COMMUNITIES COMMITTEE

Wednesday 4 May 2005

Session 2

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COMMUNITIES COMMITTEE
14th 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 ALSO ATTENDED:

Johann Lamont (Deputy Minister for Communities)
Christine May (Central Fife) (Lab)

CLERK TO THE COMMITTEE

Steve Farrell

SENIOR ASSISTANT CLERK

Katy Orr

ASSISTANT CLERK

Jenny Goldsmith

LOCATION

Committee Room 6

Scottish Parliament

Communities Committee

Wednesday 4 May 2005

[THE CONVENER *opened the meeting at 09:31*]

Charities and Trustee Investment (Scotland) Bill: Stage 2

The Convener (Karen Whitefield): I open the Communities Committee's 14th meeting of 2005. I remind all who are present that mobile phones should be turned off.

The first and only agenda item is consideration of the Charities and Trustee Investment (Scotland) Bill at stage 2. I welcome the minister, her officials and Christine May, who has joined the committee for today. Members should have a copy of the bill, the marshalled list of amendments and the groupings list for day 3, which was issued on Friday.

Members may be aware that I received a letter from the Deputy Minister for Communities yesterday about our discussion of misconduct and mismanagement as it relates to section 103 and about related amendments. Copies of that letter were sent to all committee members yesterday.

Section 70—Decisions

Amendments 107 and 108 not moved.

Section 70 agreed to.

Section 71—Notice of decisions

The Convener: Amendment 42, in the name of the minister, is grouped with amendments 43 to 45.

The Deputy Minister for Communities (Johann Lamont): The amendments relate to the notification of decisions and the appeals process for decisions that are made by a person to whom the Office of the Scottish Charity Regulator's functions have been delegated under section 38.

Amendment 42 will make it clear that notification of a decision that is listed in section 70 and which was made by a person to whom OSCR's functions have been delegated must be given to OSCR as well as to the person about whom the decision was made. That will keep OSCR aware of action that is being taken and of the possibility that it will have to review a decision.

We expect any body with delegated authority to liaise closely with OSCR over regulatory action that is taken under powers in the bill. A memorandum of understanding will be drawn up about a delegated function generally. Nevertheless, amendment 42 will formalise the requirement to inform OSCR when any specific decision that is subject to review is made.

Amendment 43 is consequential on amendment 42. It will ensure that the duty to provide information on the appeals process applies only to the notice that is sent to the person who is subject to the decision and not to the notice that is sent to OSCR.

Amendments 44 and 45 will make it clear that a delegated decision to suspend a charity trustee under section 31(4) can be appealed to the Court of Session and that the court has the same power over such a decision as it has to quash OSCR's decisions and to direct the person who took the delegated decision to take such action as the court thinks fit.

I ask the committee to support the amendments in the group and I move amendment 42.

Amendment 42 agreed to.

Amendment 43 moved—[Johann Lamont]—and agreed to.

Section 71, as amended, agreed to.

Sections 72 to 74 agreed to.

Schedule 2 agreed to.

Section 75—Appeals to Scottish Charity Appeals Panel

The Convener: Amendment 160, in the name of Christine Grahame, is grouped with amendments 78, 109 and 110. I point out that if amendment 160 is agreed to, amendments 78 and 109 will be pre-empted. If amendment 160 is not agreed to and amendment 78 is agreed to, amendment 109 will be pre-empted.

Christine Grahame (South of Scotland) (SNP): Amendment 160 seeks to delete section 75(6), which states:

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

In law, it is usually the position that success can lead to an award of expenses, although a court or tribunal can vary that award, depending on matters such as the extent of the success, what has been heard in evidence and how the parties have behaved. It is not necessary to insert in the bill an explicit statement that the panel may

"award expenses incurred as a result of participation in the appeals process",

as amendment 109, in the name of Cathie Craigie, seeks to do—as does amendment 78, in the name of Donald Gorrie—because that is the usual position in law.

The idea that OSCR should pay compensation is superficially attractive, but I hope that Donald Gorrie and Cathie Craigie will forgive me for saying that the way in which they have framed their proposals is clumsy. What would happen if a charity had a partially successful appeal and, even though OSCR had operated and behaved appropriately, the charity sustained losses as a result of OSCR's actions? How much of those losses—25 per cent, 50 per cent or 100 per cent—should OSCR cover? One could argue that a charity was unable to do street collections because the fact that it was being investigated by OSCR meant that people stopped putting money in the collecting tins. How on earth could one quantify such losses? Even if one overcame those hurdles and managed to quantify the losses, would there be a subsequent compensation hearing? If so, when would it take place? I do not think that it is appropriate to put together the awarding of expenses and the payment of compensation for some of the reasons that I have outlined, which are fairly substantial.

