) of the 1990 act provides that the court may act

"Where it appears to the court"

that there has been misconduct or mismanagement. In practice, the court has regarded that provision as allowing it to make interim, or temporary, urgent orders, which is the correct interpretation, given the powers that section 7(1) confers on the court. Hitherto, the word "satisfied" in section 7(2) has been interpreted as meaning "after hearing full evidence from both sides", so there is certainly precedent in Scotland for that interpretation.

Simon Mackintosh: I agree. The terms are different. If a court is "satisfied", the implication is that it has seen evidence that satisfies it of a matter, which is right if the court is to exercise permanent powers. A higher standard of proof is needed before permanent measures can be applied, whereas we might talk about the balance of convenience or balance of risk in relation to the interim powers that the regulator might exercise in the much shorter term. That is the right distinction to make.

Anne Swarbrick: In response to the draft bill I made the point that OSCR would have no powers that it could exercise urgently; it would be able to exercise powers only on the basis of full evidence and after full consideration, which is a nonsense.

Patrick Harvie: OSCR has argued in written evidence that the change in wording raises the bar and makes it more difficult for what it called "protective" measures to be used. Do all the witnesses agree with that?

Stephen Phillips: Under section 34(1)(b), the Court of Session needs to be satisfied only that it is

"desirable to act for the purpose of protecting the property".

Concerns have been raised about the ability to take interim measures, but the court does not necessarily have to be satisfied that there has been misconduct in the administration, only that it is desirable to act for the purpose of protecting the property—it does not have to be necessary to act for that purpose. That measure goes some way to addressing the concerns that have been expressed.

Anne Swarbrick: Section 31 states:

"where OSCR is satisfied, as a result of inquiries",

it may use the powers in that section. However, those powers are meant to be used to address issues that need to be dealt with urgently. If I was acting for a charity that was on the receiving end of those powers, I would argue strongly that the use of the interim powers was not justified and ask to see the evidence. There is a lot of scope for spoiling tactics, which means that OSCR may experience difficulties in exercising the powers.

Patrick Harvie: The point that Dr Ford made could apply in that situation—OSCR can act when it is "necessary or desirable" to do so. However, we need further clarification from the Executive on the issue.

Dr Ford: I cannot claim that point.

Patrick Harvie: Sorry, it was Mr Phillips.

Linda Fabiani: Ms Swarbrick mentioned her concern about the budget that OSCR will have to exercise its functions, let alone expand them. Under section 38, registered social landlords will be exempt from OSCR's supervisory functions. The Executive told us that Communities Scotland will perform that function in relation to RSLs. The reason we were given why only RSLs will be exempt was, more or less, that the Executive thought that Communities Scotland was capable of doing that. Should the provision be expanded? Is it fair that charities that have been formed by RSLs—which bother me slightly—may be the only bodies that are exempt in that way?

Anne Swarbrick: Several arguments can be made on the issue. One is that all charities, whether they are RSLs or otherwise, ought to be regulated uniformly and that there is no reason for RSLs to be exempt from regulation by OSCR. The issue becomes difficult if we start to discuss what other organisations ought to be exempt. Part of the difficulty is that we do not really know what the charitable sector in Scotland is. We have a vague idea of its shape, but we do not know how many charities we have, although we certainly know how many registered social landlords there are. Because our knowledge is vague, it is difficult to make judgments about the issue at this stage.

Linda Fabiani: Under section 38, OSCR can at any time authorise certain public bodies or the Scottish ministers to carry out its functions. Given your comments on the budget, do you believe that that is likely to happen?

Stephen Phillips: We would be concerned if OSCR began to delegate its regulatory functions in that way. The charity law sub-committee has not examined the matter in detail, but my personal view is that if we establish and skill up a regulator and ensure that people adopt a systematic and consistent approach to what can be difficult questions of interpreting and applying principles of good or acceptable practice in the charity field, it will be damaging if other authorities that might have a different perception of what is or is not acceptable are able to exercise the same powers. That will make it more difficult for people to understand where the boundaries lie and will lead inevitably to inconsistency and confusion.

Simon Mackintosh: The suggestion that particular bodies that happen to be charities should not require to be registered by OSCR as well as their main regulator is driven by the need to avoid overburdensome dual regulation. However, fragmenting the regulatory system will mean that quite important chunks of the charity sector will be taken out and given to another regulator. OSCR is supposed to ensure that charities act properly and in accordance with charity law, whereas other regulators might emphasise other legal aspects that they are concerned with. As Stephen Phillips has pointed out, because other regulators do not really have any expertise in charity law such concerns would not top their list of priorities.

We also need to examine the various issues that affect charities and to draw out best practice and concerns from all sorts of different bodies that are charities but that, for whatever reason, fall under different regulators. As a result, there is a tension between the need to avoid overburdensome dual regulation and the need to ensure that, however they are set up, charities operate in accordance with charity law. I would be fairly careful about fragmenting the regulatory system any further.

Anne Swarbrick: We should also bear in mind the stipulation that OSCR should co-operate with other regulators. One would think that it would be enough to make that provision a two-way street.

Linda Fabiani: One can see that the bill's provisions might be used to fragment the regulatory system even further. However, what would happen with the RSL function if the bill were passed as it stands? Many RSLs have started up various arm's-length charitable ventures; indeed, some already have more than one—these things tend to snowball. Although Communities Scotland is perfectly capable of supervising housing organisations, many of which are charities simply so that they can operate under better tax regimes, does it have the proper functions to be able to check out charities all the way down the line? Moreover, my reading of a provision further on in the bill suggests that if a charity forms another charity and is confident that it is operating properly, it is taken out of the net a little bit.

Anne Swarbrick: At the moment, RSLs are regulated by OSCR and Communities Scotland. My impression is that Communities Scotland has, quite properly, been leaving the charitable aspects of RSLs to OSCR. I suppose that I am saying that your question whether Communities Scotland would have the expertise to deal with such matters, given that it has not done so up to now, is a valid one.

Donald Gorrie: I wonder whether you could comment on chapters 5 and 6, on "Reorganisation of charities" and "Charity accounts", which give ministers the power to lay down different scales for the amount of accounting that is necessary for different sizes of charities. That might result in differences between Scotland and England. In general, are you satisfied with the provisions for charity accounts, reorganisation and in particular dormant charities? After all, between you, you must control an enormous number of dormant charities in which the people in charge have died off or whatever. They should be made to do something useful. Will the bill assist in that regard?

Douglas Connell: That is one of the bill's many aspects that we welcome. Indeed, despite the tone of our discussion this morning, we all greatly welcome the creation of OSCR and the introduction of the bill. However, one of people's great frustrations with charity law has been the difficulty of getting variations of trust purposes through the Court of Session, which in recent years has adopted a less than pragmatic approach to the matter. I should point out that that situation does not affect only small charities; some quite large charities have also been involved. We greatly welcome the streamlined procedure for reorganising charities. Personally, I am positive about the provisions and would like them to be put in place as quickly as possible.

10:45

Stephen Phillips: I endorse that view. I have a number of clients who are waiting for that to happen because the costs of an application to the Court of Session are so high.

Anne Swarbrick: One thing that might be improved relates to the fact that the reorganisation provisions in the bill apply only to charities. There is another type of organisation in Scotland, public trusts, which will be allowed to continue to reorganise under the provisions of the 1990 act. The problem is that the transfer provisions apply only between public trusts. A public trust can transfer its assets to another public trust but not, as things stand, to an incorporated charity. More and more charities are incorporating and the public trusts that are transferring their assets under the 1990 act tend to be the ones with outdated purposes. Often, they want to transfer their assets to an incorporated charity that might be doing a similar thing, but they cannot. For that reason, I would like the 1990 act to be amended—I think that the relevant sections are sections 10 and 11—to allow those provisions to apply to public trusts that want to transfer their assets to incorporated charities.

Linda Fabiani: I am interested in the situation regarding the Scottish charitable incorporated organisations. Why is that different from the situation regarding a friendly society or a charity that is registered under the Companies Act 1989?

Dr Ford: In a way, we do not know how different it is going to be because the regulations will reveal the detail. The raison d'être is that it should be much easier to incorporate as an SCIO than as any of the other available options. That is the rationale, but we do not know whether that will be realised.

Linda Fabiani: And you are not accountants, so you will not know whether there is any benefit to be had in that regard.

Simon Mackintosh: There are obvious benefits in providing a simple structure that gives corporate continuity. For example, a charity's employee commitments or leasing commitments should continue despite any change of the trustees. There are difficulties in those areas for trusts. The simple structure will limit the liability of the members and directors of the organisation in a way that is difficult to achieve with a trust, but it does so without having to go into the requirements of the Companies Act 1989, which are perhaps inappropriate for charities to have to deal with. Further, it ensures that there is one regulator for that creature, OSCR, which will deal only with charities. The proposal seems to meet a need in relation to the way in which charities operate.

One slight gap is that, although the draft bill provided for existing charities that are companies or friendly societies to roll themselves into charitable incorporated organisations, there is a question as to whether any other sort of organisation should be automatically empowered to do so as well. I do not know whether that is the case.

