

COMMUNITIES COMMITTEE

Wednesday 2 February 2005

Session 2

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COMMUNITIES COMMITTEE 4th Meeting 2005, 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:

Richard Arnott (Scottish Executive Development Department)
Quentin Fisher (Scottish Executive Development Department)
Catriona Hardman (Scottish Executive Legal and Parliamentary Services)
Johann Lamont (Deputy Minister for Communities)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 2

Scottish Parliament Communities Committee

Wednesday 2 February 2005

[THE CONVENER *opened the meeting at 10:04*]

Items in Private

The Convener (Karen Whitefield): I open the fourth meeting of the Communities Committee in 2005. I remind all those present that mobile phones should be turned off.

Item 1 on today's agenda concerns item 3, which is consideration of the committee's approach to its stage 1 report on the Charities and Trustee Investment (Scotland) Bill. Do members agree to take this and any future items relating to the stage 1 report in private?

Members *indicated agreement.*

The Convener: I note that Donald Gorrie has sent his apologies.

Charities and Trustee Investment (Scotland) Bill: Stage 1

10:05

The Convener: The second item on the agenda is stage 1 of the Charities and Trustee Investment (Scotland) Bill. We will hear evidence from the Deputy Minister for Communities, Johann Lamont. I welcome the minister back to the committee: it is nice to have you here in a different capacity. We have a number of questions that we would like to ask you, but I understand that you have an opening statement to make.

The Deputy Minister for Communities (Johann Lamont): Thank you. I would like to say that I am pleased to be here, but my joy is not totally unalloyed. I know many of you all too well and have been threatened, over the past few days, about past sins that I may have committed and which may come back to haunt me today. However, I expect that the current convener is establishing far better standards than I did and will not allow any such abuse of the minister by the committee. I am genuinely pleased to have the opportunity to discuss the bill with the committee.

You will know, but it is worth emphasising, the massive value that the charity sector brings to our society. Scottish charities raise some £2 billion a year to spend in our communities. The public donates about £240 million of that, and the services that are provided are probably irreplaceable. The main objective of the bill is to ensure that there is for the first time a robust, proportionate and transparent regulatory framework that protects the public interest and helps charities to flourish. I have read the written evidence that has been submitted to the committee and the discussions that you have had with representatives and it is clear that, as we all knew, the charity sector is an interesting, diverse and sometimes eccentric sector. In ensuring that we have a robust, proportionate and transparent regulatory framework, we must also ensure that we do not lose the things that we most respect about the sector.

The overall principles of the bill have been widely welcomed. That is probably unusual, but I hope that it shows some level of success on the part of the Executive. The bill sets out an overall framework that needs to be added to by significant subordinate legislation that will contain further processing details and other supporting rules. It is right that that detail is to be left to secondary legislation because it may, in the years ahead, need to be amended to keep up with changing times. Although there remains some disagreement on matters of detail, that is only to be expected and I am looking forward to working with the

committee on the issues that have been raised. For a bill on which there is so much agreement, the parliamentary process should be especially positive.

I will turn, briefly, to some of the specific issues that have been highlighted. There has been much discussion of the independence test in the bill. Jean McFadden's report recommended that policy and suggested that it could be implemented by limiting the proportion of charity trustees who are appointed by the Government. However, that would cover only some charities and would not ensure that a charity continued to act independently. The bill includes a requirement that a charity must, in constitutional terms, be free from third-party control. Discussion has highlighted the fact that that test may be too severe and unworkable. I therefore undertake that the Executive will consider whether further clarity is required to ensure, for instance, that funding conditions' being controlled by a parent charity, or other problems, are not obstacles.

That provision will also have an impact on charitable non-departmental public bodies. I am aware of the interest of this committee and the Finance Committee in the potential impact of the bill on such NDPBs. It is not a new issue, but it is difficult and quite different. The Executive took a view on the matter in 2002 in responding to Jean McFadden's recommendations. I was the convener of the then Social Justice Committee, which took evidence from Jean McFadden. On the basis of the financial information that was available then, ministers decided that although the proposal may impact on some such bodies, both the policy that public bodies be directly accountable to them and the principle that charities be independent should be maintained; hence, the Executive accepted the fact that that conflict may mean that some bodies may have to lose either their NDPB status or their charity status. The position of each body was to be considered case by case.

Even since the bill was consulted on and introduced, it has become clear that the national collection cultural NDPBs—the National Museums of Scotland, the National Galleries of Scotland, the National Library of Scotland, the Royal Commission on the Ancient and Historical Monuments of Scotland and the Royal Botanic Garden Edinburgh—have developed their aspirations for future fundraising for special capital projects. Recent evidence and updated cost information that has been provided by those five bodies indicates that their plans for fundraising—which are largely dependent on their retaining charity status—amount to a total of £140 million over the next 10 years.

On average, the annual value of charity status is now estimated to be £20 million for the remaining charitable NDPBs—that is double what was previously estimated. The Executive has considered the matter carefully and has taken into account the high level of public and committee support for those bodies, which is apparent from recent communications, and their reliance on charity status to carry out the work. The Executive now agrees that those NDPBs should retain charity status.

The Executive will propose amendments during the bill's progress to enable the five national collection cultural bodies to retain their charity status because of the national significance of their work in holding and developing assets that are of national public importance and which are part of our heritage. I cannot at this stage provide full details of what provisions might be included to achieve that because the mechanics may require complicated redrafting. I undertake to provide more details as soon as those are available at a later stage of the bill's progress.

I note concerns from some quarters that United Kingdom charities that operate here feel that they should not have to register again with the Office of the Scottish Charity Regulator. Although we wish to avoid any undue regulatory burden, it is important that the Scottish public be reassured that any significant operation by charities here will be regulated by the Scottish regulator.

There has been a long discussion about whether our charity definition is or should be exactly the same as that in the Home Office Charities Bill for England and Wales. We set out with the intention that, in effect, it should be the same. Despite close liaison between our officials, differences in the timing of the bills have meant that there are differences in the text on charitable purposes. There is strong support for the definitions' being compatible and I am certainly willing to consider minor changes that will bring them closer together. However, it would not be satisfactory for a Scottish bill to refer to or to be reliant on English charity law. Nonetheless, the 400 years of experience that the body of law represents will not be completely lost. OSCR, especially in liaising with the Charity Commission for England and Wales, will consider previous case law in preparing its guidance on how it interprets the charity test. Although it will not be binding on them, the case law will also be available to the appeals panel and to the courts. Specific Scottish charity case law will, of course, gradually develop.

I will touch on the public benefit test. As a result of its consultations, the Executive chose to add some criteria to the bill, which set out issues that OSCR and the courts must consider, but it is not an exclusive list. OSCR may certainly consider

other issues and must consult on its guidance. Some people have said that the test is too tough and some have said that it is not strong enough, which is why we do not feel that the test should be set in stone in the bill. It is important to recognise the significance of that. In removing the previous presumption of public benefit and requiring all charities to pass the test, we are ensuring that all charities must live up to public expectations of what a charity is. Public views evolve and the test should be able to evolve with those views. I know that OSCR is already in discussion with the Charity Commission, which is also planning how it will approach the matter.

One issue that has led to wide-ranging views being expressed is the position of independent schools and hospitals. Strong views have been expressed both in favour of and against those bodies' being allowed to retain charity status. The decision rests on the public benefit requirement. Under existing charity law, bodies that charge for services are not automatically ruled out of charity status, but that aspect of the public benefit test will be further developed by the regulators here and in England and Wales as a result of both bills. The public benefit criteria in the bill will direct OSCR and the courts to take account of any undue restriction of potential beneficiaries' being able to receive a charity's benefit.

I am sure that the committee will want to cover other issues. I am happy to discuss the bill and to answer any questions.

The Convener: Thank you very much for your comments. I am sure that the committee welcomes a number of the points that you have made, particularly those on the Executive's movement on NDPBs. I am sure that we will come back to that issue during questions.

Christine Grahame (South of Scotland) (SNP): The minister's statement has been very helpful, but the problem is that there was a lot in it. It would have been helpful to have had—or even to be given now—a copy of the statement, because it changes the direction of some of the questions that were going to be put. There was a lot to take in and many positions have moved. I do not know what the usual procedure is when there is such a full statement, but although I am grateful that the statement was so full, it would have been useful for us to have had it five or 10 minutes in advance to give us a chance to look at it. Could we do something about that now?

The Convener: At this point we are not in a position to get a copy of the statement. I am sure that the minister will be happy to furnish us with one later today. That does not address Christine Grahame's concerns, but I am sure that as we pursue our lines of questioning the minister will restate many of the points from her statement and

give members the opportunity to explore them further.

Johann Lamont: Given that the statement was substantial, I recognise that you might ask me a question that has already been answered. However, I will be content to rehearse and reflect again on the points that I made.

Christine Grahame: If my question sounds daft, it is because I missed something—no doubt you will tell me what it was. Shall I proceed?

The Convener: Yes.

10:15

Christine Grahame: From the evidence that the committee has received, it appears that OSCR's role will be regulatory but that OSCR will have no explicit role in relation to information and guidance. The Scottish Information Commissioner has such a role: the commission not only monitors the Freedom of Information (Scotland) Act 2002 but has an explicit role in the provision of information and guidance. Given that the bill would make trustees who did something wrong liable to pretty devastating penalties, does the Executive look favourably on the suggestion that the bill should place an explicit duty on OSCR to provide information and guidance to charities, in addition to its regulatory functions?

Johann Lamont: We are not at year zero in relation to charities. Well-respected charitable organisations—in particular the Scottish Council for Voluntary Organisations and CVS Scotland—represent and understand the sector and have worked to develop capacity in the sector. If we were starting at year zero, it might be logical to ask the regulator to do that work, but significant funding is provided to organisations that are already doing it.