I feel that there might be remedies elsewhere; I have no doubt that the minister will address the issue. If OSCR acted in bad faith, there might be a case for bringing a damages action in a civil court. If OSCR behaved negligently towards a charity, did not investigate properly or acted in breach of its regulations, I think that a civil action could be brought. There would have to be a separate hearing, which would take time to prepare for. One would have to plead fault, quantify the degree of fault and say what OSCR ought or ought not to have done. One would have to have pleadings and answers to those pleadings. Productions would have to be lodged and evidence heard. That might not be a minor matter. We might be talking about 100,000 quid, not 500 quid.

There are practical difficulties with what Donald Gorrie and Cathie Craigie are proposing. That is why I oppose amendments 78, 109 and 110. I ask members to support amendment 160, which seeks simply to delete the provision that says that expenses cannot be awarded, so that the rule that expenses are usually awarded when a case is successful, subject to the court's discretion, is followed.

I move amendment 160.

Donald Gorrie (Central Scotland) (LD): This is an important area and one that the committee should explore with the minister. I lodged my amendment 78 with a view to ensuring that the matter is properly discussed. Two of my colleagues also lodged amendments on the matter, so it will be discussed thoroughly.

There are two issues: expenses and compensation. What I—and, I think, my colleagues—seek to achieve is the proverbial level playing field, so that financial considerations do not prevent small charities from arguing their case as well as they can if there is an argument between them and OSCR. The process should be simplified and if a charity has a good case, it should not expect to come out badly in financial terms.

As Christine Grahame said, OSCR's well-intentioned efforts, if based on faulty information, can do great harm to charities. Charities are rather like unfortunate ladies in the Victorian era; if ladies ever lost their good name, they were in big trouble, and charities are the same. If people get the impression that there is something dubious about a charity, great harm is done, however wrong that impression might be. We want to ensure that OSCR does not enter into disputes or take action against charities unless it is sure of its grounds.

My amendment has two aims: to ensure that neither the charity nor OSCR acts unreasonably; and to ensure that the financial considerations of arguing the case are set aside. However, there is substance in the point that Christine Grahame and others have made, which is that the process that I suggest is too laborious. I do not intend to press my amendment, but it is important for the minister to tell us the Executive's views on the matter. I ask her to tell us the Executive's aim and to confirm whether there will be further discussion to make the arrangements between OSCR and charities of various sizes as clear and fair as possible.

Cathie Craigie (Cumbernauld and Kilsyth) (Lab): Amendments 109 and 110, in my name, have the support of the Scottish Council for Voluntary Organisations. Donald Gorrie highlighted the fact that we have been contacted by a number of organisations that have concerns about this aspect of the bill. There was unanimous agreement that the appeals process is right. It is thorough and there are checks and balances to allow organisations access to an affordable appeals process. However, if things go further than that, the exercise can be a costly one for a small organisation. As Donald Gorrie pointed out, people will go a long way to ensure that their organisation maintains its good name and the public's respect.

I have listened to the arguments that have been made by other organisations that have contacted me since I lodged my amendments, and I have listened to Christine Grahame's arguments this morning, which were well put. I remind the minister of the committee's views on this aspect of the bill. We want the Executive to consider in detail whether costs should be paid in the event of a successful appeal. Our conclusion was based on the evidence that we were given on the matter. That might not have been a huge part of our

evidence-taking during our consideration of the bill, but there are certainly concerns.

Like Donald Gorrie, I will be happy not to press my amendments if the minister can confirm that the Scottish Executive has considered all sides of the debate and is confident that the current wording is right or, otherwise, can confirm that it will lodge appropriate amendments at stage 3.

09:45

Mr John Home Robertson (East Lothian) (Lab): I am grateful to colleagues for raising a rather interesting issue. It is not altogether surprising that a lawyer should be enthusiastic about the prospect of litigation and associated expenses—

Christine Grahame: Perhaps some day, but I have not been in practice for six years.

Mr Home Robertson: Sorry. That was an unworthy thought.

Section 75(6) currently states:

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

By deleting that subsection, Christine Grahame's amendment 160 would presumably mean that the converse would apply, so expenses could be awarded. However, if expenses were to be awarded against OSCR, who would pay those expenses and how would they be paid? Would OSCR have a budget for that? Would there be personal liability? That perhaps takes us into the group of amendments that deal with misconduct and mismanagement. If the regulator gets himself or herself into a position in which costs arise, could he or she be personally liable for those costs or will they be covered by some other money? That is a fair enough point.