Stephen Phillips: I suppose that I am slightly biased, in that I was involved in drafting the model constitutional documents to assist the consultation processes around the issue of the SCIO. However, I believe that that model will solve a problem that has existed in the charity sector for years. It addresses not so much the position of a conventional charitable trust, in relation to which, as Simon Mackintosh has mentioned, there are technical issues to do with succession and demonstrating a link in title between the original trustees and trustees further down the line, but that of a smaller type of charity that would normally use an ad hoc constitution, become an unincorporated voluntary association and have a management committee that would be exposed to personal liability. The concept of having a clear and straightforward way of ensuring that such bodies get the benefit of being a clear legal entity with limited liability is welcome.

Linda Fabiani: I cannot remember which of you it was, but someone in their evidence had a section on non-charitable benevolent bodies.

Dr Ford: It might have been us, in relation to fundraising, which was our main point. The section of the bill on fundraising is directed at charities, but also at non-charitable benevolent organisations. However, so far as control on a continuing basis is concerned, they will not have to put in annual accounts to OSCR or any other body. That was the area of exposure that we were pointing to. It can also be said that non-charitable benevolent organisations are a good thing, and should perhaps have the benefit of a vehicle similar to the one for charities.

Linda Fabiani: So at the moment they could not be pulled into the legislation.

Dr Ford: No.

Patrick Harvie: I would like to ask about designated religious charities. I was surprised at how much of the bill exempts designated religious charities from various aspects of regulation, either by OSCR or by the Court of Session. What is your understanding of the legal grounds for that exemption?

Anne Swarbrick: The historical reason is that the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 exempted designated religious bodies from much of its scope—more than we are proposing with the bill—because they are perceived as already having in place rigorous checks and balances and accounting procedures. The situation is similar in England. I think that the Church of England is exempted from just about everything that is in the ambit of the Charity Commission, as perhaps one would expect. There is an historical reason for the situation and—wearing my former regulator's hat—I think that the matter was not raised to any extent under the 1990 act. There was no perceived difficulty with religious bodies that could not be addressed by the regulator.

Patrick Harvie: I wonder whether other substantial charities that have been operating for a long time without any problem would question why they are subjected to one regulatory regime when other large bodies that operate without problems have fewer hoops to jump through.

Anne Swarbrick: Perhaps they would, but that is the historical basis for the situation. Again, wearing my former regulator's hat, I think that if I was required to examine the finances of one of the major churches, I would find it a difficult exercise.

Patrick Harvie: Would anybody else care to comment?

Dr Ford: In looking at the provisions in the 1990 act, I always felt that the protection for the public lay in the ability of the Scottish ministers to remove the designation by fiat. The special status of religious organisations can be removed readily.

OSCR will be in the same position. Designated religious organisations are only a step away from everybody else.

Scott Barrie: I turn to the grounds under which a person will be barred from being a charity trustee. In her paper, Anne Swarbrick refers to the question of mismanagement versus misconduct. We discussed that issue with the bill team last week because, as lay people, some of us feel that there is a difference between the general incompetence and disorganisation that is implied by the term "mismanagement" and misconduct. Are the two terms exactly the same, or is there a difference legally?

Anne Swarbrick: There is a difference. The working definition that is applied to the two terms by the Charity Commission is that misconduct is something that the person knows to be wrong or is illegal in terms of the criminal law. Mismanagement, on the other hand, is something that could occur inadvertently. It could be a simple muddle or mistake. Those are the working definitions that the Charity Commission uses when applying the Charities Acts in England. The Scottish Charities Office took the same approach.

Simon Mackintosh: Section 65 deals with the duties of charity trustees. Section 65(4) states:

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

That includes a breach of the duty to comply with the requirements of the act or failing to act to the required standards of care and diligence. If a charity trustee slips, perhaps inadvertently, we move quickly to charges of misconduct, the involvement of OSCR and the possibility of criminal sanctions. A number of organisations have expressed concerns about the readiness with which criminal sanctions will be applied in situations where there may just be a mistaken trustee. If someone falls short of the duties of care, we will move straight to misconduct proceedings.

Stephen Phillips: The feedback that I have received in a few seminars that I have run on the provisions suggests that there is concern in the sector about the way in which the standard in section 65 is phrased. The duty of a director under company law is to act in what he or she considers to be the best interests of the company—what was known to them at the time, rather than what they know with the benefit of hindsight. That is rather different from saying that someone should have acted in what was the best interests of a charity.

The duty of a director is also to exercise the care and diligence that is reasonable to expect of a reasonably diligent person when looking after their own affairs. However, the standard in section 65(1)(b) is

"the care and diligence that it is reasonable to expect of a person who is managing the affairs of another person."

With some validity, it has been asked why directors in a private sector context, who derive significant remuneration from acting as directors, are subject to a lower standard of care than that which we are placing on well-meaning people who act as charity trustees. These may seem like fine distinctions, but people take them on board and start to ask questions about the nature of the liabilities to which they may be subject if they sit on a charitable company board or a board of trustees, and whether they are prepared to take those on.

Anne Swarbrick: I was asked a very hard question at the seminar that Stephen Phillips also attended. I was asked whether, if the provision is implemented, I would be prepared to volunteer to serve as a charity trustee. I had to think hard about the answer to that question, as it is difficult. The duties that section 65 imposes are very onerous and involve potential criminal charges. If I were convicted of a criminal offence, I might lose my practising certificate, which means that I would also lose my job. The provision has far-reaching consequences.

Simon Mackintosh: There may be a distinction to be drawn between standards of care and the implications of someone failing to meet those. If criminal sanctions follow, the situation is very serious. I have less concern about the standards of care, which are based on the Scottish Law Commission's recommendations for the standards of care that ought to be applied to trustees of trusts generally. We expect that charity trustees will look after funds for others, so it is reasonable to include a test based on what we would expect a person to do with money that they have a duty to look after for someone else. I am more concerned about the criminal implications of failure to meet the standards.

Dr Ford: I endorse completely what Simon Mackintosh has said.

Anne Swarbrick: I, too, agree with Simon Mackintosh. It is also important to allow OSCR to distinguish between cases of mismanagement and cases of misconduct. In cases of mismanagement, OSCR might give advice; in cases of misconduct, it might take action. That distinction must be made, but the bill fails to make it and to allow OSCR room for manoeuvre.

Dr Ford: It is fair to say that the dictionary definition of "misconduct" would include mismanagement. However, the words have acquired distinct meanings in English charity law, and indeed under the 1990 act. The bill is missing the opportunity to make the distinction and do away with the confusion.

11:00

Scott Barrie: Last week, some of us made the point that we feel that the term "misconduct" implies that people are at it, whereas mismanagement has a lower tariff and is more about general incompetence. Section 103, on general interpretation, states that "'misconduct' includes mismanagement". Would a way around the issue be to differentiate between the two words? How do we get out of this and separate the two ideas?

Dr Ford: I will enlarge on that point slightly and my reason for doing so will become clear. As a result of the charity test's departure from dependence upon English case law, OSCR and the Scottish courts will be deprived of the resource of existing case law, which is mostly, although not exclusively, English. So when OSCR comes to read a particular provision, such as that which contains the word "misconduct", it will be on its own. That is also true of the words in the charity test. OSCR will not be obliged to go to the existing case law. However, if the case law were to be made expressly available, and that was the clear will of the Scottish Parliament, I suggest that the words "misconduct or mismanagement" could be reinstated. They would then have a meaning that was established in case law and the case law would be available to OSCR. That would be a way of dealing with the specific problem, but it is part of the larger issue of the availability of the resource of existing case law.

Anne Swarbrick: That is right. Section 30 of the bill gives OSCR the power to investigate mismanagement as well as misconduct. Section 31 gives OSCR the power to take action in respect of mismanagement. That action might be giving advice to the charity. Indeed, speaking from my experience of the Scottish Charities Office, 95 per cent of all the cases on which we took action meant giving advice to charities. Those were cases of mismanagement. That leaves 5 per cent of cases that arose through misconduct.

That seems to be the right balance and that is what is missing from the bill. Mismanagement as an issue seems to have been removed from the bill and that has resulted in the bill becoming more extreme and calling things misconduct that are not misconduct. The term "mismanagement" should be reinstated and the result of that will be that the bill will take a much more reasonable approach.

Christine Grahame: Continuing with the theme that the bill seems to be quite draconian in places, I move on to ask you to develop your views on the arrangements for reviews and appeals. I am looking at Anne Swarbrick's written submission.

Anne Swarbrick: My concern is about the restrictions placed on people who can appeal.

Christine Grahame: I am looking at chapter 10 of the bill, from section 70 to section 77.

Anne Swarbrick: Those who have a right to appeal in Scotland are either the charity or the person against whom the order is made, and that depends on whether the order is against an individual or the charity.

For example, if a trustee of a charity is suspended, and that trustee chooses not to appeal, the charity cannot do anything about it; it cannot tell OSCR that it has got it wrong or ask OSCR for help if it is in difficulties. In England, the range of people who have a right of appeal is much wider; it is anyone who is or might be affected by the decision. That is a better formula because it allows the appeals tribunal to consider evidence from everyone and decide all the issues arising out of a decision of the regulator rather than only some of them. It does not seem to me to be particularly productive for the range of those who can appeal to be drawn as narrowly as it is in the bill. It would be much more fair, just and sensible to allow a wider range of people to appeal.