At this stage, the Executive is content that the regulatory role of OSCR will be established and properly bedded in. OSCR will have a specific and important job, which is to restore and maintain public confidence that the charitable sector is what it says it is. A very committed sector already works on behalf of charities, so it is not necessary for OSCR to be given that role.

Christine Grahame: There are an awful lot of small charities—I am trying to find the numbers. I appreciate the point in relation to larger charities, but small charities pop up when people encounter something sad and decide to set up a charity. Sometimes such charities are set up just by a husband and wife or a family. The charities are bona fide, but they might fall foul of the law if they do not have access to guidance. With respect, I suggest that it might be useful if OSCR were to put

guidance in place, so that there would be a one-stop shop for guidance and regulation.

Johann Lamont: I understand the importance of ensuring that people who are involved in charities are supported in doing what they want to do without their falling foul of legislation. OSCR will have an important duty to co-operate with other bodies and, obviously, OSCR will not withhold information from someone who registers a charity. However, as I said, a very strong sector already gives advice and support. In the first instance, it is important that OSCR be clear about its regulatory role and areas of responsibility.

It is worth adding that section 1(2) of the bill, which sets out OSCR's general functions, includes the function:

"to encourage, facilitate and monitor compliance by charities with the provisions of this Act".

OSCR will not wait until someone does something wrong and then chap on their door. I do not know whether that addresses your concern about OSCR's role.

Christine Grahame: You think that section 1(2)(c) could be a catch-all provision that would allow advice to be given if inquiries were made. It is useful to have that on the record.

OSCR must be regarded as an entirely independent body, but as an Executive agency one of its objectives will be to provide independent advice and information to Scottish ministers and the Scottish Parliament on regulatory matters. However, that function is not included in the list in the bill. Should the bill set out an explicit role for OSCR in giving advice to ministers?

Johann Lamont: The key point about OSCR is that it will be operationally independent. It will be given the responsibility to regulate the sector, it will present its annual accounts to Parliament and it will provide information directly to Parliament if that is requested, rather than via ministers. That is how OSCR is being set up.

Christine Grahame: I might be missing something. Does the bill explicitly state that the provision of such information is a function of OSCR?

Johann Lamont: If OSCR thinks that it is necessary to advise ministers, it will be able to do so. The test will be whether ministers pay attention to that advice.

Christine Grahame: Is OSCR's role in advising ministers in the bill?

Richard Arnott (Scottish Executive Development Department): We feel that such advice would be covered by the general function of encouraging compliance.

Christine Grahame: If OSCR could give advice on charities' compliance to ministers, could it also give advice to Parliament?

Richard Arnott: OSCR could give advice to ministers or to Parliament if it felt that legislation needed to be changed.

Christine Grahame: Okay. I will move on while I am on this seam.

Section 2(4) requires OSCR to comply with ministerial direction on the form and content of its annual report. Given the importance that the minister has attached to the need for OSCR to be seen to be fully independent, will OSCR's independence be affected by the fact that the form and content of its annual report will be subject to ministerial direction?

Johann Lamont: No. As I said, OSCR will be operationally independent. Members will be appointed by ministers following the normal public appointments procedure, which is regulated by the commissioner for public appointments in Scotland. The ministerial power to determine the form of OSCR's annual report will not detract from OSCR's independence but will ensure that OSCR remains accountable for its use of public funds.

Christine Grahame: As a matter of information, was a similar duty imposed on the freedom of information commissioner?

Johann Lamont: The freedom of information commissioner is a parliamentary commissioner. We need to clarify that there is a distinction between those two bodies.

Christine Grahame: Clarification on what duties are imposed on the freedom of information commissioner would be useful.

Johann Lamont: There is a difference between requiring OSCR to be accountable for the use of public funds by publishing an annual report in a certain form and influencing its actions as a charity regulator. The two things are different.

Christine Grahame: The freedom of information commissioner also uses public funds in running his office and in carrying out his regulatory duties. Perhaps I am making too close a connection between the two bodies, but they seem to be parallel. If a similar duty has been imposed on the freedom of information commissioner, there is perhaps a precedent for such a requirement, given that both bodies must be seen to be at arm's length.

Johann Lamont: Given the thrust of the Executive's position, it is clear that any directions that we were to issue to OSCR on the form of its annual reports would not undermine its independence. The requirement is simply about

making OSCR accountable for its use of public funds.

Christine Grahame: My final question is probably harder. Does the fact that the board of OSCR will be appointed by ministers compromise OSCR's independence?

Johann Lamont: No. The appointments will be made under the normal public appointments procedure, which is regulated by the commissioner for public appointments. I understand that the same happens for the appointment of the commissioners.

Christine Grahame: I am content with that.

Patrick Harvie (Glasgow) (Green): Good morning. The bill provides for a two-part charity test. Other members will ask about the public benefit part of the test, but I want to ask about the charitable purposes part. There are a number of differences between the charitable purposes that are listed in the bill and those that are listed in the equivalent Westminster bill. Is there a general reason why the Executive decided that it was legitimate to have differences between the two bills and why the charitable purpose tests did not need to be identical?

Johann Lamont: The intention is that the definition of charitable purposes should be identical. Even if the bills do not have a word-perfect match, there should be a general match. We did not decide as a matter of policy that the two definitions would not be the same—it is simply that the bills have undergone changes as they have gone through the different Parliaments. If the definition in our bill were to diverge too much from that in the bill for England and Wales, that would not help anybody and might cause difficulties for the sector. That approach has been widely supported.

We have already said that are willing to revisit the wording, perhaps at stage 2, if any bits look out of kilter. However, we cannot impose absolute consistency between the two bills when we have two separate parliamentary processes. The general intention is that the charitable purposes tests should be as close as possible. Where we can bring them closer, we will do so. However, it is certainly not a policy intent to identify differences.

Patrick Harvie: Are you saying that you expect to lodge amendments that will bring the wording of the two bills closer together but that, in general, you expect the bill to result in OSCR making the same decisions?

Johann Lamont: I am saying that any divergence in the definitions of charitable purpose is not because we have actively chosen to seek differences.

I am happy to have dialogue with any member of the committee who thinks that there are obvious cases in which that divergence needs to be brought together. I am relaxed about there being some differences between the bills because—obviously—they have been through different parliamentary processes. However, if there are obvious points that we can bring closer together I will be happy to discuss those. The other side of the matter is that we do not want to end up in a position where we impose on ourselves a control over and above what is in the bill, nor should we try to get a word-perfect match that does not express what we want the bill to express.

Patrick Harvie: I will ask you about your position on one or two specific charitable purposes. It has been suggested that “the advancement of equality” should be included in the Scottish bill, and clause 2(2)(h) of the Westminster bill mentions

“the promotion of religious or racial harmony or equality and diversity”.

Do you have any views on that?

Johann Lamont: That is a provision that we will perhaps want to consider. It would support the objectives of the equality unit in the Scottish Executive, so we could look further at that.

Patrick Harvie: My other question on the list of charitable purposes is about the advancement of religion. Questions have been asked about whether that will include other forms of spiritual or non-spiritual belief systems. Is it your view that such belief systems or philosophical positions would be covered?

Johann Lamont: I think that the advancement of religion is seen to capture spiritual benefits. I understand that there is no definition of religion in law, but I expect that that is how it would be defined. I do not know whether Catriona Hardman wants to add to that.

Catriona Hardman (Scottish Executive Legal and Parliamentary Services): No definition of religion was attempted in the Charities (Scotland) Act 1990. I imagine that it would have its normal dictionary definition, so it would include other spiritual—

Patrick Harvie: The point was raised by the Humanist Society of Scotland, whose members reject the notion of spirituality or spiritual benefit and think that it does not apply to them. Do you regard that as applying to them?

Johann Lamont: If the Humanist Society of Scotland says that its organisation is not spiritual and is not a religion, it is hard to see how it could pass the test on the grounds of religious benefit or the promotion of religion, but it may be that

another charitable purpose could be identified in relation to the views of humanists.

Mr John Home Robertson (East Lothian) (Lab): Section 7(2)(d) in the Charities and Trustee Investment (Scotland) Bill refers to

“the advancement of health,”

but the equivalent in the UK bill is

“the advancement of health or the saving of lives”.

I am sure that we all want to ensure that Scotland's lifeboats and mountain rescue teams are covered. Can we establish that they will be?

Johann Lamont: That is another of the purposes that have been identified in relation to which it would be reasonable to consider amendments at stage 2.

Mary Scanlon (Highlands and Islands) (Con): As you said in your statement, the bill will lead to substantial regulation. Will you clarify how you expect OSCR to measure spiritual and moral benefit?

Johann Lamont: Perhaps that question reflects the points that I made about the challenge that we have set ourselves in trying to regulate a sector that is so diverse and which includes philosophical views, commitments and beliefs. I hope that the way the bill is presented allows flexibility and dialogue between interested parties. It is very much for OSCR to consult, to talk to people and to work with them to get definitions and a consensus around its views.

Mary Scanlon: Do you think that spiritual and moral benefit can be measured, and will that lead ultimately to public benefit?

Johann Lamont: I think that we can measure what we can measure; we do not set ourselves standards that encompass the human condition. However, in trying to ensure that we have a sector that is regulated, that people trust and that is not open to abuse, it is still reasonable to try to capture the common understanding of public benefit, of what religion is and so on.

Mary Scanlon: That will be quite a challenge for OSCR.

The phrase “unduly restrictive” in section 8(2)(b) of the bill causes me some concern. A submission from the Scottish Council of Jewish Communities quoted an MSP at the Public Petitions Committee:

“I am ... very disturbed ... that the charity benefits only people from the Jewish religion and with a Jewish background. That is not charitable in any way.”—[*Official Report, Public Petitions Committee*, 27 October 2004; c 1151.]

We may, or may not, say that many of our charitable organisations are unduly restrictive. Last week, I spoke about that at a meeting of the

clans. The clans are extremely restrictive. What do you deem to be “unduly restrictive”?