If OSCR or any other regulator pursued an organisation unreasonably in a way that gave rise to costs, I suppose that the case that has been outlined could be made. That is no doubt what Christine Grahame and other colleagues have in mind. However, we need to tease out the issue to find out both the extent of OSCR's liability and who would ultimately pay the costs. I would appreciate some help from the minister on the issue.

Johann Lamont: Members are right that the issue that the committee and others have flagged up is important. I am not quite sure that we have reached a conclusion yet, but the issue is certainly worth exploring further. However, I suspect that if things got to the stage of the regulator having adopted the kind of role to which John Home Robertson referred, the matter would need to be decided by courts at a level much further up the hierarchy than the Scottish charity appeals panel.

The appeals panel is designed to provide a cheap and straightforward means whereby a charity might appeal a decision that has been made by either OSCR or a body to which OSCR has delegated powers. It was envisaged that the appeals process would be simple and quick, with many cases, for example, being dealt with by correspondence alone.

The decision was taken to prevent the panel from awarding costs to parties in order to facilitate the provision of a simple, quick and inexpensive system. Requiring the panel to consider awarding expenses would considerably lengthen and complicate the process. Matters would only be exacerbated if the panel were also required to consider compensation.

If the proposed changes were made, we would also need to set out either in regulations or in the bill how the panel would decide what level of expenses or compensation to award and how any consultation that might be required would impact on decisions. In addition, any decision on expenses or compensation that was made by the panel would itself need to be subject to appeal. As I have already pointed out, the result would be a much more drawn-out, complicated and expensive process for all involved and an increasingly less flexible appeals panel.

I am concerned that amendments 78, 79 and 110 would allow the panel to award costs and compensation to the appellant but not to OSCR. Such a move would take us into the complicated issue of how financial loss and the level of compensation should be assessed. There might need to be an assessment of subjective issues, such as how charitable donations have been affected by the decision. In some cases, that could provide an opportunity for vexatious or frivolous complaints and for protracted procedures, which would impact on the panel's workload and greatly increase administrative costs. Indeed, OSCR's actions at earlier stages could also be inhibited.

However, I recognise that we need to wrestle with the issue of expenses and ensure that we provide the level playing field to which Donald Gorrie referred. I recognise the strength of the committee's feelings on the matter and I undertake to consider the issue again before stage 3. In the meantime, I urge members not to support the amendments.

Christine Grahame: I hear what the minister says, but I hope that she will tease out the issues of compensation and expenses, which are completely distinct issues. Industrial tribunals operate in similar circumstances and do not generally award expenses to people other than in special circumstances.

The issue is that there should be discretion. The basic rule might be that, because of the kind of investigation that OSCR conducts and how it deals with such investigations, through paperwork and so on, expenses will not generally be paid. However, there should always be discretion in the appeals procedure for expenses to be awarded in certain circumstances if that is shown to be appropriate. As I say, the position at other tribunals is that there is that flexibility. Such flexibility even exists in the civil courts. In general, success gives one expenses, but that is not always the case—it depends on the circumstances that arise. I would like to see flexibility that would operate for OSCR and for the appellant.

In the light of the minister's comments and the fact that stage 3 is ahead and we will want to return to the matter, I seek to withdraw my amendment at this stage.

Amendment 160, by agreement, withdrawn.

Amendments 78, 109 and 110 not moved.

The Convener: We must now agree to section 75, but before we deal with that, I will allow Mrs Scanlon to comment as she has indicated a desire to speak.

Mary Scanlon (Highlands and Islands) (Con): I am happy to agree to section 75, and we will discuss it further at stage 3, but can the minister and her advisers give the committee some idea of the costs involved? The costs outlined in paragraphs 158 and 159 of the financial memorandum are based on a system without compensation and so on. I would like to have some indication of what the costs would be if amendments similar to the ones that we have discussed are agreed to at stage 3.

The Convener: That will obviously be a matter for stage 3. We will have to wait and see whether such amendments are lodged and the outcome of the minister's deliberations.

Section 75 agreed to.

Section 76 agreed to.

Section 77—Appeals to Court of Session

Amendments 44 and 45 moved—[Johann Lamont]—and agreed to.

Section 77, as amended, agreed to.

Sections 78 to 81 agreed to.

Section 82—Regulations about fundraising

The Convener: Amendment 46, in the name of the minister, is grouped with amendments 47, 51 and 54.

Johann Lamont: I am pleased at the support in the committee's stage 1 report for the provisions in the bill to regulate fundraising. Many would say that the provisions are key if we are to help to improve public confidence in giving to the sector. There is a need to make arrangements for fundraising as transparent as possible.