Christine Grahame: I was thinking that if, for example, someone regularly gives large donations to a charity they would have no entitlement to appeal the decision.

Anne Swarbrick: They would not.

Christine Grahame: Perhaps things might even be said about that person in their actings and they would have no right of redress within the format that is laid out in the bill.

Anne Swarbrick: That is right. One of the things that OSCR could do is to freeze bank accounts. The account might be a joint account, but the joint account holder would have no right to come to OSCR and say, "I have something to say about this." That seems to be particularly unjust.

You could argue that what is proposed in the bill is more restrictive than the current position. Currently, if OSCR decides to take action against a charity it goes to court and the petition is served on everyone who has an interest. All those people have the right to come along, lodge answers and be heard by the court.

Christine Grahame: I am astonished—perhaps astonished is too strong a word; no, I am astonished—as some of the points that are being made in evidence seem to be about pretty basic errors in the drafting of the bill. I do not understand why we are in this situation. Those would be quite substantial amendments.

Simon Mackintosh: The approach taken by the Charity Law Association was to say that almost any decision of OSCR should be appealable and that instead of having a list of decisions that

someone can appeal against, why not state that any decision of OSCR can be appealed by anybody who is affected by it? That would avoid any possibility of missing out decisions that ought to be included.

The general principle of providing us with a quick and cheap appeals process is entirely right. One of the reasons why we do not have many charity law cases in Scotland is because people have found that the process is too expensive and too difficult, so other ways must be found to deal with, for example, the decisions of the Inland Revenue on charitable status. The idea of having a quick appeals process is entirely right. It is a matter of ensuring that everybody who ought to get into the appeals process can get into it. First, OSCR has to review its own decisions on request, then there is the Scottish charity appeals panel and then there is the court. That is the right pyramid to go up.

Christine Grahame: But as I understand it, someone would have to have money to go to appeal, because there is no award of expenses. Is my understanding of the situation correct?

Anne Swarbrick: That is right.

Simon Mackintosh: The process removes the pressure of someone going to court and having to worry about paying the other side's expenses if they are unsuccessful, which is a disincentive. When someone goes to the charity appeals panel they are not faced with the prospect of having OSCR's expenses landed on their desk. That should mean that decisions by OSCR are perhaps more readily appealed than those of previous regulatory bodies.

Christine Grahame: On the other hand, if someone's appeal is successful, there is no award of expenses in their favour. Should there not be discretion to award expenses in certain cases?

Anne Swarbrick: I think that there should be. If an individual tries to appeal a decision made by OSCR, they have to take legal advice and pay for that themselves, or they have to turn up at the tribunal unaccompanied and face the might of OSCR.

The Joint Committee on the Draft Charities Bill, at Westminster, has proposed that successful appellants should be entitled to get their expenses from the Charity Commission for England and Wales, but that the tribunal should award expenses to the commission only when the appeal amounts to an abuse of process. That seems to be right, because otherwise charities and individuals would have to bear the whole cost of the appeals process. They would have no award of expenses made against them, but there would be a substantial cost involved in achieving equality before the tribunal.

Simon Mackintosh: In tax cases, the Inland Revenue will sometimes—it is a rare occurrence—pay expenses if it would like to see a point of principle litigated and a decision made on it.

Christine Grahame: Once the bill has been passed, in the early days in particular it could be tested on certain issues. There is a point of principle here. Rather than prevent people from testing interpretations of the act because they are concerned about costs, the law should award expenses to a successful appellant. Having a Queen's counsel arguing on one's behalf might be a very expensive business. I do not know how much QCs cost—it could be about £1,000 a day.

Douglas Connell: I support what Christine Grahame has said. Especially with a new regulator, it is very important that adequate checks and balances are in place, so it must be right to have a general right of appeal. It would be appropriate to have the ability to deal with expenses in the way in which Anne Swarbrick has suggested, especially given that we are talking about a brand new regulator that will have very broad powers, and that some criminal remedies will be involved. It would be good to have a robust system of review.

Dr Ford: Christine Grahame asked how we had arrived where we have on certain issues that we now recognise as important. I was a member of the bill reference group. Although I did not always agree with the group's conclusions, I must make the general point that the step from identifying the need for something in principle and making a recommendation to producing detailed legislation is enormous. Points that one never had the opportunity to consider at the policy stage become apparent only late in the day. I think that that has happened again between the production of the draft bill and that of the bill that is before us. On behalf of the bill team—rather than the reference group—I would say that that is what seems to have happened. I am sure that it was unavoidable.

The Convener: I point out, too, that at the beginning of their evidence, everyone said that they were satisfied with the Executive's consultation on the bill. Given the witnesses' other answers, if they had not been satisfied, they would have said so. That suggests that, in general, the Executive and the bill team have got their approach right. That does not mean to say that there will not be times when what is on the table needs to be revisited or amended. That is the whole point of stages 1 and 2 of the bill process.

Mary Scanlon: I am pleased to say that we have reached the final question, which is about the investment power of trustees.

Part 3 of the bill implements the recommendations of the Scottish Law Commission

to extend the powers of investment of charity trustees of Scottish trusts, but the submission from Anderson Strathern says that the bill represents a "missed opportunity". It states:

"In Scotland there is a prohibition against trustees delegating the management of trust investments to agents or nominees. In difficult investment conditions this is unsatisfactory because investment decisions can be taken much more effectively by an agent or nominee than they can by a body of trustees."

It compares that to the situation in England and Wales, where

"Part IV of the Trustee Act 2000 gave trustees … power to delegate certain functions, including investment of assets."

Will you clarify what you meant when you said that the bill was a missed opportunity? How much of a disadvantage could that be if the bill goes through in its present form?

Anne Swarbrick: At present, Scottish trustees cannot nominate investment managers to manage their investments for them—in effect, they have to do it themselves; they cannot delegate the task. That was a problem in England, too, but the situation was addressed by the Trustee Act 2000, which gave English and Welsh trustees powers to delegate investment of assets to fund managers. Such powers are especially important in the difficult investment conditions that we are experiencing at the moment. Managing one's investments is easy when the stock market is going up all the time; it is not so easy when it is moving in fits and starts. To level the playing field, it is appropriate to give Scottish trustees the same powers as English and Welsh trustees. That would provide assistance.

11:15

Simon Mackintosh: England has the Trustee Act 2000, which provides extended investment powers, the power to use nominees and delegates and the important duty to supervise the activities of those to whom investment powers, for example, are delegated. I would not like the committee to go away thinking that trustees of charities or any other trusts cannot delegate investment management. We are talking about the position when a trust deed contains no specific power or a trust deed's general terms are not wide enough to allow delegation. We are talking about the implied statutory powers when nothing else is said.

Plenty of Scottish trust deeds allow delegation of investment management and the use of nominees. Modern trust deeds will provide that. The risk for trustees is that if they do not have a specific power and the general powers are not wide enough, they commit a breach of trust if they undertake sensible financial management by giving an investment manager a policy to act within and the requirement to report to trustees quarterly or every six months. That is a perfectly sensible way to manage a trust fund's investments, but the concern is that Scots law prevents trustees from acting in that way. The general principle of extending investment powers—which a joint report of the Law Commission and the Scottish Law Commission suggested and which has been applied in England—is to be supported. As Stephen Phillips said, some charities are waiting for the new reorganisation provisions, just as some are waiting for those powers.

Mary Scanlon: I will not go into the offences in section 99, which have been covered adequately. Anne Swarbrick talked about people becoming trustees. Will part 3's provisions on investment powers act as a disincentive to some people to become trustees, given the responsibility that that involves?

Anne Swarbrick: Are we talking about the investment powers or trustees' responsibilities?

Mary Scanlon: I am asking about the provisions on trustees' responsibilities in relation to investment powers.

Anne Swarbrick: I do not think that they will have the suggested effect. The point that I made about trustees' responsibilities is separate.

The Convener: I thank all the panel members for their full answers, which I am sure committee members found helpful. If you would like to make further points, I am sure that all committee members would welcome written submissions.

I suspend the meeting to allow for a change of witnesses.

11:18

Meeting suspended.

11:27

On resuming—

The Convener: I welcome our second panel to this morning's Communities Committee meeting. We are joined by Maureen Harrison, the chair of the public affairs committee and vice-chair of the Institute of Fundraising Scotland; Martin Sime is the chief executive of the Scottish Council for Voluntary Organisations; Margaret Wilson is development officer for CVS Scotland; and Norrie Murray is head of the policy and strategy unit at Volunteer Development Scotland. I thank you all for taking time out of your schedules to be with the committee this morning.

I will ask a couple of questions that are similar to those that I asked our previous panel of witnesses, all of whom said that they were happy with how

the Executive had consulted on the bill's proposals. Are you equally satisfied with the Executive's consultation or do you have any concerns?

Martin Sime (Scottish Council for Voluntary Organisations): In general, I am very happy—the process has been good and inclusive. We have not been dealing with the Executive's recent consultation alone; the same matters have been the subject of several consultations over the years and some of my members are familiar—or even over-familiar—with some of the questions about charity law, but there is still an enthusiasm for the task.