10:30

Johann Lamont: OSCR will be responsible for dealing with cases charity by charity and it will be asking what the purpose of each charity is. Is it unduly restrictive for a charity to identify itself as supporting a particular religious group? It is not the intention of section 8(2)(b) to say that. If there were a very narrow group, or a group within a group, that might lead to a further difficulty.

Quentin Fisher (Scottish Executive Development Department): The minister is right. What is unduly restrictive will be a matter for OSCR's subjective judgment. OSCR will have to consider the reasonableness of the restriction. Any charity restricts access to its benefits in one way or another. It is for the charity to justify why it restricts its benefits as it does.

Mary Scanlon: I appreciate that. I was impressed by the contribution of Jane Ryder of OSCR last week, but I want to understand what you—the authors of the bill—mean by “unduly restrictive”. Almost every charity is restrictive in some way. The phrase in the bill causes me concern and I know that it causes concern to other committee members. We need you to take more of a lead, and to offer more clarification, rather than to say that decisions are at OSCR's discretion.

Johann Lamont: Decisions will be at OSCR's discretion but OSCR's view has to be seen to be reasonable. We might need to have further discussions on that. OSCR's view would have to be in tune with the commonly held view of what was unduly restrictive.

Mary Scanlon: Let me put to you a question that has been raised by the Scottish Council of Jewish Communities. If a charity raises money within the Jewish community, from people from the Jewish religion and with a Jewish background, and if that money is then distributed among Jewish people, is that charity unduly restrictive?

Johann Lamont: For what it is worth, my instinct is to say, no, that does not seem to be unduly restrictive. I would be concerned if we were developing legislation that said that it was. That is what I would regard as a commonly held view, but it would have to be tested by the regulator, who would make a judgment that would have to be deemed reasonable. I think that that offers protection.

Mary Scanlon: Thank you. That is fine.

The Convener: One of the key principles of the bill is independence. In your opening statement, you said that the Executive was willing to look at the issue again. I would not have thought that you

would want to overhaul your ideas, but you might be willing to reconsider measures on the proportion of charity trustees who sit on a board and the way in which charities meet the requirements under the charity test. Why are the principles of independence key to the bill?

Johann Lamont: The first thing to say is that the issue is not new. We have known for a long time that the issue of independence was regarded as central to legislation on charities.

I may have misrepresented my position. I made a particular statement about the cultural NDPBs, because it became obvious that they were in a very specific situation. The view was taken that the independence of charities was so important that NDPBs would have to decide on a case-by-case basis whether to remain NDPBs or whether to become charities. If they became charities, they would no longer be subject to direction by ministers. However, some bodies are charged with responsibility for national collections and heritage. There is general acceptance that those bodies should be subject to ministerial direction. The public hold a particular view of such bodies and the possession of charitable status provides those bodies with access to significant endowments and so on.

The issue of independence has been clear for a long time. We also knew that making a commitment to that principle would create a dilemma in respect of cultural NDPBs. However, the cost of that approach was quantified only very recently. At one stage, it was believed that the Scottish Executive could bear the cost. From the evidence that has been given to them, members will know better than I that the cost that has been quantified recently is so significant that the position has become untenable. A distinction is being made for cultural NDPBs, which are in a special position.

The Executive and I believe that it is important that charities should be independent, so that people can be confident that the sector cannot be manipulated or used in any way. The Executive's approach has been to say that the issue is not the number of trustees who sit or come from particular groups, but the fact that any trustee, regardless of where they come from, is charged with the responsibility of operating and making decisions on behalf of the charity. In acting, trustees ought not to be under direction from a third party.

I have highlighted issues on which we may want to reflect further. We do not want to end up in a position where a parent charity is not able to ensure that the local version of the charity is acting in a particular way. However, we have accepted from the beginning that the charitable and voluntary sector should be independent from both

the public and the private sectors. The sector has made the case for that very strongly.

The Convener: You have touched on the issue of non-departmental public bodies, on which both the Finance Committee and this committee have heard extensive evidence. You indicated that the Executive intends to revisit the provisions in the bill that relate to NDPBs. All members of the committee welcome that. I understand that the English Charities Bill allows an exemption for national collections institutions. In your opening remarks, you said that there will be a number of amendments, which may be technical. Are you looking to create a similar exemption in the Charities and Trustee Investment (Scotland) Bill?

Johann Lamont: We need to consider what will work best for the organisations that have been identified. I do not know whether there is clarification of the exact position in England. I understand that in England a significant number of charities have exempt status, but I do not believe that members of the Communities Committee and people more broadly who have a commitment to the charitable sector want the same provisions to apply in Scotland. We want to ensure that we do not build up a significant number of exceptions, which could undermine the principles that define the sector.

The Convener: We want to be reassured that our important national galleries and art collections and the National Library of Scotland will be protected and that those national treasures and assets will be safeguarded. The issue is not simply about the money that the national collections institutions can accrue from rates relief; it is also about Government indemnity on the assets and the properties that the institutions own, so that those can be held in trust for us as a nation and for future generations of Scots.

Johann Lamont: Absolutely. As I said, people have wrestled with the issue for a long time. We took the decision that the national collections institutions should remain non-departmental public bodies precisely because we understood the importance of the responsibilities with which they are charged. The clear understanding was that a commitment to the collections through ministerial direction was required, which was why the national collections institutions were to lose charitable status. However, when we began to appreciate the cumulative effect that charitable status has for those bodies, we realised the importance to the public of their accessing funds and commitments and doing what they want to do and decided to alter the proposals. We tried to find a solution that did everything that we wanted it to do, but we suddenly became aware of the significant cost for those bodies. Our decision is the right one and it does not undermine our commitment to

independence in relation to other charities. The primary aim of the changes is to protect the national collections.

Christine Grahame: You are right to suggest that, when we start making exceptions or granting exemptions, that can be an open door to other bodies. For clarity, it is better to have a simple law. Why have you moved away from the Scottish Charity Law Review Commission's recommendation 5 for a solution on the NDPB issue, which was that not more than a third of the trustees should be directly or indirectly appointed by ministers or local authorities? That issue has not been dealt with. The National Library of Scotland's position is that a range of sources for appointments to the board would be perceived as a move away from third-party direction.

Johann Lamont: The Executive's view is that that proposal would not protect charities' independence. A charity's independence will be protected if the trustees are charged with the responsibility to act in the charity's best interests and not to take external direction. The proposal would not solve the independence issue; equally it would not resolve the issue that there should be ministerial direction over the national collections, which is our clear view.

Christine Grahame: The problem is that, as the SCVO's submission points out, the founding documents of several of the national collections institutions state that ministers can direct their actions. Whether or not ministers do so, it is in those bodies' constitutions that they can be directed. That would surely fall foul of the third-party test.

Johann Lamont: Yes. That is why, although bodies must be either one thing or the other, we must exempt that narrow group of institutions, which manage to embrace both because of their nature. That group is distinct. Simply restricting the number of trustees who are appointed by ministers would not guarantee a body's independence, nor would it deal with the issue of ministerial direction.

Christine Grahame: Unless those bodies change their constitutions, which is possible.

Johann Lamont: If a body's constitution says that it has third-party direction, it could not be a charity without that being removed.

Mary Scanlon: There will obviously be further discussion of the issue when the amendments are produced. I listened carefully to your answer to the convener's question about Government indemnity. Will Government indemnity still be assured when we have agreed that the national collections organisations will maintain their charitable status?

Johann Lamont: Those organisations will be a special group: they will have charitable status, but

the independence test will have to be changed because we want to retain the power of ministerial direction. If one of the benefits of ministerial direction is the protection of Government indemnity, that will remain, too.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): The issue of arm's-length bodies that have been established by local authorities was raised with the committee by the City of Edinburgh Council and other local authorities. They worry that section 7(3)(b) will impact on their ability to deliver local services. Has the Scottish Executive considered the financial implications and the implications for communities if local services are inadvertently lost as a result of the bill?

Johann Lamont: They should not be lost if the charitable purpose of the trust is to provide those services. Charity trustees are charged with the responsibility of operating in the interests of the charity and its charitable purpose, which, in such cases, would be to deliver the provisions at a local level.

There are a number of instances in which councillors sit on bodies and cannot be directed on how to conduct themselves. For example, when they sit on licensing boards, there can be no mandate on how they behave. If a body was set up with a particular charitable purpose—for example, to deliver sports and community facilities in the local community, which I know happens in some places—it would not be necessary for the council to direct the councillors to fulfil that purpose, because the trustees would be obliged to work in the interests of that purpose.

10:45

Cathie Craigie: Has the Convention of Scottish Local Authorities raised the issue with the Executive and have there been discussions?

Richard Arnott: We had discussions with COSLA at an early stage. A number of local authorities welcomed the clarity that was being given, because we are emphasising that charity trustees have to act in the interests of the charity. Some local authorities said that, to emphasise that point, they already gave guidance to people whom they appointed as charity trustees. Others felt that the clarity that we were bringing would spread the word better. However, local authorities welcomed the fact that it was clear that, when a charity was set up, the people who were appointed to be trustees had a duty to act for that body, rather than to represent the people who appointed them.

Cathie Craigie: So if a councillor was appointed to the board, as long as they acted independently and without direction from the council, the local authority should have nothing to fear from section 7(3)(b).

Johann Lamont: Local authorities have to recognise that there is a distinction between their delivering services themselves and establishing an arm's-length body. Those have to be two different things. Difficulties will not be created for local authorities; if independent people who are committed to a charity deliver on the charitable purposes of that body, they will be delivering what the local authority expected of them.

Scott Barrie (Dunfermline West) (Lab): I return to the public benefit test that you talked about in your introductory remarks and to which other members, Patrick Harvie included, have alluded. How the public benefit test will operate has exercised the committee since we began taking evidence on the issue. There is a view that a fair degree of interpretation will be required to enable any organisation that has charitable status to prove public benefit. What test do you think will be required for bodies to indicate that there is sufficient public benefit to justify charitable status?