Amendments 46 and 47 are technical amendments that seek to ensure consistency in the provisions that deal with the information and identification that fundraisers are to provide. Provisions on all badges or certificates of authority are to be provided for in regulations under section 82, irrespective of whether they are used for general fundraising or public benevolent collections. However, under section 85(5)(d), local authorities may set conditions about the use of such means of identification for particular PBCs.

We have lodged amendments 51 and 54 in response to a suggestion from the Subordinate Legislation Committee that the reserve fundraising powers in section 82(2)(h) should be subject to the affirmative parliamentary procedure. Given that such powers would be used only if it was felt that self-regulation by the sector was not sufficient, I am happy to agree to make the power subject to affirmative parliamentary procedure to allow full consideration and approval of the provisions.

I move amendment 46 and ask the committee to support the other Executive amendments that relate to the regulation of fundraising.

Donald Gorrie: The collection system can go wrong in two areas. First, at a simple level, an unauthorised, dishonest individual can get hold of a collecting tin for some good cause or other and rattle it under people's noses in Princes Street or Sauchiehall Street. People could put money into the tin and he could walk away and drink it in the pub. Will the regulations prevent such activity?

Another more sophisticated area is where people in the street get members of the public to authorise direct debits for somewhat dubious charities that might not be all that they say they are. I find that incredible. Does the bill deal with those two matters?

Johann Lamont: On Mr Gorrie's first example, someone who tries to raise money by helping themselves to a collecting tin and pretending to be from a particular organisation would probably be committing a criminal act. OSCR could investigate the matter but, if such an offence were established, it would probably be a more straightforward case of fraud that the police could deal with.

OSCR would be able to investigate the second situation that Mr Gorrie highlighted, because it relates to an organisation's claims as a charity, its charitable purposes and its intent.

Amendment 46 agreed to.

Section 82, as amended, agreed to.

Sections 83 and 84 agreed to.

Section 85—Local authority consents

Amendment 47 moved—[Johann Lamont]—and agreed to.

Section 85, as amended, agreed to.

Sections 86 to 92 agreed to.

Section 93—Exercise of power of investment

10:00

The Convener: Amendment 48, in the name of Christine May, is in a group on its own.

Christine May (Central Fife) (Lab): Good morning. I remind the committee of my registered interests as a member of East Fife Supporters Trust, a board member of Community Enterprise in Strathclyde and chair of the Scottish Library and Information Council, all of which are either trusts or companies limited by guarantee that might apply to trusts for funding.

I assure the committee that amendment 48 is not intended to be a charter for those who would wish to avoid the bill's purpose, principles or ethos. I agree that diversification of interests is wholly appropriate and to be encouraged, but it is more relevant for some trusts than it is for others. The amendment would alter the wording in regard to diversification to:

"the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust."

I circulated a briefing document to members; further copies are available for those who did not get one. To summarise, the briefing document states that it is important for trustees generally to have regard to the need for diversification. However, the appropriateness of the amendment is particularly important for one kind of trust; namely, where proprietors of a family business have handed over a controlling interest in that business to a trust with the purpose of maintaining the business as an independent entity. That objective sits alongside a possible further objective of a trust of ensuring that any dividend income is used for charitable purposes.

An example in my constituency is the Russell Trust. The trust holds a major investment in Tullis Russell Papermakers in Fife, which employs some 540 people. The purposes of the trust deed are to run the company and to make sure that it remains independent. In fact, the company has subsidiary holdings in England and South Korea. Other such examples are contained in the briefing.

On precedents for the amendment, the existing legislation that deals with trustees' statutory investment powers is in section 6(1)(a) of the Trustee Investments Act 1961. In England and Wales, the provisions of the Trustee Investments Act 1961 were replaced by the Trustee Act 2000, which relates closely to the bill that the committee is now considering. The requirement for a trustee to have regard to the need for diversification of investments in that act applies in so far as it is appropriate to the circumstances of the trust.

I refer members to paragraph 93 of the policy memorandum. On powers of investment, the Scottish Law Commission's recommendation 172 of 1999 states at paragraph 2.31:

"in the exercise of their investment powers, trustees should have regard to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust".

I move amendment 48.

Scott Barrie (Dunfermline West) (Lab): I thank Christine May for lodging the amendment and for bringing this issue to the committee's attention. As one who was brought up in Glenrothes, I am well aware of the position of Tullis Russell as a major employer, although I am not as au fait with its management as is Christine May.