The Executive has gone about the consultation in a diverse way to represent the different stakeholders. However, my one caveat is that the Executive does not come back to us and say, "Well, that means that you have to be content with the content," although there is broad consensus on large parts of the bill. The current consultation has confirmed that consensus on many aspects of the bill. There are a few areas where we feel that the bill could be stronger, but in general it has been a good consultation exercise and I commend the Executive on it.

The Convener: I am sure that those areas where you feel that the bill needs to be strengthened will be explored both at stage 1 and stage 2 of the bill. Do other members of the panel concur with that view?

Margaret Wilson (CVS Scotland): I agree.

The Convener: My second point concerns the independence of OSCR. It will be a statutory body—a non-ministerial department—and accountable to the Scottish Parliament. Questions have been raised about the independence of OSCR and indeed the witnesses who were here earlier this morning raised some concerns about the ability of Scottish ministers to influence OSCR. What are your views on the independence of the regulator as proposed in the bill?

Martin Sime: As a member of the reference group that the Executive established, I can tell the committee that it was broadly agreed that OSCR should have a significant degree of independence, particularly in relation to its decisions on the awarding of charitable status. There was no pressure to enable Scottish ministers to influence those decisions; there was a recognition that it would be much better if Scottish ministers were clearly disassociated from that kind of activity.

In relation to the discussion with previous witnesses earlier this morning, I understand why Scottish ministers might want to have the power to require OSCR to report on certain matters and to retain that power, because it is possible that OSCR's future reports might not cover all the issues that might be of concern to Scottish ministers.

On the broader issue of independence, the point was not raised earlier—and SCVO would prefer this—that the role of making appointments to the board of OSCR should emanate from sources other than Scottish ministers. That would be a way to establish at the highest level that Scottish ministers have a low involvement in the governance of OSCR. The reference group explored a number of possibilities in that direction and I am rather disappointed that the bill has not picked them all up.

11:30

Maureen Harrison (Institute of Fundraising Scotland): From the Institute of Fundraising's point of view, we agree that OSCR's independence is vitally important, and that, especially for an organisation that aims to improve standards of governance for charities, it is extremely important that its own governance of the appointment of board members should be seen to carry that level of independence.

Norrie Murray (Volunteer Development Scotland): I agree with Martin Sime and Maureen Harrison that it is important that OSCR generates public confidence. Moves such as those that have been described would assist that.

Cathie Craigie: Establishing OSCR as the independent regulator would bring together all the main functions of regulating charities. We have heard some evidence in our journeys throughout Scotland that people feel that the bill lacks any directions or objectives for OSCR. Do you think that the bill should include objectives, and that those should be to promote charities and increase public trust in the sector? Do you think that part of OSCR's statutory duties should be to provide advice to the sector on good governance as well as on adherence to the law? Do you think that OSCR's remit should include an advice-giving role to Scottish ministers? You will have heard this morning's earlier evidence. We realise that there are different views on the situation, and it is important to hear your views too.

Margaret Wilson: OSCR should have a restricted advice-giving role. I agree with some of the speakers this morning that the advice should be about compliance with the law and not about more general matters because that would be much better provided by the sector itself. Certainly, SCVO and CVS are already involved in that work. We have built up a body of expertise in that work so the advice would be much better delivered in that way. It would be a conflict of interests for OSCR to have a supportive role as well as being the regulator. That would not be comfortable for OSCR.

Martin Sime: These matters have been subject to considerable debate in England, because many charities there have had problems working out whether interventions from the Charity Commission are the commission acting in its policeman role or as a friend to the charity.

There is a further distinction to be made about whether OSCR would provide advice to individual charities as a result of inquiries, or whether more general advice would be provided. There is a broad consensus that the right way for OSCR to go about its business would be for it to offer individual advice to charities as a result of inquiries. This morning we heard that 95 per cent of the work of the Scottish Charities Office consisted of that kind of input. However, there are substantial issues to be addressed in relation to the general provision of advice to charities. The first is the provenance of that advice. It seems to me that, given the diversity of the sector, what is good practice for some might not be good practice for others. In our work on charity law during the past 10 years, we have come across examples of Charity Commission leaflets that contain things to which we would certainly not want our members to subscribe. Some of those areas can be quite contentious and I would say that there is no consensus on best practice.

Secondly, the nature of OSCR requires it to put its regulatory functions first. It is a regulator first and foremost and we are all wary of establishing a sort of super-quango with enormous numbers of staff. This morning, it was suggested that the budget of the Charity Commission is £50 million, but I think that it is probably around half of that. However, we do not believe that it is appropriate to over-resource OSCR in order to provide a solution to all the issues that face all the charities in Scotland. That would detract from its regulatory function.

Thirdly, I am not a lawyer, but I understand that there are some differences between Scots and English law in this area. The provision of advice by the Charity Commission is of quasi-judicial nature, which means that, if charities follow that advice, they are indemnified. I understand that that would not be the case in Scotland.

Finally, it is obviously in the interests of the sector to have advice provided. However, much support and advice is given within the sector and we would have some concerns that some of that might disappear if OSCR started to extend its role in that way.

Margaret Wilson: I wonder whether the bill is the best place in which to put objectives for OSCR. The world changes and it is unlikely that, in 100 years' time, the same provisions will be required. With that in mind, it might be that other instruments could be used to give OSCR its direction. I do not know whether the encouragement of charities is the sort of thing that should be laid out in a statutory way in a bill. I would have thought that OSCR should be told that, in general terms, it should act in a way that encourages charities and gives the public confidence in charities and so on. However, I am someone who does not know about these things in any great detail and can provide only a layman's view.

Maureen Harrison: I endorse Margaret Wilson's last point. I am not sure that the bill is the place for objectives. I would also like to restate the fact that the Institute of Fundraising believes that, while regulators should have a strong role in working to promote best practice, that role should probably be carried out in partnership with the principal stakeholders in the sector, such as the people around this table. We have already had several discussions with OSCR on various arrangements that are coming into place. I think that working with umbrella bodies is the best way in which to take that objective forward.

Patrick Harvie: The witnesses will have heard our earlier discussion about charitable purposes and the public benefit criteria. In particular, we heard evidence about the cross-border issues that might arise as a result of the fact that various bodies have differing charitable purposes. Do you have any comments on the list that has been arrived at? Are you satisfied with it?

Martin Sime: Again, the issue is complex. I listened to the debate this morning and was disappointed to realise that the drawing up of the list was not conducted on a set of broad principles that would enable us to move forward. It may well be the case that we can satisfy ourselves and be comfortable with the charity legislation and regulation in other jurisdictions. That said, charity legislation and regulation is a fast-moving feast.

Although members of the first panel said that the bill should go down a particular line because the Charity Commission in England and Wales has been in play for a while and the panel members were broadly content with its activities, charities in Northern Ireland, which are not at present the subject of regulation, are in the process of putting regulation in place. At this stage, I simply could not comment on how charities are regulated in Iceland.

That brings me back to the first principle, which is that charitable activity in Scotland ought to be regulated. Subsequent to the passing of the act, the extent of regulation may be the subject of discussion between regulators in different jurisdictions. However, in Scotland, we should start from the first principle that all substantial charitable activity that takes place in Scotland should be regulated. I leave to one side the debate

on the subject of newspaper advertisements, as I think that there is consensus that we should try to exclude such activities. However, if an organisation is undertaking charitable activity in Scotland, that activity ought—at least in principle—to be regulated by OSCR.

As I said, subsequent to the passing of the act, there will be a job for OSCR to negotiate with other regulators to minimise the burden and duplication of regulation that charities face. If that happens, the principle in the legislation will be established and—in the end—that is what the legislation is for. Those negotiations will also locate the issue of UK charities in the broader context of Scottish charities that are regulated by other regulators. In other words, dual regulation is an issue for many people, not just for charities that are based in England and which wish to undertake charitable activities in Scotland. If we return to that first principle, we will find a proper way forward in the context of the bill.

Margaret Wilson: I agree with the principle that activity in Scotland should be regulated in Scotland. Although we can all cite examples of well-organised charities that do excellent work, surely part of the reason for the bill is to deal with the activities of the less scrupulous operator. Sometimes the burden of regulation has to be placed on people who do not need it to stop the activities of those who need to be stopped. It is just one of those things. If we can get cross-border agreement on how to achieve a reduction in the burden on charities, the principle can apply that all charitable activity that takes place in Scotland should be regulated in Scotland.

I want to address the divergence of language between the draft bill and the bill as introduced. The issue was raised earlier this morning in the context of disability. That issue needs further exploration as it could cause problems for Scottish charities. We raised in our submission the fact that we want to ensure that the wording does not take precedence over the public benefit test.

Let us take the example of an organisation that provides advocacy on behalf of children. At the moment, advocacy is one of those grey areas; it is not of itself a charitable purpose. The Parliament should ensure that advocacy is listed as a charitable purpose because of the public benefit that results—in this case, to children. Another example is community transport—indeed, at the moment, several activities have to be fitted around something else for them to be recognised as having a charitable purpose. Within a broad spectrum of what is an acceptable activity in terms of tax relief and so forth, the Parliament should make it easy for people to do the things that help other people After all, the whole point of charities is that they are there to help people.