Johann Lamont: Bodies have to pass the first test, which is that they have a charitable purpose, then the public benefit test. That highlights the complexity of the area. We can go into a situation with a degree of certainty that we can measure this, shape that and do this, but we begin to realise that the issues are more difficult than that. The bill is not about creating measures that prevent charities from doing things; it is about creating measures that protect charities. We think that we know what something means, but trying to find the words to say what it means is different. It is recognised that, through consultation, OSCR will develop a view on the public benefit test. However, I would not have thought that a public benefit test could be applied in a proportionate way. We could not say that public benefit is established if 50 per cent of what a body does is good works. I hope that, through consulting fully and putting out guidelines, OSCR will capture what we understand to be public benefit.

Scott Barrie: Let us be honest. What is giving some of us difficulty is the whole issue of independent schools and the level of public benefit that such institutions must prove that they provide. The local community having access to playing fields of an evening may, in some people's eyes, be sufficient public benefit; for other people, it may not be. The issue is the degree of benefit that is provided.

I fully accept what you have just said about our not being able to impose a tariff system whereby an institution has to get to level 4 before charitable status is achieved, for example. Nevertheless, there is a difficulty in the fact that one person's public benefit is not necessarily another person's public benefit. The whole concept of the charity brand—which has often been talked about when

we have taken evidence on the bill—depends on a large number of people being able to agree on whether an organisation is a charity in terms of what it is achieving. Some people find it difficult to accept that independent schools should have charitable status, as they do not believe that those schools operate in the same way as charities.

Johann Lamont: You are right to say that the issue is difficult. There are strongly held views on such issues, on both sides of the argument, and widely different perceptions of independent schools. That is why it is important for OSCR to have the responsibility for dealing with the matter in a way that people will accept. The bill also identifies public disbenefit as a factor. The public benefit test has to be real if we are to ensure that the charitable sector is underpinned by public confidence.

The other issue relating to independent schools is the fact that the sector is perhaps far more diverse than many of us might have realised. Some good examples of the public benefit that is provided by independent schools have been identified. Cathie Craigie has talked to me about the Craighalbert Centre, but there are other schools—such as Donaldson's College for the deaf, from which the committee has taken evidence—on which we could gather consensus in this room. Equally, there are others that are far more contentious. It is helpful, therefore, to have OSCR, as the regulator, developing a test that people can see as reasonable.

Scott Barrie: We have touched on the “unduly restrictive” criterion in section 8(2)(b). In your opinion, could high charges or fees be construed as unduly restrictive?

Johann Lamont: They could be. If a wide range of fees was being charged, OSCR would need to explore what was causing that wide difference and what the point of it was. If the point was to ensure that only a very small group of people would apply to use a facility, that might be deemed to be unduly restrictive. However, that would be a matter for OSCR to decide. I am confident that OSCR will have such powers that people will feel that that issue has been and will be explored thoroughly. There is no presumption in the bill about who would pass or fail the test; the important thing is that there is a test and that people see that test as reasonable, rigorous and robust.

The Convener: John Home Robertson had a question.

Mr Home Robertson: That exchange has covered the point that I wanted to address. I do not want to spoil things by confusing the issue.

Linda Fabiani (Central Scotland) (SNP): Let us leave aside the special needs private schools such as Donaldson's and look at what we might

call mainstream private schools. Are you saying that OSCR might decide that one mainstream private school should have charitable status and that another mainstream private school did not meet the benefit test and, therefore, should not have charitable status?

Johann Lamont: Yes. The onus is on the independent school to establish that it has a charitable purpose, which is to provide education, and that it meets the public benefit test. The Executive has not taken the view that we should set the test; OSCR will set the test and institutions will either pass or fail it. To say that certain groups of institutions will naturally fail the test is to miss the point of having a test that is reasonable and fair and that considers every individual case on its merits.

I made an obvious distinction between certain kinds of institutions in the independent schools sector. However, within what you describe as mainstream independent schools, there will also probably be divergence on commitments to, for example, special needs or the local community. There might even be divergence in founding principles. Therefore, I think that it is helpful to have a test that everybody has to meet and for which there is no presumption that a body will pass or fail.

Christine Grahame: The same principle obviously applies when someone pays their way to be treated in what we might call private health care. I take it that the test will be proportionate. Many of us have probably made up our minds already—I have, at least—about what we consider a charity in the hospitals or independent schools sector. However, will you just make it clear that if the vast majority—90 to 95 per cent—pay for the facilities, the institution would find it difficult to overcome the public benefit test?

Johann Lamont: The same test would apply in the hospitals sector. The problems in that sector will probably be less challenging and difficult for us than in the education sector. However, the test would remain the same. The bodies would have to establish public benefit. It may be a commonly held view that it would be difficult to see public benefit where it did not look as if there was much evidence of it. Obviously, that would be something that OSCR would have to—

Christine Grahame: Is that your view?

Johann Lamont: Sorry?

Christine Grahame: Is that your view? The private sector has said in evidence to us that, leaving aside schools such as Donaldson's, fees are paid for 90 per cent of the children in independent schools. Is it your view that that position will make it difficult for independent schools to meet the public benefit test?

Johann Lamont: I will be interested to see how everybody seeks to meet the public benefit test. I am certainly committed to ensuring that OSCR produces guidelines that people regard as clear, transparent and logical and to which they can sign up.

Christine Grahame: Thank you.

Mary Scanlon: I think that this point has been covered, but I have two brief questions. Scott Barrie said that charging meant that independent schools could be unduly restrictive in terms of meeting the public benefit test. If the high charges were used to help with bursaries for less-well-off families, would that be taken into consideration when judging whether a school met the public benefit test? You said, minister, that there is quite a diversity of fees within the independent schools sector. That is certainly something that I have learned as we have taken evidence. For example, the fees for Fettes College are probably more than 50 per cent higher than those for many other independent schools in Edinburgh. Would OSCR look at the fees and make recommendations about them for independent schools, if it felt that the fees made the schools too exclusive?

Johann Lamont: That would be for OSCR to decide. The public benefit test will be a transparent process and if OSCR decided that a body had failed the test, it would make its reasons clear. If the body wanted to pass the test, it would have to reflect on the reasons for failing and act accordingly.

Mary Scanlon: The point is that, under the charity test, all the independent schools will meet the advancement of education test, whereas, under the public benefit test, we get back to the two words that cause me concern: "unduly restrictive". If the fees for a particular school are significantly higher than those for other schools, surely that makes that school unduly restrictive.

Johann Lamont: I have already said that we do not presume that any school in the independent sector will pass or fail. For the example you gave, OSCR might decide that the fees were unduly restrictive, so the school would not pass the public benefit test. However, another school's fees might not be regarded as being unduly restrictive, so that school would pass the benefit test. As I said, that will be a matter for OSCR.

Mary Scanlon: I think that this is an important point, so I want to be clear that, in terms of meeting the public benefit test, OSCR could make a recommendation not just on the benefits to the local community but on the basis of the fees that a school charged.

Johann Lamont: I would assume that OSCR would not make a recommendation about how a body was going to pass the test. A body will seek

to pass the public benefit test and OSCR, when giving its reasons why the body may not have passed the test, will say either that there is no public benefit or that it deems that the unduly restrictive charging does not have public benefit.

Mary Scanlon: That is what I meant—thanks.

Scott Barrie: Section 8, which is on public benefit, does not refer to case law but attempts to encapsulate the basic principles that have been established by precedent. Will the lack of reference to case law restrict OSCR's flexibility when deciding whether a body operates for the public benefit?

11:00

Johann Lamont: The opposite could be argued. OSCR has the benefit of case law in other places but is not obliged to act entirely in accordance with that. The arrangement gives OSCR greater flexibility.

Cathie Craigie: I will move on to part 3 and in particular section 20, which requires OSCR to co-operate with other regulators and to share information. At our meeting last week, Jane Ryder of OSCR expressed concern that section 20 did not go far enough and said that OSCR felt strongly that the bill should contain a reciprocal obligation for other regulators to co-operate with OSCR. Could a statutory obligation to co-operate with OSCR be imposed on other regulators in Scotland? Could Westminster impose a similar statutory duty on relevant English regulators?

Johann Lamont: OSCR will have a statutory duty to seek co-operation with other regulators. The bill—rightly—focuses on the role of OSCR and how it will operate. We are not allowed or able to impose a duty on regulators outwith Scotland. The powers under section 24 will allow other Scottish public bodies, including regulators, to disclose information to OSCR. The Executive's view is that that is sufficient to ensure that OSCR can do its work.

It is intended that other regulators that commonly deal with charities, such as the Charity Commission, will agree to co-operate with OSCR to reduce the burden on charities. We expect that to lead to protocols or memorandums of understanding about investigations, the exchange of information and common formats of information collection.

The Executive's view is that that is sufficient, given a general commitment to supporting the charitable sector, an understanding of the sector's importance and a wish not to work against the bill's aim, which is to underpin the charitable sector with public confidence.

Cathie Craigie: I am sure that the Executive has undertaken much work on and put much thought into the matter. However, when OSCR strongly recommends something to the committee, we must sit up and listen. Could the Executive liaise with colleagues in England to make a reciprocal arrangement in the Charities Bill there to deal with public bodies that are based in England?

Johann Lamont: As I said, we can discuss with Westminster colleagues and others the mechanism for that. We will seek the commitment to working together, which could be dealt with through a protocol and memorandum of understanding. Conflict does not arise over what we are looking for at the other end of the process. What is in the Charities and Trustee Investment (Scotland) Bill is sufficient to meet people's concerns.

OSCR will report to Parliament and will be in dialogue with ministers—we have discussed that. If OSCR appears to have difficulty in obtaining co-operation from any group as the process moves on, we will revisit the matter.