Amendment 48 seeks to correct an apparent anomaly in the bill. It is important for other such trusts that Christine May, as an MSP, has brought the matter to the committee's attention. I urge members to support the amendment.

Christine Grahame: I am a bit confused. Christine May's submission on amendment 48 states, with regard to Tullis Russell Papermakers:

"The Trust has been instrumental in promoting employee ownership of the company through buy-out of other family shareholders."

Does that refer to the purposes of the trust? How does that fit with the bill's section 8(2)(b) on public benefit, which states:

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

Will Christine May comment on those two points in due course?

The Convener: Christine May will get an opportunity to wind up the debate on amendment 48. At that time, she may wish to respond to all of the points that have been made. Has the minister any comment on this amendment?

Johann Lamont: I thank Christine May for bringing the issue to the committee's attention. As a result of her consistency in raising the issue elsewhere, people have been made aware of its importance.

Section 93(1)(b) will impose a duty on trustees of all trusts, not just charity trusts, to consider the need for diversification of trust assets when exercising the wider investment powers under section 92(2). That duty is not expressly qualified. In the Trustee Investments Act 1961 there is a statutory duty on trustees to consider diversification but it is qualified by the words:

"in so far as is appropriate to the circumstances of the trust".

When drafting section 93(1)(b), we favoured simple drafting and took the view that, if trustees were to be required to have regard to the need for diversification, it would be implicit that they would have to take into account the circumstances of the trust. However, concern has been expressed because the duty has not been expressly qualified. The type of situation that has given rise to concern is that in which someone wishes to set up a grant-making trust by gifting to the trust a large block of shares in a private company. It was felt that people may be deterred from doing so by the absence of an express qualification because of the possibility that the trustees might sell the shares on, which could have serious implications for the balance of control of the private companies.

The inclusion of amendment 48 will clarify the need to consider diversification of investment in the context of the trust's circumstances. Therefore, I am happy to urge the committee to support the amendment.

Christine May: I apologise for trying to answer out of turn earlier.

I will have to put my response to Christine Grahame's points in layman's language. My understanding is that the purpose of the Russell Trust bequest is to enable Tullis Russell Papermakers to be run by the employees in the main and to reinvest any moneys into the company so that it continues to maintain its independence. For that reason, other major shareholdings have been acquired over time and employees operate a share-ownership scheme, through which shares are dispersed once a year.

Christine Grahame asked me to comment on whether the promotion of employee buy-out is an unduly restrictive condition. I argue that it is not, because the public good could be served by the fact that Tullis Russell Papermakers is a major employer in Glenrothes. It brings huge employment not only to Glenrothes, but to the wider area and is therefore of benefit to the Scottish public in general through being a healthy business. I do not think that there is a restriction on anyone who wishes to have shares for the purposes of the trust, but the need to preserve the holding for the primary purpose of the trust—to operate the company—would probably restrict the purchase of large blocks of shares by speculative shareholders. Therefore, amendment 48 is entirely in keeping with the bill's purposes and would not contravene any other section of the bill or its ethos, which is to have charitable organisations that are clear, transparent, do not restrict others' access unduly and operate for the wider public good.

I intend to press the amendment. I am grateful to the minister and her officials for the consideration that they have given to my representations and those of others.

The Convener: The question is, that amendment 48 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Gorrie, Donald (Central Scotland) (LD)
Home Robertson, Mr John (East Lothian) (Lab)
Scanlon, Mary (Highlands and Islands) (Con)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS

Fabiani, Linda (Central Scotland) (SNP)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)

The Convener: The result of the division is: For 6, Against 0, Abstentions 3.

Amendment 48 agreed to.

Section 93, as amended, agreed to.

Section 94—Power to amend enactments

The Convener: Amendment 153, in the name of the minister, is grouped with amendments 161 and 154 to 156. I point out that, if amendment 153 is agreed to, amendment 161 will be pre-empted.

Johann Lamont: It has been suggested that the order-making power in section 94 is redundant because there is an equivalent order-making power in section 100. We have considered that suggestion and are satisfied that section 100 is sufficient for the purpose of amendments under sections 92 and 93—provisions on the extension of general powers of trustees and on the exercise of those powers.

Amendment 154 will delete the order-making power in section 94(1), which means in effect that all incidental, consequential or supplementary provisions that ministers consider necessary or expedient for the purposes of or in consequence of the bill can be introduced under section 100.

Amendments 154, 155 and 156 are consequential on amendment 153. Christine

Grahame's amendment 161 will become redundant if amendment 153 is accepted.

I move amendment 153.