As I said, we raised the issue of the wording that is used in the drafting of the bill as introduced. The Parliament might want to consider amending section 7(2)(m) to allow charitable activities such as advocacy and community transport to be included in the bill. I am also aware that, in 50 years' time, we could be talking about different activities—things change over time.

11:45

Patrick Harvie: The message so far seems to be that the cross-border differences are not as serious as others have argued and are resolvable. Are there other issues with what is, or is not, in the list in section 7?

Martin Sime: There is a general view—it is certainly the SCVO's view—that alignment with the definition of charitable purposes in the draft bill for England and Wales is desirable. That is also the view of the Joint Committee on the Draft Charities Bill at Westminster. The challenge for us all is to determine how we can get to the point at which we can align the definitions. There are parallel parliamentary processes, and I am not sure that there has ever been an attempt to legislate on the same issue in two different jurisdictions to achieve alignment. That is not to say that one definition is right or that another is wrong; it is just that there is a consensus that we should all cast the definitions of charitable purposes as broadly as possible to ensure that the definition of charity accords with public understanding and that it is durable enough to sustain the development of charity.

Public benefit is perhaps more complex, because the two jurisdictions are not starting from the same point, which means that there is not necessarily a possibility of alignment on the definition. There is a possibility that Scotland could hold up its hands and say that it is comfortable with what is going on down south, but there is also a possibility that we could examine the issue in the light of what we believe best meets the interests of the Scottish public.

Norrie Murray: Volunteer Development Scotland's primary concern with the bill is volunteering—I hope that that came through in our written submission. We examined one particular aspect of the list and proposed that

"the advancement of civic responsibility or community development"

should read "the advancement of citizenship or community development", on the basis that we have a straightforward idea that citizenship embraces much broader aspects—mutuality, rights and responsibilities—than civic responsibility. It so happens that that change would, as we understand it, bring the bill into

alignment with the draft bill for England and Wales.

Christine Grahame: I am interested in what Martin Sime said about the charity test and public benefit—if I can link together sections 7 and 8—and the public understanding of "charity". I do not think that the public would understand that Fettes College or the BUPA Murrayfield hospital are charities. However, as I understand it, under the charity test, they would remain charities and continue to have charitable status. Is that correct?

Martin Sime: That is uncertain, and I am not sure that that uncertainty is necessarily a bad thing. The previous witnesses' view seemed to be that uncertainty was to be avoided, but the important thing is that a strong charity brand emerges from the bill and that that brand is aligned as closely as possible with what the public understand a charity to be. If we have such a strong brand, that will create the conditions for the charitable sector in Scotland to flourish, develop its work and extend its contribution to Scotland. Therefore, the SCVO approaches public benefit not by taking a view on whether individual organisations might or might not qualify, but by seeking in the bill a definition of public benefit that aligns with a broad public understanding of what charity is and means.

Christine Grahame: If my test is that, under sections 7 and 8, Fettes College and the BUPA Murrayfield hospital would still count as charities, the bill's definition of public benefit would surely not accord with the public's idea of a charity.

Martin Sime: Many members of the public are shocked to discover that some institutions that are ostensibly privileged and to which the public do not have significant access are charities. However, I should also say that the argument spreads more widely into charity independence. For example, most members of the public are shocked to discover that the Scottish Qualifications Authority is a charity.

Mary Scanlon: The same goes for colleges of further education.

Martin Sime: On all those fronts, the SCVO, which has a long history of engagement on the issue of public benefit, wishes to establish in the bill a definition that would make it clear what charity is and what it is for.

Donald Gorrie: Are you content with the definition in the bill as introduced? From your point of view, has it been improved since the draft bill?

Martin Sime: It is better than no definition at all. I am not sure that I entirely agree with it, but it is pretty obvious from the explanatory notes that it will allow all existing bodies to continue to enjoy charitable status. However, we would like a tighter definition of public benefit. It seems to me that under the proposed definition it will be possible for an institution to offer a tiny charitable act within its overall ambit of activities, yet the whole organisation will still qualify as a charity. The public would not understand or support such a proposition.

Donald Gorrie: The written evidence from CVS Scotland refers to modern types of charity such as

"development trusts, community radio … advocacy and community transport",

which you feared would not be included in the definition in the bill. Do you think that we need to enlarge the list of 13 charitable purposes that is given in section 7(2), or should we approach the matter in some other way? Such organisations are good and probably deserve charitable status.

Margaret Wilson: The matter needs to be approached in a different way. As Stephen Phillips said this morning, section 7(2)(m) may well need to be re-worded. I do not understand the distinctions that are made by the word "analogous", but it is not clear from paragraph (m) that organisations that do not fall easily under the other headings but pass the public benefit test would get charitable status. If people are to understand that, the paragraph needs to be clearer. Some organisations that seek to be charities have great difficulty in achieving that aim even if the public perceives that it is obvious that they should be charities. The Inland Revenue puts up tremendous barriers to such organisations becoming charities because they do not fit with the law. We want the new law to allow more flexible interpretation than is apparent on the part of the Inland Revenue.

Donald Gorrie: Do you think that the appeal system that is included in the bill is satisfactory for clarifying the disputes that will, no doubt, arise?

Margaret Wilson: It is a step in the right direction, but surely it is better to get things right at the first stage so that organisations that the public accepts as charitable do not have to go to appeal. We do not want to have loads of appeals; we want a clear set of tests that can be applied to determine whether an organisation is a charity, without having to jump though hoops. As I said in my evidence, one of the concerns that CVSs have is that there is a demand on fledgling organisations to produce documents, as if they will prove that the organisation is charitable. I am sorry, but I do not see how a business plan proves that an organisation is a charity. There has to be another way to investigate whether a proposal can be deemed charitable. I hope that OSCR will take a much more flexible approach and that the bill will include a test so that we can interpret activities that might arise in the future—we do not yet know

what they might be—to say that they are of public benefit and may be deemed charitable.

Mary Scanlon: I move on to chapter 3, on co-operation and information. Do you think that section 20(1), which obliges OSCR to

"seek to secure co-operation between it and other … regulators",

is sufficiently strong to prevent duplication of effort, particularly by smaller charities?

Martin Sime: The field of regulators is getting ever more crowded. That is a serious issue for charities—one thinks of the care commission and other actors in the field—and there is an overarching need for regulators and inspectors to meet one another and get their act together with a view to minimising the regulatory burden on charities of all sizes. Whether it is best for that to be cited in the bill is another matter. As we commented, it is all very well to put a duty on OSCR but the system will not work if no duty is put on other regulators, and the bill cannot do that. Maybe it would be better to remove all that from the bill and to require the Executive to ensure that all regulators are under a duty—perhaps a special duty—to work with small organisations.

Mary Scanlon: A duty is being placed on OSCR to seek and secure co-operation, but co-operation takes two. Is that all that is possible within the terms of the bill?

Martin Sime: Yes; I am just raising the question whether it is sufficient to ensure that all regulators engage in the discussion with the same degree of enthusiasm. On its own, that provision does not achieve anything, and the bill cannot achieve any more than that.

Mary Scanlon: But is it not likely to lead to more streamlining of information rather than duplication?

Martin Sime: It may do if the other regulators co-operate.

Christine Grahame: How does the role of OSCR interact and reverberate with charities and freedom of information? We already have freedom of information legislation. I presume that the public can now request a lot of information from charities that would not have been available before. Is that correct?

Maureen Harrison: There was always a duty on us to provide our annual accounts, for instance.

Christine Grahame: Yes, but the Freedom of Information (Scotland) Act 2002 imposes further duties now. I am trying to find out whether charities are going to have to duplicate work because they will be required to provide the same or similar information to OSCR. Will there be an extra burden on charities?

Martin Sime: It is quite easy to provide the same information to lots of different people; providing different information or information in different formats is more complex. That is why much more co-operation is required between regulators, the information commissioner and others to ensure that the forms in which charities are asked to provide information are lined up.

Christine Grahame: I understand. I was just trying to find out where the information commissioner came into the process, as the Freedom of Information (Scotland) Act 2002 will come into force in January.

Martin Sime: Some aspects of the matter are unclear—for example, whether the minutes of the governing body of a charity should be made available to the public. I am afraid that I do not know the position regarding such matters under the Freedom of Information (Scotland) Act 2002.

Mr Home Robertson: I want to return to a point that you flagged up in relation to the duty to co-operate. As drafted, the bill would lay that duty to co-operate on OSCR. You make the point that it is not possible to lay an equivalent duty on other agencies; however, that is not the case. I presume that it is open to the Parliament to lay a similar duty on other relevant regulatory bodies, provided that they come within the devolved remit. That could be done; are you suggesting that it should be done?

Martin Sime: If it could be done, that would be beneficial; however, whether it could be done by the bill is another question.

Mr Home Robertson: Well, we can look into that.

Mary Scanlon: Under section 23, which creates an entitlement to information about charities, a request can be made for a charity's constitution and statement of accounts. Moreover, the information must be provided

"by the charity in such form as the person may reasonably request."

Has that caused you any concern? It was brought to our attention by the lawyers this morning.