Cathie Craigie: I am sure that the committee will watch the matter, minister.

I keep trying to call you "convener", although you are on the other side of the table now.

Johann Lamont: If you had done that, I would have told you to be quiet and called somebody else to speak.

Cathie Craigie: I might have to seek the chair's protection on that, minister.

Under section 38, Communities Scotland will be excepted from reporting back to OSCR, which accepts that organisations regulated by Communities Scotland have already been subject to a rigorous process. Could the Scottish Higher Education Funding Council be included in that provision?

Johann Lamont: As we want efficient, proportionate regulation, we have rightly sought to delegate certain regulatory functions to Communities Scotland. However, I should point out that the organisations that it regulates have to register first with OSCR. Communities Scotland's regulation of registered social landlords covers not only money and funding, but governance, how RSLs deal with tenants and so on. Such an approach is quite distinct from that of SHEFC.

We must strike a balance. Although we do not want bodies that are already heavily regulated to face further regulation, we also do not want desperately to offload everyone onto other bodies. The very clear case that has been made for Communities Scotland could not be made for SHEFC. We must ensure that the objectives of

setting up OSCR are met, and we know from its work that Communities Scotland will meet those objectives. Indeed, it is very important that Communities Scotland and OSCR co-operate to ensure that that happens.

Cathie Craigie: Do you expect OSCR to hold discussions with SHEFC to ensure that colleges do not duplicate certain aspects, such as accounting practices?

Johann Lamont: Although we have proposed something different for Communities Scotland, we will ensure that a whole range of other measures support our commitment to proportionate regulation. The Office of the Scottish Charity Regulator has already been working very closely with other relevant regulators and it is important that their information can be used in the form in which it is provided, instead of having to ask people to redo things. Many sensible measures can be taken in that respect, and I know that Jane Ryder from OSCR has been working on the matter.

Linda Fabiani: Although I completely understand why you want to give Communities Scotland certain regulatory functions, I am slightly concerned about the fragmentation of the charity sector. Could Communities Scotland and OSCR reach some agreement that would give OSCR full responsibility for charities by allowing it to sign off the charitable purposes aspect?

Johann Lamont: The organisations in question first have to register with OSCR, and their regulation is then delegated to Communities Scotland. That should meet your concern that Communities Scotland might do something completely different. OSCR will still make the initial decision about whether an organisation is a charity.

Linda Fabiani: So if RSLs want charitable status, they will have to apply to OSCR.

Johann Lamont: Yes, and then Communities Scotland would ensure that they comply with the rules. However, as I have said, the two bodies need to work together to ensure that they are fulfilling their statutory roles.

Linda Fabiani: I just feel that OSCR should have ultimate responsibility for all charities and that we should find a way of achieving that with regard to RSLs without giving it much more work. What about the hands-off organisations, that also have charitable status, that RSLs tend to create within communities?

Johann Lamont: Any hands-off body that had been created by an RSL and had charitable status would be regulated by OSCR. They cannot fall into a black hole in which no one regulates them.

Linda Fabiani: Unless I picked the whole thing up wrongly last week—I will look at it again—I think that everyone involved requires clarification.

Johann Lamont: The bill is trying to capture what the sector looks like. It appears that RSLs have set up other wee groups, but any such group that is independent from and is not regulated by an RSL will need to be regulated by OSCR. The power to decide whether an organisation has charitable status or not remains with OSCR. That is probably a sufficient bottom line from which people should get comfort.

Linda Fabiani: Right. I shall look at that again.

I refer now to some of the other evidence that we heard last week. I worry about the information that charities are obliged to give. We heard from Oxfam in Scotland about the potential difficulties for an organisation that has its head office in one country but operates in many other countries. The Oxfam representatives quoted the Companies Act 1985, and their view was that it should be possible for the work that is being carried out within a country to be regulated, but for the internal machinations of the parent office to be subject only to the jurisdiction of the county in which it is based. I would like your views on that.

Johann Lamont: My views on the Companies Act 1985 are scant.

Linda Fabiani: Forget the act. What is your view on the general point?

Johann Lamont: I shall ask Quentin Fisher to give some information about the act first, and then we can talk about the general point.

Quentin Fisher: In the first instance, when OSCR requires information from charities, primarily in the form of accounts—and I imagine that that is what the concern was directed at—it will be quite happy to accept accounts that refer only to that body's activities and structures in Scotland. Of course, many charities might find it onerous to try to drive a wedge between their Scottish operation and their operations elsewhere, so OSCR will also be able to accept unified accounts. In other words, where a body wishes to return accounting information about only its Scottish functions and operations, it should be able to do so.

Linda Fabiani: That is interesting. However, there is a deeper point about the level of regulation. I am not saying that it was Oxfam's intention, but I have picked up from the evidence that we heard that some larger charities think that it will be an absolute bother to be regulated in Scotland to the same extent as they would be regulated in England. I am trying to get confirmation of your intention—is it to stay as it is

in the bill just now, or are you looking to relax that requirement?

Johann Lamont: It is a question of balancing being proportionate and not creating onerous and unnecessary work for people—and the bill has tried to do that—against ensuring that charities are regulated if they are operating in Scotland, have premises in Scotland, and so on. That is reasonable. OSCR would need to be alive to complaints that the regulation was burdensome and was creating difficulties. We recognise that there must be a balance, but we think it has been struck.

Linda Fabiani: Another issue that arose concerned small charities that have limited staff and resources. There are concerns about the public asking for information all the time and about the amount of staff time that it would take to put together sets of accounts. The view was expressed that it might be possible for OSCR to be the point of contact for people who wanted to ask for information about a charity's constitution or accounts.

Johann Lamont: All charities have to maintain proper accounting records, so those should be available. However, the nature of the report that they have to make to OSCR will vary depending on their size. It is right that we understand that there are not the same pressures on big charities that there are on small charities, but at the same time we want to ensure that all charities have a commitment to being open and transparent, and it is reasonable for any charity to be asked to produce its accounts and an explanation of what it does. That is something that charities should see as their responsibility.

Scott Barrie: OSCR will have powers to investigate any charity and also any bodies controlled by that charity. For example, it will be able to look into the activities of a non-charitable trading arm of a charity. What would be the process for reporting on such inquiries and do you think that OSCR should be placed under a duty to report on them publicly?

11:15

Johann Lamont: Where the body that is being investigated has been found not to be guilty, OSCR should report the findings of the inquiry, if the body requests that. It should be for the body that is being investigated to make that decision, because it might judge that having its name in the press, even if it is being exonerated, does not do what it wants. Where there has been a problem I would expect the findings to be made public—that would be important. The only caveat is that where a body has been cleared, the report should be published with its permission. That is in the

interests of transparency and bodies have nothing to fear from that.

Scott Barrie: That is useful clarification.

Christine Grahame: I am approaching accounts with trepidation, as you did company law. I appreciate what the minister said about members of the public being entitled to see the accounts of various charities. I understand from section 45(5) of the bill that regulations will be brought in that will do different things to different kinds of charities. Will you elaborate on that? I presume—you will, no doubt, clarify this—that a major organisation such as Oxfam, which has enormous accounting teams, will have different obligations to the two-person animal welfare charity that was set up to rescue wee birds. Will the accounts that all charities produce have to conform to the statement of recommended practice?

Johann Lamont: The SORP—you have said what it stands for—applies only to charities producing fully accrued accounts. Although the regulations will set out the detail and thresholds, the intention is that smaller charities will produce accounts on a receipts-and-payments basis.

Christine Grahame: I refer to the supplementary evidence from the Institute of Chartered Accountants of Scotland, which states that accounting thresholds should be lower than those in England and Wales. Is that what you are saying?

Johann Lamont: The first point is that larger charities will have to give more information than will smaller charities.

Christine Grahame: Absolutely. I understand that.

Johann Lamont: There is a view that the thresholds set in England and Wales are not appropriate to the Scottish charity sector and are too high to allow a reasonable number of charities to be audited, given the nature of the charitable sector in Scotland, which comprises more, smaller charities. We would want to capture more charities, because the principle of transparency and public confidence in the system might be undermined if there is not sufficient auditing.

Christine Grahame: One of the points that the institute made was that we do not know the financial situation of many charities in Scotland. I was surprised by that, because I thought that charities had to be registered with the Inland Revenue and that there would be a database of their financial position. Will you clarify what we know about the income of various charities? What information is available?

Johann Lamont: I will go back to first principles. We introduced the bill because the financial position of the sector cannot be tracked in the way

that you are suggesting. There is evidence that the Inland Revenue's lists are incomplete—the SCVO mentioned that—and that they include charities that no longer operate. There has been no such tracking and monitoring of what charities are doing, which is what we are attempting to do now. Through the regulator we will begin to address those issues, get a better sense of the size of bits of the sector and develop an understanding of the demands of the sector.

Christine Grahame: What is your view of the Institute of Chartered Accountants of Scotland's recommendation that charities that are not companies, and charities with an income of £25,000 or less, should not require an independent examination?

Johann Lamont: The main thing to say is that we will consult on that, as we acknowledge that that is an important decision that must be made.

Christine Grahame: Obviously you have seen the submission.

I will move on. Should auditors have a duty to report wrongdoing to OSCR, to protect them from legal action for breaking client confidentiality, as the Institute of Chartered Accountants of Scotland suggested?

Johann Lamont: Section 25 will remove any restriction on auditors or independent examiners that would prevent them from

"disclosing any information to OSCR for the purpose of enabling or assisting OSCR to exercise any functions",

which provides enough protection to allow auditors to report possible wrongdoing to OSCR. Therefore the inclusion in the bill of a specific duty is unnecessary.

Christine Grahame: Are you saying that the concerns of the Institute of Chartered Accountants of Scotland are unfounded?

Johann Lamont: I did not say that. I said—

Christine Grahame: I know that you did not.