Christine Grahame: I am not sure whether amendment 153 will make amendment 161 redundant, so I will speak to my amendment. I cannot see how amendment 161 will be made redundant by leaving out subsections (1) and (2) but not subsection (3), which states:

"Schedule 3 makes amendments consequential on those sections."

Can the minister explain how that is? In amendment 161, I am saying that amendments should be made by subordinate legislation only after consultation with such persons as are considered appropriate. It is appropriate that there be provision on the face of the bill for consultation whenever amendments are made. My point is simply about consultation.

Johann Lamont: Christine Grahame may want to clarify at stage 3 the issue that she has raised. The wording that she wants to introduce would be inserted in provisions that we want to delete. The issue that she is flagging up will have to be dealt with elsewhere.

Christine Grahame: That is fine. I will return to the matter at stage 3.

Amendment 153 agreed to.

Amendment 154 moved—[Johann Lamont]—and agreed to.

Section 94, as amended, agreed to.

Schedule 3 agreed to.

Before section 95

The Convener: Amendment 115, in the name of the minister, is in a group on its own.

Johann Lamont: Amendment 115 was lodged to allow Scottish charities in the future to join common investment or deposit funds—commonly, or not commonly, known as CIFs—that have been established in England and Wales. CIFs are schemes that allow charities access to a trust fund that is specifically for charities. They are a means by which a group of charities in England and Wales can pool funds for investment to gain the advantages of investing with a large, centrally managed fund that would not otherwise be available to them individually. CIFs allow charities to combine their investments to gain more financial power and economies of scale, with the expectation of earning more income.

Amendment 115 will give Scottish charities the power, assuming that there is nothing in their constitution that expressly prevents it, to join a CIF that has been established under a scheme by the Charity Commission in England and Wales.

In practice, however, Scottish charities will not be able to join CIFs until the legislation in England and Wales—the Charities Act 1993—has been amended so that CIFs are permitted to be available for access to Scottish charities. The Executive would therefore not expect to commence the new section until the appropriate amendments had been made to the 1993 act by the Home Office's Charities Bill. Members will be aware that that bill has now fallen, so participation in the schemes will not be available to Scottish charities until a similar bill is passed. That is obviously a matter for the UK Government, but we hope that the bill will be revived without too much delay after the UK election.

Amendment 115 is an enabling amendment. I ask members to support it so that the provisions will be available for use at an appropriate time in the future.

I move amendment 115.

Amendment 115 agreed to.

Sections 95 and 96 agreed to.

Section 97—Transitional arrangements

10:15

The Convener: Amendment 116, in the name of the minister, is grouped with amendments 117 and 118.

Johann Lamont: During stage 1, it became apparent that there was a deal of confusion as to which bodies were to be covered by the transitional provisions in the bill. The Subordinate Legislation Committee also expressed concerns that section 97 will provide ministers with open-ended powers to exempt from the terms of the act existing charities for an unlimited period, and it recommended that the Executive consider adding a cut-off date for exercise of ministers' powers. Amendment 116 clarifies which bodies are covered by the provisions and introduces time limits that will apply to exemptions granted.

New subsection (2A), which will be inserted by amendment 116, will allow ministers to disapply section 3(3) by order by up to a maximum of 18 months. Section 3(3) specifies the information that must be set out in the register for each charity. Disapplication of that section will allow OSCR time to gather the necessary information on each charity before it has to comply with section 3(3). The new subsection will also allow ministers to provide by order that any unregistered charity, or type of unregistered charity, may continue to refer to itself as a charity in Scotland for a period of 12 months following commencement of the section,

despite its not being entered in the register. That will allow foreign charities and non-Scottish UK charities that have a substantial presence in Scotland time to apply to OSCR to be entered in the register. It will also allow foreign charities or non-Scottish UK charities that do not intend to register time to change the way in which they refer to themselves in Scotland.

Finally, the new subsection will allow ministers flexibility to provide that, during the 12-month period in which unregistered charitable bodies are permitted to refer to themselves as charities, other legislative enactments can still apply to those bodies, subject to any specified modifications, as if they were in fact entered into the register. For example, it could allow such bodies to continue to benefit from rates relief under the Local Government (Financial Provisions etc) (Scotland) Act 1962.

As amendment 116 will remove the power of Scottish ministers to make such further transitional, transitory or savings provisions as they consider necessary or expedient as a result of the act, amendment 117 will re-insert that power into section 100.

Amendment 118 will amend section 104 so that Scottish ministers will be able to specify in a commencement order when the transitional arrangements will come into force, instead of the provisions in the section coming into force on royal assent.

I move amendment 116.