Martin Sime: I was very interested in that discussion. For the past five years, SCVO has been trying to do precisely what was suggested this morning was terrible—that is, to ask all Scottish charities for a copy of their accounts and founding documents. The only people who sought to charge us money or withheld that information were lawyers. The existing law allows them to make a reasonable charge, but it does not specify what a reasonable charge is. There is no way of managing that proposal. Section 23(2) states that Scottish ministers may propose a maximum fee: that would certainly put an end to the rather restrictive practice of some bodies.

I should say that a very small minority of charities was unwilling to provide information. Therefore, I think that it is already established that charities have an obligation to provide such information to anyone who requests it. Irrespective of OSCR's role in collecting and providing such information, that principle must be right, as charity is a public matter in Scotland. Views have been expressed that charities are private bodies but, in our view, a body that has the privilege of calling itself a charity and accruing tax benefits has a responsibility to make such information available to whoever asks for it.

12:00

Mary Scanlon: I think that we have got the message and I would like to move on.

We have discussed charities that are managed or controlled wholly or mainly outside Scotland, so perhaps we should not go into this matter in too much detail, but has the correct balance been struck on the issue? Is there a regulation and accountability gap that could be exploited by charities outwith Scotland? Do you think that there is a loophole for charities that operate with a significant presence in Scotland? I refer to a contractual presence, office premises or whatever.

Martin Sime: I did not think so until the earlier discussion on whether an organisation that is engaged in contractual work would be captured by the provisions. My assumption is that it would. If that assumption is correct, I do not think that there is a loophole. It is difficult to draw the line—

Mary Scanlon: I should correct you. I think that I simply asked about a local authority carrying out contractual obligations in Scotland, but it was not established that carrying out a contract in Scotland meant that there was a significant presence in Scotland.

Martin Sime: My assumption is that carrying out a contract in Scotland would mean that there was a significant presence.

Mary Scanlon: Even though the company did not have premises in Scotland.

Martin Sime: Many different forms of charitable activity do not necessarily involve office or shop premises. Perhaps we need to consider that matter.

Mary Scanlon: When you talk about carrying out a contract, do you mean providing a service as opposed to simply fundraising in Scotland?

Martin Sime: I would have thought that both are covered, particularly if the fundraising involves individual approaches to members of the public. That OSCR should be notified in that respect and the organisation should have at least in-principle regulation with OSCR is absolutely correct. Such an organisation should fit in with the regulatory requirements. The subsequent degree of regulation north and south of the border is a subject for the regulators to discuss.

When we considered the issue, we tried to exclude things that are simply impossible to regulate in the same way, such as national TV advertising and the internet. However, we think that face-to-face operations in Scotland would amount to substantial activity.

Mary Scanlon: So there could be a loophole in television advertising and advertising in national daily or weekly newspapers.

Martin Sime: We think that that is inevitable.

Linda Fabiani: Chapter 4 of the bill is on the supervision of charities. It proposes the powers that OSCR and the Court of Session will have to investigate charities and to act in the case of wrongdoing. Is the sector fairly content with the bill in that regard?

Margaret Wilson: There is general concern about the distinction between misconduct and mismanagement, which the first panel discussed. What will be most effective? I do not think that criminal proceedings will be helpful. They would reduce the number of people who want to come forward and would not necessarily stop people making mistakes. People make mistakes because they do not know something, are mistaken about something or whatever, and criminal proceedings will not necessarily stop such things. There is a concern about the proposals being too harsh and about there needing to be a distinction between deliberate misconduct involving somebody embezzling funds or using a charity for their own purposes and somebody making a mistake.

Norrie Murray: We very much agree. Trustees will be volunteers and there are already concerns about the impact of regulation in its broadest terms. Yesterday, we had stories about the perceived impact on volunteering levels of the Protection of Children (Scotland) Act 2003. Potential trustees look at their situation and, as any other reasonable person would do, weigh up the advantages and disadvantages. We are worried that, if the scales are tilted too much in one direction, that might impact on the number of people who are willing to volunteer as charity trustees.

Linda Fabiani: I want to move away a wee bit from individual trustees and talk about the powers that will be given to OSCR and the Court of Session.

Martin Sime: I have a comment on the bill's genesis. One reason why we are considering the bill—which my organisation is pleased about—is

precisely because in at least one recent case, and perhaps in another, a person sought to defraud a charity for their personal benefit. There is a widespread view in the sector that, to sustain and increase public trust in charities, proper regulation is required and that the full force of the law should descend upon those who seek to abuse charity. There is no ambiguity among our membership that, in cases of deliberate misconduct and defrauding of charities, the law ought to be put in place as swiftly and as effectively as possible. In the two cases that were brought to public attention recently, that was not possible because, as a result of technical issues, the law was not strong enough. People had found ways to gain significant personal advantage and the law was unable to act. Our members have no difficulty with the aspect of the bill that deals with those issues.

Linda Fabiani: You are broadly content with the proposals.

Martin Sime: Yes, but important points were raised earlier with the previous panel of witnesses about the need to distinguish between misconduct and mismanagement. The vast majority of charity trustees are volunteers who are trying to make a contribution to their community and they should be encouraged, enabled and supported. Where mistakes are made, they should be picked up and the people should be offered guidance and support to help them to proceed. If we get the balance right in dealing with misconduct and mismanagement, we will do well.

Linda Fabiani: So you are generally content with the powers of inquiry that OSCR and the Court of Session will have, but you raise the issue of how trustees are dealt with.

OSCR's post-inquiry supervisory role is covered in section 31. Are you generally content with that provision? Given that OSCR will act and refer to the Court of the Session in broadly the same way as it will before an inquiry, you have probably covered the issue. Are you happy that the process is to be speeded up and that the issue will be much more clear-cut than before?

Martin Sime: We understand entirely why the court should be encouraged to act swiftly to protect charitable assets in prima facie cases of misconduct. However, one problem is that it will be difficult for a charity to re-establish itself, even if the inquiries are subsequently proven to be inaccurate or if it is established that the case was a result more of mismanagement than of misconduct. That is why we feel that cases should not go on for long and that OSCR should publish its final verdict. A big weakness with the Scottish Charities Office was that people never found out what it had discovered.

Linda Fabiani: So it is important that that is included in the bill.

Martin Sime: It is important that such information is made available publicly. The measure follows good examples from the Charity Commission, which publishes a digest of cases to show what it found in its examination of charities. That information gives charities confidence to progress and their supporters confidence that the charity has been given a bill of health—although that bill of health may not be absolutely clean and issues may need to be addressed, the information is in the public domain and everybody is comfortable with that. When such information is not in the public domain, there are lots of whispers about whether certain charities are bona fide, which is difficult for the charity trustees. Charities are completely undermined by semi-public inquiries and they suffer badly as a result.

Linda Fabiani: So you are happy with the provisions on inquiry reports.

Maureen Harrison: It is also important that other charities can read the report of the inquiries so that they can see if there is something that they need to do to ensure best practice.

Linda Fabiani: I want to ask about registered social landlords being exempt. How do you feel about fragmentation of the regulatory role and the possible extension of that under the bill?

Martin Sime: Despite SCVO having a few registered social landlords and the Scottish Federation of Housing Associations among our members, we are rather puzzled by that exemption and suspect that there has been some special pleading. We do not think that registered social landlords should be excluded from primary regulation by OSCR because that will create an unhelpful precedent. We think that there are other organisations and charities that are subject to dual regulation and which could well come to the committee and ask, "Why them, but not us?" We think that it is wrong that the exemption is included in the bill because it is not a principle. The principle is that all charities ought to be regulated. Subsequent discussion about how they are regulated is the way in which to sort out the issues that relate to registered social landlords.

We know that the bill emanates from the Development Department and that the Development Department is also responsible for Communities Scotland, so we can only suspect that the provisions have been created as a result of lobbying—they have not been the subject of widespread consultation. That does not mean that we support onerous dual regulation on registered social landlords or anyone else; it is simply that we do not think that special cases ought to be made in the bill.

Linda Fabiani: For the sake of clarity, we should state that not all RSLs are charities, so the bill covers only some of them.

Donald Gorrie: I want to ask about smaller charities and their accounts. Do you think that some smaller charities do not need to do too much accounting or do you think that the bill is going in the right direction, in so far as it seems that there will be a graduated system that ministers can set out and which will ensure that small charities can have simpler accounts than bigger charities? Would it be possible to have only one set of auditing and to have OSCR regulate charities on a basis such as that which colleges use in relation to college activities, for example?

Margaret Wilson: It is a good idea to use graduated instruments to ensure that a charity that has £10,000 or less is not treated the same as is one that has £10 million or less.

The principle of producing accounts that show how money has been spent is important. If regulation is reduced too much, a slapdash attitude is encouraged. Human nature being what it is, people will say that they will not do something because they do not have to. However, it should be a first-principle assumption that if public money has been received, whether through donations or grants, it should be accounted for. There might be a temptation to lop the lower-level charities off the list on the basis that such small sums of money do not matter much, but they matter a great deal to the communities that are involved. Mismanagement and misconduct happen in smaller charities as well as in larger ones so there should be as much protection as possible for the public money that is involved. That is why I think the graduated approach is best.