Johann Lamont: I certainly would never say that an auditor's views were unfounded. Perhaps we need further discussion on the matter. If movement is possible on the issue, we would be happy to explore that.

Christine Grahame: Obviously, auditors think that they will find out whether they are protected only when they are taken to court. That is a huge problem.

Johann Lamont: It is certainly important that auditors and independent examiners should be able to disclose information. We would not want to do anything that prevented that from happening and, if it is suggested that that might be an

unintended consequence of the bill, I will be happy to explore the matter further.

Christine Grahame: Thank you.

Patrick Harvie: On designated religious charities—

Johann Lamont: Are you saving the easy questions for last?

The Convener: What makes you think that that will be the final question, minister?

Patrick Harvie: Notwithstanding OSCR's ability to remove designation, which would be a fairly serious step to take, why will designated religious charities be exempt from many of the powers of OSCR and the Court of Session?

Johann Lamont: Designated religious charities must have particular internal governance structures, which ensure that we can be confident that the charities are being appropriately regulated.

Patrick Harvie: Is there a specific reason why that approach should apply to religious charities, rather than to other large charities that have their own internal processes?

Johann Lamont: The concept of designated religious charities is taken from the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. Under the existing law, religious charities that satisfy strict criteria may be granted exemption from some of OSCR's regulatory controls. A feature of such charities is a long-established system of internal controls and some charities have a special status in law.

I suppose that we are capturing a recognition of the role of religion in society. We are addressing the regulation of what are deemed to be charities and, in regulating designated religious charities, we recognise such charities' systems of internal governance. The status of religion in society underpins that approach. The bill is intended not to address that status but to reflect it and to regulate charities on that basis.

Patrick Harvie: The bill stipulates that a designated religious charity should have

"the regular holding of public worship as its principal activity".

Would the provision cover religions that do not necessarily worship something but that perform other rituals or ceremonies?

Johann Lamont: It will not be compulsory for an organisation to seek to become a designated religious charity; it could be a charity without being a designated religious charity. If a group did not meet to worship, it would have to satisfy the test for a designated religious charity in other ways, if it wanted to be so designated.

Patrick Harvie: The provisions on the designation of religious charities would apply to some types of religion, but not to others.

Johann Lamont: It will be for religions to choose to seek designation if they take the view that their system of internal governance is such that they are able to regulate the charity themselves.

Patrick Harvie: Do you accept that the test that a religion would have to meet to become a designated religious charity could discriminate against some religions, because of the nature of worship? Some religions would not satisfy the test.

Johann Lamont: The bill does not define the nature of worship, it simply refers to people meeting, which is a reasonable test.

Patrick Harvie: The bill uses the word "worship".

Johann Lamont: The test will be the same as the test in the 1990 act.

Patrick Harvie: I raise another matter that the committee has considered. If OSCR considers that there is a problem with a single congregation that is worthy of investigation, will it be required to remove designated religious charity status from the entire family of charities of which that congregation is a member in order to intervene?

Johann Lamont: Ultimately, that could happen; however, the expectation is that it would not. A range of powers would be open to OSCR, but we are not working on the assumption that it would go to point Z immediately. There is a whole range of places in between.

Patrick Harvie: But the state of removing designation could apply to the entire church, rather than to only one congregation.

Johann Lamont: Yes.

Patrick Harvie: Right. I think that other members will want to pick up on that, so I will leave it at that for the moment.

Mary Scanlon: We have received a significant amount of written information from the Church of Scotland. I am sure that you have had the opportunity to read that, minister. The bill is concerned with the charitable status and the internal management of churches. How does it specifically affect the Church of Scotland Act 1921?

Johann Lamont: We should make it clear that, if somebody wanted to do something about the powers that the Church of Scotland has under the Church of Scotland Act 1921, there would have to be a repeal of the 1921 act. That is not the intention of the bill. The bill's intention is to

regulate charities and to find an interface with all the churches in relation to their charitable status.

There is recognition of the fact that the Church of Scotland has a particular place in law. It is not the view of the Executive that, in attempting to ensure that there is a regulatory framework for charities, we should impinge on the internal matters of the church. We are saying that, if an institution is a charity, there are certain obligations and duties that go along with that which must be fulfilled. Through the designation of religious charities, we have sought to recognise the fact that there is strong internal governance in a lot of churches in dealing with their charitable work. However, ultimately, if a body seeks charitable status and acts in relation to that, there is an accountability that goes with that even if, because it is a designated religious charity, only a very light touch is required. The bill does not address the place that the Church of Scotland occupies in Scottish society, as reflected in the 1921 act.

Mary Scanlon: I understand that. Nevertheless, would the part of the bill that encroaches on the internal management of the Church of Scotland supersede the elements in the 1921 act that deal with the internal management of the church in relation to its charitable status?

Catriona Hardman: There is no straightforward answer to that. It would be presumed that, in general legislative terms, the two acts could sit together. The terms of the bill specifically concern the regulation of charities, whereas the Church of Scotland Act 1921 is a general act. The two should be able to sit together. Whether a problem would arise in a particular instance would, possibly, be a matter for the courts to determine. It would be for the courts to decide whether what was happening under the new act impinged on the earlier act. There are all sorts of rules about implied repeal, which it would not be appropriate to go into in this forum. It is a complicated matter. Generally, however, the presumption would be that the two acts could run along together and be compatible in most respects.

Mary Scanlon: Minister, have you or the bill team had discussions with the Church of Scotland to oversee any misunderstanding in that respect?

Johann Lamont: During the consultation period, changes were made to the draft bill to address some of the anxieties and concerns that the Church of Scotland had, and the Minister for Communities met the Church of Scotland last week or the week before. I expect that there was dialogue over time.

A fallback power on the part of OSCR to intervene in the internal workings of any church is precisely that, because of the recognition that internal governance covers the charitable work.

Nevertheless, it is reasonable to have a power that says that, ultimately, if it is evident that action is not being taken, as a regulator of charities OSCR has the right to intervene. It will intervene, not in the business of the church, but in relation to its operation as a charity.

11:30

Mary Scanlon: Thank you. The issue will probably come up later, but that explanation has helped enormously.

Although we have already considered 7(3)(b), on third-party direction, I will ask the minister about the suggestion that congregations might be deemed the subject of third-party direction from or control by church authorities. I refer to the written submission from the Church of Scotland Trust, which raises concerns that

“all Congregations of the Church of Scotland are charities in their own right ... but, in terms of the current Bill, they would not pass the charity test because their parent body ‘the Church of Scotland’ is a ‘third party’ which, in terms of their constitution, is permitted to direct or otherwise control their activities.”

The submission adds that a number of such charities might be affected. It states:

“This could include voluntary organisations such as Guides, Scouts and Girls and Boys Brigade.”

The submission also mentions that members of the Church of Scotland Trust

“are appointed by the General Assembly of the Church of Scotland, a separate charitable body which is distinct from the Trust”.

The submission continues:

“if OSCR considers the General Assembly does have an element of control over the Trust the Trust would fail the charity test.”

Are the concerns that the Church of Scotland expresses about the charity test reasonable?

Johann Lamont: There has been some discussion about how the independence test might be inappropriately interpreted. I would be happy to explore further the issues that Mary Scanlon raises, particularly in relation to control by a parent charity—that is perhaps how we could describe the relationship of an individual church to the General Assembly or whatever. That relationship has parallels in other churches.

I am happy to consider the issue further because we do not intend to screen out such bodies. If we end up screening out a large number of bodies that we would all view as charities, the framework would obviously not be right. We will be happy to reflect on what the committee says in its stage 1 report and what has been said in the evidence that has been provided to consider how the provision could be refined.

Mary Scanlon: That is very helpful, particularly given the internal structure of the Church of Scotland.

Do you foresee that section 66, which regulates the remuneration of trustees, might pose difficulties for churches because in many—if not most—cases, a church’s ministers or priests are charitable trustees?

Johann Lamont: I do not foresee a difficulty with that section. Perhaps someone else can explain why—I know the answer, but I cannot find it.

Richard Arnott: I will try to explain the situation. We must be clear that section 66 provides that in certain circumstances charity trustees can be paid for their services. We must also be clear that, in the example that Mary Scanlon gives of a church minister being a charity trustee, the church minister also has a number of other roles. Perhaps there needs to be clarity about whether he is being paid for being a charity trustee or whether he is being paid for some of the other roles that he carries out. I understand that a lot of ministers receive a stipend, which does not count as pay. There are complications around that area.

Mary Scanlon: Being a trustee is an integral part of the role and job description of a minister.

Johann Lamont: This issue follows on from a point that I made earlier. If, in our general commitment on remuneration, we have captured bits that we did not mean to capture, we would have to revisit the matter to give people confidence.

Scott Barrie: I want to pursue the issue of charity trustees. You will have seen the evidence that we have taken on the offences of misconduct and mismanagement. Most of us appreciate that one sounds like partial incompetence and a mistake, whereas the other sounds more serious and suggests that people have been at it. Various witnesses expressed alarm about the possibility that trustees will be found guilty of misconduct, which might deter people from becoming charity trustees. Why are those offences considered equal in the bill?

Johann Lamont: After I have made some general points, I will say something about the anxieties surrounding the two terms.

The sanctions are in place to deal with serious breaches of the law relating to charities and will not be used in all cases. OSCR will use its powers of intervention in a proportionate manner and will report cases to the procurator fiscal only when there is evidence of wrongdoing, which is a substantial test. The procurator fiscal will prosecute a case only when they believe that it is in the public interest to do so. Scott Barrie

suggests that at some point making a mistake could become dereliction of duty, if a trustee has not paid attention to mistakes that they made previously. We wish to ensure that there is a sanction where there has been misconduct. That is important to ensure that there is confidence in the sector.