Christine Grahame: I have a couple of questions. First, why did you decide on the time periods? I appreciate that a time has to be set, but which groups did you consult in coming to your decision? Secondly, I take it that if, after a period of 12 months or 18 months, OSCR takes the view that a body is not a charity, such a decision will not be retrospective. Is that the case?

Johann Lamont: On the first point, the times were discussed with OSCR and were considered reasonable. On the second point, we are moving to the new model, so at that stage a body would either be a charity or not.

Christine Grahame: Could you clarify that a decision on a body's charitable status will not be retrospective? If a body continues to refer to itself as a charity, and OSCR then takes the view that it is not a charity, I take it that that would not be retrospective and that there would therefore be no clawback of rates relief, for example.

Johann Lamont: No. If that were the case, there would be no transitional arrangements.

Christine Grahame: There could still be transitional arrangements.

Johann Lamont: My understanding is that OSCR's decision would not be retrospective.

Amendment 116 agreed to.

Section 97, as amended, agreed to.

Sections 98 and 99 agreed to.

Section 100—Ancillary provision

Amendment 117 moved—[Johann Lamont]—and agreed to.

Section 100, as amended, agreed to.

Section 101—Orders, regulations and rules

Amendment 111 not moved.

Amendments 49 to 51 and 155 moved—[Johann Lamont]—and agreed to.

Amendment 112 not moved.

Amendments 52 to 54 and 156 moved—[Johann Lamont]—and agreed to.

Section 101, as amended, agreed to.

Section 102 agreed to.

Schedule 4

MINOR AND CONSEQUENTIAL AMENDMENTS AND REPEALS

The Convener: Amendment 55, in the name of the minister, is grouped with amendments 56 to 60.

Johann Lamont: The amendments in the group are technical. The bill provides that Scottish recreational charities will be covered by the purposes that are listed in section 7, rather than by reference to the Recreational Charities Act 1958. However, the 1958 act continues to extend to Scotland for certain tax purposes. Amendments 55 and 56 delete the reference in section 6(2) of the 1958 act to the Local Government (Financial Provisions etc) (Scotland) Act 1962, which is a non-income-tax-related enactment that has a devolved purpose. The bill amends the 1962 act so that that act will no longer interpret the meaning of "charity" in accordance with the law of England and Wales, but will do so in accordance with the new Scottish charity test. The references to the 1962 act in the 1958 act are therefore unnecessary.

Amendment 57 is necessary to amend an incorrect reference in paragraph 2 of schedule 4. Amendments 58 to 60 make further necessary consequential amendments to section 79 of the Sex Discrimination Act 1975, to deal appropriately with charitable educational endowments.

I move amendment 55.

Donald Gorrie: The minister will be aware of concerns about amateur sports clubs. Will she give us an assurance that the change from the approach that is used in the Recreational Charities Act 1958 and the 1962 act to the approach that is taken in the bill will not disadvantage sports clubs and will not inadvertently cause some worthy local clubs to lose their charitable status?

The Convener: As no other member has indicated a desire to speak, I invite the minister to wind up. [*Interruption.*] I ask that members indicate clearly whether they wish to speak about a particular group of amendments because it is very difficult for me to chair the meeting properly if they do not. All the amendments in the group were lodged and made public on Friday. Members have a responsibility to make the time to read the amendments and figure out how they affect the bill.

Johann Lamont: The amendments are technical and it is certainly not the Executive's intention to introduce technical amendments that create disadvantages elsewhere. I recognise the broader issue that Donald Gorrie flags up and we have committed ourselves to looking at that further in relation to groups or bodies that provide recreational sporting activities. If it were to be established that these technical amendments impinged in any way, we would revisit the matter.

Amendment 55 agreed to.

Amendments 56 to 60, 137 and 61 to 64 moved—[Johann Lamont]—and agreed to.

Schedule 4, as amended, agreed to.

Section 103—General interpretation

The Convener: Amendment 157, in the name of the minister, is grouped with amendments 113 and 79. If amendment 157 is agreed to, I cannot call amendments 113 and 79. If amendment 157 is not agreed to and amendment 113 is agreed to, amendment 79 cannot be called because of pre-emption.

Johann Lamont: The Executive amendment in this group is in response to concerns that were raised with the Executive by the National Trust for Scotland regarding the difficulties that it would have in identifying its charity trustees using the definition in the bill. The NTS has an extremely complicated governance structure and it is concerned that the definition as drafted would cast too wide a net in its organisation. I understand that the amendments in the name of Donald Gorrie also attempt to deal with those concerns.