Maureen Harrison: I endorse that. The abiding principles of transparency and proportionality are important. If I remember correctly, at one stage in the bill reference group's discussions—I was a member of that team—we examined proposals from south of the border that would have meant that audited accounts would not be required for lower-level charities. We felt that that was not at all appropriate because it is important to ensure that public money is properly accounted for.

Martin Sime: Three variables have to be considered. One is the level at which an audit by a qualified auditor, rather than an accountant, is required. Another is the content of accounts and the extent to which charities have to keep accounts in different formats; for example, charities are required to produce a statement of financial activities and the level at which that kicks in is important. The third variable is, of course, the turnover of the charity. Those matters, which are the subject of regulations associated with the bill, ought to be the subject of pretty wide consultation in order to ensure that thresholds are right so that charities account appropriately but smaller charities are exempt from the more onerous provisions. We must not have the same regime for a charity that has £10,000 as we have for one that has £10 million. There is general acceptance of that principle, but we need to create consensus about where the different thresholds should be located.

We must also regularly update thresholds. One problem with the current accounting regulations is that they are largely ignored because they were introduced more than a decade ago and have fallen into disuse. When OSCR examined compliance issues in its recent pilot monitoring programme, it found that many charities ignore the regulations. That is not the right climate. Compliance must be associated with reasonableness.

12:15

The Convener: Linda Fabiani has a question.

Linda Fabiani: I was away on another train of thought.

What do you think about the new form of Scottish charitable incorporated organisations? Everyone seems to think that it is a good idea. Do you share that view?

Margaret Wilson: Yes, but, no level for liability is specified; it may not be possible to include that in the bill. Will liability be the same—£1—as the liability that currently exists for companies limited by guarantee? Will there be guidance on that? That is our query about the proposal. In general it is welcomed as a sensible step forward.

Linda Fabiani: Perhaps one of you can deal with a query that occurred to me when I examined the bill but which I forgot to have clarified. The bill states that only two trustees are required for a Scottish charitable incorporated organisation to be formed. What is the situation for trustees who enter into a company limited by guarantee or a friendly society? Will only a few be liable?

Martin Sime: I cannot answer in respect of friendly societies, but it is possible to establish a company limited by guarantee with only two members. I may be wrong, but I think that the provision is very similar.

Linda Fabiani: I will check the matter.

Martin Sime: The key issue is that unincorporated associations can establish themselves as they please, with any number of members, and can adopt any constitution. However, there is no protection in terms of liability for the actions of the organisation. The new legal personality of the Scottish charitable incorporated organisation is seen as a very good news story. Its creation will enable charities to take on more responsibilities and to have a legal form that

meets their needs, without their needing to become a fully blown company limited by guarantee.

Linda Fabiani: Would many SCVO members voluntarily switch to the new model?

Martin Sime: It is difficult to predict the extent to which organisations will change. SCVO, which is a company limited by guarantee, will consider the new form for itself. We expect that, over time, there will be a gradual migration to the form as the preferred legal personality for charities in Scotland.

Norrie Murray: To us, it sounds like a volunteer-friendly policy, so we are very supportive of it.

Patrick Harvie: I was interested by Martin Sime's comment that he does not believe that special cases should be made on the face of the bill. That comment was made in the context of RSLs, but do you have the same thoughts about designated religious charities?

Martin Sime: The very short answer is yes. SCVO has tried to work its way through the issue. Sometimes it is difficult to build consensus in the voluntary or charitable sector because we are a population of special interests. However, we see the bill as an opportunity to establish some broad-brush principles. Our view is that, unless there are compelling arguments, those principles should stand. I have not yet heard a compelling argument for why designated religious bodies should be subject to a lower level of inspection and scrutiny than other organisations. They may have a compelling argument, but it has not yet been put.

Patrick Harvie: I will seek the views of other members of the panel in a moment, but do you think that, in general, there is a case for saying that certain charities are big enough, sufficiently long established and sufficiently trusted by the country to receive a different level of regulation, which could be suspended by ministers or by OSCR if necessary?

Martin Sime: It is difficult to sustain the idea of one law for the rich and established and a completely different law for everybody else. That is not a charitable principle at all.

Patrick Harvie: I ask only because the attachment of the exemption to charities under paragraph (c) instead of paragraph (a) or (f) or whatever in the list of charitable purposes would seem to be one way of levelling the playing field. However, if the simple existence of any kind of exemption is a problem for you, that is a different matter.

Martin Sime: There is a problem with exemptions that have not been earned and been seen to be earned, which are two different things. In terms of SCVO's broad-brush approach, we are here after a 10-year campaign for a charity law bill. I hope that in 10 years' time we do not have to do the exercise again, so we need to ensure that everything that is established under the bill will be sustainable. We need the bill to be robust and based on the right principles, which requires equity of treatment across charitable bodies.

Patrick Harvie: Do other panel members have comments?

Margaret Wilson: I do not see why it should be presumed that because an organisation is religious it is more trustworthy. They have tax benefits, people give them gift aid and they collect money from the public. Why should people not have the chance to scrutinise that? I know that many churches publish their accounts and make them available to church members, which you can say means that they are available to the public, if you like, but I do not accept their case for being out of the loop. Regulation will not be so onerous that it will cost them thousands of pounds. I do not see why they would have a problem—although maybe they do not. Perhaps the problem is something else. I agree with Martin Sime that if an organisation is charitable and it is in Scotland, it should be regulated in Scotland.

Maureen Harrison: If there are going to be exemptions they will have to be monitored.

Scott Barrie: You have already touched on — and perhaps answered in your response to Linda Fabiani—the question that I was going to ask about the mismanagement versus misconduct debate that we had earlier. Do you have anything to add?

I will take the silence as a no.

Christine Grahame: I seek your comments on chapter 10, on "Decisions: Notices, Reviews and Appeals". First, I may get this wrong—because I am paraphrasing the evidence of a clutch of solicitors—which would be unforgivable, but I got the impression that section 70 is overly complex, listing as it does the various sections under which orders can be made. Should there be a general power for OSCR to make orders, rather than having to go through the list in section 70, in case something is missed? Secondly, will you comment on the appeals procedure and the fact that third-party rights are not part of the process? Thirdly, will you comment on the discretionary award of expenses to the appellant following the regulator's decision?

Martin Sime: It is difficult for us to comment on the first question because it is a drafting question.

Christine Grahame: Certainly. Delete it from the record.

Martin Sime: In general terms, SCVO supports the proposition that there should be some third

party or independent right to appeal decisions of OSCR. If the situation is completely open ended it will open the floodgates of possible appeals, which would be beyond the scope of the proposed mechanism to deal with. That would not be in anyone's interests.

On the other hand, charitable status or public benefit propositions that are rejected or accepted by OSCR ought to be subject to some form of public interest appeal. In other words, we feel that who is or who is not awarded charitable status is a matter of public interest and that an interested member of the public should be able to establish that information.

As I am not a lawyer, I find it difficult to suggest a form of wording that would ensure that the appeals panel will not be swamped. I certainly think that, in public interest appeals to the panel, appellants should bear their own costs. In any case, it is important that members of the public be able to challenge OSCR on the matter.

Christine Grahame: Should appellants bear their own costs if their appeals are successful?

Martin Sime: On the general principle of appeals to the appeals panel being accepted, I think that the panel should have the power to award costs to the charity or the person concerned. It should not always be the case that costs are awarded to people or organisations whose appeals are successful. Instead, the panel should use its judgment. Costs should be awarded against OSCR, because that would place an added burden on the regulator to get things right. As this morning's earlier discussion highlighted, such checks and balances would be helpful.

Christine Grahame: I understand that in most court processes there exists discretion to award, or not, costs in part or in whole. Do the other witnesses concur with Mr Sime's view?

Maureen Harrison: Yes.

Christine Grahame: Part 2 of the bill, which concerns fundraising, is terribly interesting because it involves situations in which the public come face to face with tin rattlers, shops selling certain material and so on. People are concerned about whether such activities are being carried out properly and for proper charitable purposes. Do the proposals in part 2 allow for sufficient transparency and accountability so that people can maintain their trust in charities that have street collections or sell material in shops?

Maureen Harrison: The most important aspects are that contracts will be required for all involvement with professional fundraising activities and that there will be regulation not only of public charitable collections but of public benevolent collections, which will include the giving of pledges for regular donations. Unauthorised fundraising will be prohibited and there will also be a clear requirement for fundraisers to be authorised by a charity. Such provisions will give the public a great deal of confidence.

Christine Grahame: Are there any gaps with regard to OSCR's role in this particular area?

Maureen Harrison: Our written submission makes it clear that licensing of public benevolent collections is a particular gap. The bill does not give OSCR a strong role in the process and we are concerned about local authorities' capacity and ability to oversee that area. It is important that OSCR should have a role in guiding and monitoring the work of local authorities.

Christine Grahame: You mentioned guidance. In your submission, you say that such guidance is currently floppy and that it should be statutory in order to give it clout.

Maureen Harrison: That is right.

Christine Grahame: Do the rest of the witnesses have other views on the bill's proposals on fundraising?

Martin Sime: We need to strike a balance in making such a complex area subject to more statutory regulation. After all, there are so many different ways of raising money from the public, and charities are always inventing new ones. A formal agreement between the charity and the professional fundraiser will be important for charities' direct and indirect fundraising activities. It is also important that OSCR should have the power to determine what ought to be in such agreements.