I agree with Scott Barrie that, if we use words that suggest to people that we are setting an extreme penalty, we will deter them from becoming involved. That is not the intention of the bill. I would be happy to work with the committee to determine whether we are capturing what we mean or whether we are creating anxiety about a problem that does not really exist. There is a hierarchy of responses that OSCR can make. At the same time, we must protect people's commitment and not deter them by suggesting that, if they make one mistake, they will end up in poky. I am happy to work with the committee to find language that addresses our needs, indicates that different things can cause charities difficulties but does not deter people from volunteering.

Christine Grahame: I refer to section 31, which is entitled "Powers of OSCR following inquiries". The test is

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

That appears to be quite a tough test—it will not be sufficient for OSCR to have reasonable concerns. Do you think that OSCR's concerns about the test have merit? What is the evidential test? Is it the balance of probabilities or beyond reasonable doubt?

Johann Lamont: OSCR should be in possession of enough information to be satisfied that there has been misconduct or that it is necessary or desirable to act to protect the charitable assets of a charity. Section 31 allows OSCR to intervene when it believes, following investigations, that there is a threat to those assets. We do not believe that it should be able to exercise the significant powers in section 31 to protect charitable assets without being sufficiently convinced that there is good reason to suspect wrongdoing.

Christine Grahame: What is the evidential test for OSCR?

Richard Arnott: I am not sure that this counts as a legal term, but we would expect OSCR to be reasonable. I do not know whether the test would be the balance of probabilities or beyond reasonable doubt.

Christine Grahame: There is a big difference between the two. We are talking about the possibility of criminal offences and suspension—quite draconian measures. An evidential test based on the balance of probabilities is much less

demanding than one based on something being beyond reasonable doubt. Will OSCR take action if it believes that it is likely that there has been mismanagement, or will there be a higher test?

Catriona Hardman: I cannot say what the test will be. However, the wording in the bill implies that OSCR will have to be satisfied that there is evidence that there has been misconduct.

Christine Grahame: I know, but I am talking about the level of evidence. Such investigations will be serious. I seem to recall—I may be wrong—that when OSCR gave evidence it was concerned about the degree of satisfaction that must be reached. Obviously, there could be serious consequences for OSCR if it goes in and takes action, such as suspending accounts, but, because the test is not clear, there is an appeal by the charity or by individuals.

Johann Lamont: Protection comes from the fact that there is an appeal and that if there was a report to the procurator fiscal, the fiscal would judge whether to proceed.

Christine Grahame: We are talking about procurators fiscal, so we are getting close to the principle of beyond reasonable doubt. We are not talking about the balance of probabilities but about criminal law.

Richard Arnott: It depends on the case on which a decision is being taken. If the case will result in criminal action, presumably OSCR will look more carefully.

Christine Grahame: I see. I am not trying to be difficult—I am seeking clarification. If OSCR thinks that there has been some criminality, the evidential test will be different. If the issue involves a lesser level of mismanagement—perhaps just that someone lacks capability—the test will be different. My point is that, if the issue involves a muddle rather than a fiddle, the consequences for the trustee are the same. Section 31 is difficult and confusing.

Quentin Fisher: The powers for OSCR that section 31 sets out are powers of suspension, powers of interdict and powers to protect property. They are not powers that result in a criminal conviction. If a criminal conviction were being sought by the procurator fiscal, they would have to satisfy the standing burden of proof that is associated with criminal cases. Section 31 refers to a different set of powers. We are talking about the powers of OSCR to suspend people or tell a body to stop behaving in a particular way. Before taking that action, we would expect OSCR to believe that there had been misconduct. When we say "is satisfied", we mean that OSCR should have that belief.

Christine Grahame: I am sorry, but “have that belief” is different from “is satisfied”. There is a higher test in being satisfied than in having a belief. Having reasonable grounds for believing something as a result of inquiries is a different test from “is satisfied”.

Johann Lamont: If you believe something, are you not satisfied?

Christine Grahame: It is an important phrase. Having reasonable grounds for believing something is a lesser test for OSCR than “is satisfied”. You can believe and be wrong, but you cannot be satisfied and be wrong.

Richard Arnott: You can.

Johann Lamont: I think that you can, but the very fact that you think one way and we think another perhaps means that we need to clarify the section, because we all want to do the same thing. The issue is one of tightening up the language.

Mr Home Robertson: I want to address reviews and appeals, which are dealt with in sections 73 to 77. Under schedule 2, the Executive will have a duty to appoint the Scottish charity appeals panel. How can that panel be perceived as independent if its members are appointed by ministers? A similar point was covered earlier, but let us address the appeals panel specifically.

Johann Lamont: In appointing panel members, ministers will have to follow the Nolan principles, guaranteeing independence. What is important is how panel members act once they are appointed; it is also important that the panel scrutinises cases in a way that is independent of OSCR and the charity involved. Ministers may appoint, but they cannot direct. Under the Nolan principles, a panel member taking on that responsibility would be charged with acting independently.

11:45

Mr Home Robertson: Fine. So the Executive would appoint an independent body. Is there any risk of claims against OSCR if appeals are upheld? If that were to happen, who would indemnify OSCR?

Johann Lamont: I do not know whether there is a risk of claims; the intention is that we would not expect the appeals panel to award costs, but I do not know whether people could then pursue the matter elsewhere. The appeals panel is designed to be a simple and cheap way to appeal for those who are affected by OSCR’s decisions. Although charities and trustees might wish to take legal advice, it is intended that that will not be necessary and it should therefore be possible to appeal without incurring large costs. There is also recognition that OSCR operates in the public interest and in the interest of the charitable sector,

so such matters will not be seen as conflicts, and conflict might be implied if costs or compensation were sought.

Mr Home Robertson: I raise the point because there is a possibility that an organisation might apply to OSCR, be turned down, suffer losses as a consequence and then go to appeal, which might be upheld. In such a case, there could be an argument about losses that had occurred in the intervening period. That is something against which OSCR might need to be indemnified. I ask the minister not to worry about that just now, but it may be something that—

Johann Lamont: The suggestion has been made that a non-ministerial department might be covered, but we might want to explore the technicalities further.

Mr Home Robertson: Okay.

Should third parties be able to appeal decisions by OSCR?

Johann Lamont: The appeals panel is designed to give those who are directly affected by OSCR’s decisions a simple, cheap and accessible way to appeal. Third parties who wish to challenge OSCR’s decisions will be able to do so through the existing avenue of judicial review or, if they believe that criminal wrongdoing is involved, they could report the matter to the police. The appeals panel is concerned with the relationship between the charity and OSCR and it provides a way for the charity to appeal. The charity has the right to appeal because OSCR’s decision will have an impact on it. Other people may have opinions on that, but we already have structures that allow them to express their views and pursue the matter.

Mr Home Robertson: On a related point, will there be a mechanism for public notice of applications for registration as a charity? My question goes back to another part of the bill, but the point is related because there are rare occasions on which something controversial is put forward as a charity. I found myself reading Hansard of 8 November 1988, when the then MP for East Lothian—I cannot remember who he was—raised questions about a particular charity. Under the system at that time, there was no way to challenge registration as a charity. The concern was about the Atlantic Salmon Conservation Trust (Scotland)—I will not go into that now, but occasionally there are controversial applications and there is a case for notifying the public that an application has been made and for allowing people to make representations.

Johann Lamont: First, the register will be public. I know that I am talking about the next stage, but it is significant that the register will be public. Secondly, on the specific point that you make, OSCR will have to devise guidelines and so

on and it may be that we will want to reflect on the issue at that stage. We are saying that OSCR will have to make decisions, as we identified earlier, in relation to the public benefit test, charitable purposes and so on. Those decisions will have to be transparent and open, so I expect that OSCR will perhaps consider whether there should be a process of notification. I am not sure how the process would work if someone had information that would affect a transparent decision that OSCR had made, but we might ask OSCR to reflect on the matter.

Mr Home Robertson: I would be grateful if you could reflect on it as well. You understand the point; obviously, a body that applies for charitable status will want to put the best possible spin on their case, but someone else may well be aware of other factors that OSCR should take into account, and there needs to be some mechanism to allow that information into the system.

Johann Lamont: I suppose, though, that the granting of charitable status is not a once-and-for-all opportunity. OSCR might deem an applicant a charity based on the information that it had. However, after that, somebody might come along with evidence that suggested that the applicant had misled OSCR or was operating in a way that they should not. OSCR would have power to act on that basis.

Linda Fabiani: The minister will be glad to know that we are nearly at the end of the session—I think that I am the last member to ask questions.

We have heard concerns about differences in how authorities apply provisions on public benevolent collections and fundraising. Should local authorities have a duty to follow guidelines from OSCR, to obtain consistency?

Johann Lamont: We are always in favour of consistency, provided that it is matched by not seeking uniformity when that would be inappropriate. After consultation last summer, the bill was strengthened to include a duty on local authorities to have regard to guidance that OSCR issues on public benevolent collections or goods collections. That is intended to improve the consistency with which such collections are regulated. That in itself will be sufficient.

I understand that if an authority has to have regard to guidance, it must explain any departure from guidance. Nevertheless, it is important to have that wee bit of flexibility, because people operate in different environments in different parts of the country. I am happy to have that flexibility while recognising that we expect authorities to have regard to standards.

Linda Fabiani: The financial memorandum estimates that a typical local authority receives 100 applications a year, which cost it £500—that is

a fiver a throw for an application. The City of Edinburgh Council felt that that was an underestimate. Where did the information for the financial memorandum come from?

Johann Lamont: The figure in the financial memorandum was based on numbers that several local authorities provided in response to a request that the Executive made to all local authorities. The averages from the figures that were provided were of 100 applications per year and of 20 minutes per application. I am aware that the City of Edinburgh Council has said that it processed 250 to 300 applications per year. That is much higher than the figure of 122 that it provided us with.

Linda Fabiani: Section 86 is on designated national collectors. Subsection (3) of that section says:

“OSCR must publish any criteria specified under subsection (1)”,

which are the criteria for obtaining and retaining designation as a designated national collector. Will ministers have input into those criteria? Will they be brought to the Parliament or a parliamentary committee?

Richard Arnott: If my memory serves me, when OSCR publishes the criteria that it will use, that will in effect be like its guidance. OSCR will consult on whether people agree with the criteria, which will not be set out in statute.

Linda Fabiani: Should the criteria come before the committee?

Johann Lamont: I suspect that we could not prevent the committee from considering things that it wants to consider and that it will act accordingly.

The Convener: I will ask about charities that are not regulated in Scotland but which collect money here. The committee has heard evidence from many people in the voluntary sector who have expressed concern about a possible loophole in the bill, because some organisations will be able to fundraise in Scotland but will not be regulated by OSCR, as long as they have no premises in Scotland. Many people in the sector believe that that is unfair and are concerned that a loophole might need to be addressed. I am interested in the minister's comments.

Johann Lamont: The fundraising regulations cover bodies that are not charities. However, on the broader point about charities that fundraise in Scotland but which will not be regulated in Scotland because they do not have premises here, such charities will be obliged to say how and where they are regulated. They will need to say, for example, “We are a charity that is regulated in England and Wales.” They will be able to provide that information to folk who sought it from them.

The Convener: I suppose the sector is concerned about adverts that sometimes appear on television or on billboards advertising the work of a charity. People give money to the charity in the belief that the money will, for example, address issues of animal welfare or children's rights in Scotland, but they then discover that none of that money will be spent in Scotland. There are questions about accountability in respect of that money and such situations are at the heart of why the Executive has introduced the bill. We wanted to make regulation and accountability of charities transparent.

Johann Lamont: The first point is that it is obviously up to individual charities to decide where they spend their money. When people give money to a charity, they can judge how much information they have about where they can expect their money to be spent. I think that we all probably donate to charities when it is evident that they will not spend the money in Scotland. Charities that spend their money outside Scotland will be subject to the same provisions as other charities are when fundraising. However, the bill will allow OSCR to require a charity to change its name if OSCR feels that the name is misleading.

For example, if a charity's name created the impression that it was raising funds for poorly treated dogs in Scotland but, in fact, no such dogs in Scotland benefited from the funds, OSCR could take up that issue. However, if a charity pitched itself as being one that raised money for animal welfare and was doing that, the onus would be on donors to ensure that the charity was doing what they thought it was. I suppose that OSCR's test will be whether a charity presents itself in a misleading way, which would be a reasonable responsibility for OSCR.

The Convener: I have only another couple of questions about finance. The Finance Committee has completed its report, which was given to the Communities Committee only last night. The Finance Committee has concerns about the significant costs of the bill and the fact that the bill has come about because of two rather well-publicised cases of indiscretion within the charity sector. Given that the bill was to a degree inspired by those cases of impropriety, will there in the future be a possibility that any new regulatory regime will be able to recoup any money that is lost through such impropriety?

Johann Lamont: I will perhaps ask one of the officials to deal with the second question. There must be a balance; I acknowledge that two well-publicised cases rang alarm bells for people in the charity sector and beyond and that that had an impact on charitable giving in the short term. However, we know that huge amounts of work

were done by bodies in the sector to redress the situation and to rebuild confidence.

The bill is not driven by crisis. In my view, people had been talking about such a bill for a long time. The two instances to which you referred alerted us to the fact that we needed the bill. We had to grapple with difficulties, but the bill is about a far broader benefit, which is that bodies that are deemed to be charities will be in tune with what people in Scotland feel charities should be. Things should not be going on in the charity sector that sap people's confidence in the important role that the sector plays. We must get the balance right. We should not imply that there is a terrible crisis and that, if we do not get the bill through, everybody's money will be put in somebody's hip pocket and they will head off down the road—that is not how the sector operates. As I said, the charitable sector makes a huge and significant contribution not just to delivering services, but to the broader well-being of communities in Scotland. That said, I ask Richard Arnott to say whether there is a view on the specific question about recouping money.

12:00

Richard Arnott: I will try. We have to accept that, no matter what laws are set up, we can never stop people breaking the law. It is also worth emphasising that we are trying to set up a preventive regime that will improve transparency in the sector and provide wider powers for OSCR to take action when necessary. For instance, the bill provides for OSCR to have increased powers of inquiry and action on bodies that are connected to charities—we talked earlier about those arm's-length bodies.

Those powers, had they existed, may well have assisted in preventing some of the cases that have happened to date. It would not be wise to say that we can prevent such impropriety happening or that we can recoup any of the moneys that were lost. We are trying to improve public confidence in the charitable sector by preventing problems like that from happening in the future.

The Convener: My final question—based on the Finance Committee's report—relates to the differing evidence that this committee and the Finance Committee heard about the costs that the new regulatory regime in Scotland will place on Scotland-based charities. Anne Swarbrick gave evidence to both committees. She suggested that a significant cost would result to Scotland-based charities in trying to defend their charitable status. However, SCVO said that it was less certain that there would be such costs. As there seems to be a divergence of views, what is the minister's view of the conflicting evidence that the Finance Committee and this committee received?

Johann Lamont: I am content that the financial memorandum identified the costs to the extent that it was possible to do so. From the small example that the City of Edinburgh Council's evidence raises, we can see how such a divergence from the figures that the Executive was given could be created. The one obvious difference relates to the impact on the cultural bodies—the national collections institutions. When minds were concentrated and we started to think about the costs, a broader picture of which we had not been aware until that point began to emerge.

I am content that the financial memorandum gives a proper estimate of the costs. As OSCR develops, the dialogue between it and Parliament will provide the opportunity for OSCR to highlight issues in its reports to Parliament, including the issue of its resources not matching what it seeks to do. It is important to stress the direct relationship that OSCR will have with Parliament in its reports to Parliament.

The Convener: I think that the concern that some witnesses expressed to both committees was not so much about the costs of regulation that the regulator will bear, but the costs to individual charities of complying with the new regulations. Both committees heard conflicting evidence on that. The underlying concern of the witnesses is that, although the new regulatory burdens are welcome, they could create financial difficulties, particularly for smaller charitable organisations.

Johann Lamont: We should always have in mind that the regulatory framework is proportionate—it will not work against the interests of the sector. In the making of all regulation, however, we must be aware of impacts. If a disproportionate impact is felt by smaller charities—that is not the bill's intention—I would expect OSCR to revisit the provisions. Indeed, if that sort of impact results from creation of the regulatory framework, some of the principles of the bill will have been undermined. After all, the bill is about supporting the sector and ensuring that it does what we need it to do, but transparently and openly.

Christine Grahame: I return to Anne Swarbrick's evidence. She refers to what she calls "The repeal of case law".

We know that OSCR is starting out with a clean slate. The presumption is that a charity must meet the statutory charity test that is set out in the bill. She goes on to make the serious point that

"The Charity Commission will form their guidance by reference to the existing law, but OSCR's guidance would have no such foundation and would be open to attack in court because of the lack of any legal basis."

That was with regard to the public benefit test. She then says:

"Far from being authoritative, no-one (including OSCR) will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session."

That seems to me to be fundamental, and I would like your legal team to answer that point.

Johann Lamont: I shall make one point, but I hope that if I have it wrong you will expand on what you mean. The guidance that is to be developed by OSCR will have to be followed, unless it is deemed in court to be wrong.

Catriona Hardman: It will depend on whether the guidance is reasonable and whether it falls within the terms of the statute. As was said earlier, although we will not have the basis of case law, the courts would—in the absence of any Scottish case law being available—look at case law in other jurisdictions in particular circumstances. There is probably a policy issue here, which is not really for me to answer, about how OSCR will go about making its guidance. I assume that it would examine existing guidance from the Charity Commission for England and Wales, as well as basing its own guidance on the new legislation. There is information on certain things in guidance, and OSCR would be able to consider examples of existing charities when deciding on public benefit issues.

Johann Lamont: It would be fair to say that there would be an expectation that OSCR would refer to case law from other places, but that it would not be bound by it.

Christine Grahame: No. Such case law would be persuasive but not precedent. My point is that the concern is about there being tests of that guidance. It will be tested by charities and perhaps rejected. The point that is being made in written evidence—I am not saying that I agree with it, but it is serious—is that

"Far from being authoritative, no-one (including OSCR) will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session."

Is that right or wrong?

Richard Arnott: It is wrong.

Catriona Hardman: It is partially right, in that it is—

Christine Grahame: There are two legal opinions here.

Richard Arnott: Mine is not a legal opinion.

Catriona Hardman: We do not have a real basis of charity law here at the moment. The legislation is new and there is new legislation in England as well, and English case law will

obviously change. You either have that or you say that all existing English case law is to be—

Christine Grahame: That is not my point. I am just asking you to say whether or not it is true that

“no-one will know whether that guidance should be followed until it has been tested by the Scottish Charity Appeals Panel and the Court of Session.”

Is that right or wrong?

Johann Lamont: I would have thought that, if somebody were to issue guidance that was drawn from legislation, people would have to follow that guidance. If somebody decided not to follow that guidance, that would be tested in court, but one does not wait until something is tested in court to decide whether or not to follow the law or the guidance that is drawn from it. In regard to other legislation, that would not make much sense.

Christine Grahame: So Anne Swarbrick is right?

The Convener: I think that—

Christine Grahame: I just want to know whether Anne Swarbrick is right or wrong.

The Convener: I think that the minister has answered the question and has made it quite clear that she does not think that it is as straightforward as a simple yes or no answer. Officials and all members of the committee will need to reflect on those points.

There are no further questions, so I thank the minister and her officials for attending. I know that you were scheduled to be here for just over an hour but you have been here for two hours. We are grateful to you for your full evidence.

Johann Lamont: I would not want to hear members' views brought back to me if I had dared to try to leave early.

12:09

Meeting suspended until 12:15 and thereafter continued in private until 12:56.

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