Secondly, SCVO broadly supports the emphasis on self-regulation. It is not in the bill, but we should look to the Scottish fundraising community to regulate itself—obviously with appropriate support—and to develop codes of practice and training on self-regulation. The fundraising community must recognise the vital role that fundraisers have because they enjoy the public's trust and confidence, and it must acknowledge the importance of getting its approaches to the public right and weeding out bad practice, so that it can be seen to be in control of its own house. That will be just as important as the regulatory framework. If the two aspects can be made to work together, we will have created the right regime in Scotland.

12:30

Christine Grahame: Is there guidance for small charities on how they should go about fundraising and collecting? Good-hearted people sometimes do the wrong thing. If such people were caught under the bill's provisions they might be found guilty of misconduct, although their fault would

simply be ignorance of how they ought to handle taking cash.

Martin Sime: Currently there is no law on the matter, which is part of the problem.

Christine Grahame: People could be prosecuted under common law for fraud, even though they might have been acting out of ignorance. The fact that there is no statute does not mean that people cannot be prosecuted.

Martin Sime: Yes, but there is a distinction between misconduct or fraud and mismanagement through ignorance.

Christine Grahame: Is there any guidance that people can use when they are collecting, on which we might build?

Maureen Harrison: The Institute of Fundraising produces codes of practice, which have been developed through consultation with the fundraising sector and the wider voluntary sector in Scotland and throughout the UK. The codes of practice are available to everybody. However, very small charities might not be aware of the codes, which is why self-regulation will be important. Whereas statutory regulation is—to an extent—stuck in one time, self-regulation is capable of modernisation and constant updating, as are the codes of practice. Self-regulation will grow out of the codes of practice. The Institute of Fundraising has had discussions with stakeholders north and south of the border to work towards self-regulation, which will lead to much greater public confidence. However, considerable funding will be needed if we are to ensure that everybody is aware of the scheme.

Margaret Wilson: There are local byelaws, which confuse the issue, although some of them might have been repealed—or whatever we do with byelaws. It can be difficult for charities to know where they stand and what they should do. For example, there is a big debate about whether a shopping centre is a public place and whether someone is okay if they stand at the entrance to Asda but not if they stand outside the store and so on. Such matters confuse people. There are some weird and wonderful byelaws that have never been enacted. For example, it is illegal to charge entry to a jumble sale, but a charge can be made for the tea and coffee—

Christine Grahame: So that is why people do that. I had never worked it out.

Margaret Wilson: People fall foul of such weird rules because they do not know about them, as you said. It is very difficult to keep up with everything.

Maureen Harrison: There are huge disparities between the approaches of different local authorities in Scotland to public collections, which are difficult to understand.

Mary Scanlon: What are the witnesses' views on sections 92 to 94, which comprise part 3 of the bill, on the investment powers of trustees? We discussed the matter earlier with the lawyers.

Martin Sime: As I followed the debate, I thought that it was a moot point that was being raised about whether trustees would have the power to delegate responsibility—that is a lawyer's term—for their investments to other organisations or professional advisers. Ultimately, trustees are always liable for the activities under their control, so delegation needs to be considered quite carefully. However, as I understood the debate, it would be perfectly possible for trustees to delegate their investment power, which would be widely considered to be good practice. It could be that, in some instances, the charity's constitution does not allow that, in which case it ought to change its constitution.

Having said all that, the business of charity investment ought to be left to charity trustees and the state should not intervene with too many regulations. The Trustee Investment Act 1961 was largely a matter of second-guessing charity trustees, patronising them slightly and saying that the state knew best about how charities ought to invest their resources. SCVO would like there to be much more creative investment of charitable resources in, for example, cause-related investment—there is significant potential for charities' assets to be invested to support other charities—so we would prefer to have a completely liberal regime that recognised that charities were best able to manage their own affairs in the way that they see fit.

Mary Scanlon: If trustees delegate responsibility for investment to so-called experts, do they also delegate some of their accountability? How can they be held accountable for a decision that is made by someone else to whom they have delegated the responsibility in good faith? Is that a problem?

Martin Sime: Ultimately, the trustees are accountable to the members of the charity for all the actions that they have taken. I would say that a member of the public would entirely understand that, if trustees recruit a professional adviser or investment company and the results are not as anticipated, the trustees are ultimately liable.

Mr Home Robertson: We have a new regulator—OSCR—and we will have a new body of legislation. Understanding and adapting to living within that new environment will inevitably pose some difficulty for individual charities and voluntary organisations throughout the sector. The umbrella organisations will be aware of the burden that that will involve. Do they foresee any specific challenges for the charitable and voluntary sector in adapting to the new framework that is presented in the bill?

Martin Sime: Two points occur immediately. First, we need to ensure that the regulator is smart—in other words, that it does only what is necessary to restore public confidence and does not get involved in chasing points that are of no importance with individual charities. We need to get that balance right. Recent experience and OSCR's pilot monitoring have revealed that OSCR was casting its net much too widely.

Mr Home Robertson: We have picked up that message.

Martin Sime: I hope that, when the bill is passed, we get a regulator that can intervene at the minimum level to sustain public confidence.

Secondly, once the bill becomes law, there will need to be a significant initiative to upskill governance in charities and promote good governance in them. SCVO is keen that that should happen, because we have all struggled on that matter in the past. Perhaps up to 50,000 people have volunteered to give their time to help to run charities, and they are the ones whom the new framework captures. They are the ones who are responsible for the operation of the charities, but, until now, little effort has been made to sustain, support and promote good governance in the sector.

There is a need for us to get our act together, and we must start by working to resource and support the charity trustees who volunteer to run Scotland's charities. There are many ways in which that can be done, and there are some difficulties—people volunteer their time to run charities and it is difficult to persuade them to go on training courses—but that is where the energy should go once the bill is passed.

Maureen Harrison: From the point of view of the Institute of Fundraising, I concur with the challenges that Martin Sime has mentioned, but I would add the challenge of self-regulation. We need to be able to implement that quickly and to develop a scheme in which the public can have great confidence and which will facilitate the working of charities. There will be challenge in ensuring that that self-regulation scheme is inclusive and that it reaches far and wide to large and small.

The bill also presents a significant challenge to local authorities to take on the extra work of the new licensing schemes that will come into force.

Margaret Wilson: One of our concerns about the bill is that parts of it almost legislate against charities using the bill to improve practice and make them better at what they do. There is the issue of payment of trustees, and there is nothing in the bill that says that a member of staff cannot be on the committee of a charity. CVS Scotland promotes best practice and it is best practice not to have members of staff on the committee and for trustees not to be paid, because they are volunteers who do the job because they want the job to be done. I do not think that the bill helps in that regard, because it does not specify that staff should not be on the board. That is one of the areas in which the bill might cause problems for charities.

Mr Home Robertson: Are you suggesting that those provisions should be included in the bill?

Margaret Wilson: Councils for voluntary service are clear that such provisions should be included in the bill and that staff should not be eligible to serve on the board of their charity.

In general, the sector has received the bill very positively. Charities want to be seen to be doing a good job and they want the support that allows them to do a good job. CVSs would like to be able to support the idea of improving governance. There are not many committees that say, "We want to do the job badly"; they want to do the job well and they need to be supported to do that. CVSs are well placed to do some of that work, but at the moment—you would expect me to say this—we do not have the resources; I thought that I had better get that in. CVSs are already doing that and the bill will mean an additional burden of inquiries from new and existing organisations that want to explore, for example, whether they should become incorporated.

The way in which the sector has accepted the bill augurs well for the future. However, we need to get the support mechanisms right for the sector.

Norrie Murray: Volunteer Development Scotland endorses all that has been said, but I will pick up on a couple of points. Margaret Wilson made a point about payment of trustees. The bill needs to be improved in that regard, so that if trustees are carrying out their normal duties and functions as trustees, they should not be paid. If they are doing extra duties beyond that, payment is fair. We agree that the issues surrounding members of staff need to be clarified as well. It is inappropriate for staff to be on boards and that is currently seen as bad practice.

For us, the trustee issue is important. Substantial numbers of people are coming forward. Martin Sime quoted the figure of 50,000. We did a piece of research recently in which we asked people about volunteering. It appears that about 10 per cent of people who volunteer say that they are involved in committees. By our reckoning, that makes the figure 170,000. I guess that there are statistics and statistics, but a substantial number of citizens are participating actively by being trustees and committee members. We see it as essential to good practice that those people are well supported in those roles. Some people will not

need support, but others will and it is important that we are able to tailor that help. The principle of proportionality comes through in that regard, and if we do not get it right, we run the risk of individuals finding it irritating. It is crucial that people get the support to help them to deal with the new legislation, so that the charities can be as effective as possible.

Mr Home Robertson: Thank you. I think that there are a few charity trustees around this table, so we might endorse what you are saying.

The Convener: I thank the panel members for coming and for their written submissions. I know that members have found the submissions and this morning's session useful. Since most of you have taken an interest in the bill for quite some time, I am sure that you will continue to do so. If you believe that there are any issues to which the committee's attention should be drawn, please do not hesitate to contact us in writing or less formally.

Meeting closed at 12:45.

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