Amendment 157 uses the same definition of charity trustees that is used in England and Wales, which is those in

"general control and management of the administration",

and applies it to all charities whatever their legal form, including Scottish charitable incorporated organisations. Using that form of words has the advantage of being a tried and tested approach. It will provide a flexible definition that describes broadly rather than narrowly those that are trustees, so that it does not prejudice charities with complicated structures. It is therefore capable of dealing with the NTS difficulties as well as with any as yet unknown difficulties with other existing charities whose constitutions contain unusual governance arrangements. The amendment includes SCIOs so that the general definition of trustee applies throughout the bill.

10:30

Section 50(2)(b) makes it clear that any Scottish charitable incorporated organisation's constitution must provide for the appointment of trustees who are charged with the general control of an SCIO's administration. Application of the general definition to SCIO trustees makes it clear that, in all cases, being a trustee involves management as well as control.

Amendment 113, in the name of Donald Gorrie, also imports the English law definition of charity trustee. However, the main difficulty with that amendment is that it does not apply to charities that are SCIOs and therefore creates a less flexible definition than that set out in amendment 157. The effect of amendment 113 would be to ensure that the trustees of SCIOs would continue to be defined in terms of section 50(2)(b). It therefore artificially distinguishes between SCIO trustees and all other trustees and is in effect a halfway house between the existing provisions and amendment 157.

We also do not believe that amendment 79 deals satisfactorily with all the issues that arise from the National Trust for Scotland's structure. It could mean that all members of any committee or group with a delegated function would be charity trustees. That could mean that the duties of charity trustees would attach to a large number of people even though many of them will have a limited remit, which would make the situation impractical from an administrative point of view. In addition, it fragments the responsibilities of trustees and thus undermines the value of this concept.

I recognise that all the amendments in this group are wrestling with the same difficulty. I move amendment 157 and ask Donald Gorrie not to move either of his amendments.

Donald Gorrie: As the minister said, my amendments address the same issue as hers does, in that they concern those organisations that have a multi-tiered structure with a large supervisory body and a smaller executive

committee. The smaller body takes the day-to-day decisions but, in theory at least, the constitution means that the larger body has the power to overrule those decisions and, therefore, might be considered in some way to have

"general control and management of the administration"

of the charity.

If the minister has had discussions with the National Trust for Scotland and has found that it is satisfied that it—and other organisations of a similar type—would be able to operate effectively under her amendment, I will not quarrel with that position. She might have a point when she says that I should have included SCIOs in the arrangement.

It might be helpful if the regulations or some other detailed document were to indicate more clearly who has the "general control and management" of an organisation. Is it the body that has the theoretical power and meets occasionally to rubber-stamp decisions but does not get particularly involved in things or is it the body that carries out the day-to-day management of the organisation?

On the basis of the discussion, I am happy to support the Executive's amendment.

Christine Grahame: This is the amendment that I thought that Donald Gorrie was talking about when I last spoke.

I should declare an interest, as I am a member of the Royal Zoological Society of Scotland, which has e-mailed the committee on this subject. I want to support what Donald Gorrie has said about the difficulties that organisations such as the Royal Zoological Society face. It has 30 members but has delegated powers to various committees. In its submission, it says that the drafting of the bill does not make it sufficiently clear which members of which committees would be regarded as charity trustees, who would have the

"general control and management of the administration"

of the charity. There is a need to make clear to the parties who serve on those committees what their capacity is and what their duties and obligations are.

I recognise that Donald Gorrie is not going to move the amendments in his name, but I stress that there is an important issue of clarity for large organisations that operate through committees that are involved in various designated areas. The Royal Zoological Society has an audit and investment committee, an animal welfare committee and so on. Which of the people on those committees are the people who have the

"general control and management of the administration"

of the charity?

I am obliged to Donald Gorrie for raising the issue in the way that he has done, as it is important to tease the issue out.

Johann Lamont: There has been dialogue at official level with the National Trust for Scotland and recognition of its difficulties, which is why amendment 157 was lodged. If the NTS identified further difficulties, obviously that dialogue should continue. It is important that organisations know who has general management control. That is good governance and I am sure that OSCR would expect that to happen; indeed OSCR might produce guidance on it. I am aware of the issue that Christine Grahame raised about the Royal Zoological Society and what I said in my initial remarks applies equally to it. We are trying to deal with the fact that, as we have said from the beginning, charities come in all shapes and sizes and have all sorts of structures The general principles of the bill are about transparency, openness and regulation. There is an obligation on the charity to be able to understand and show who is taking "general control and management" of the organisation. Equally, we are trying to deal with different structures. Amendment 157 covers that.

Amendment 157 agreed to.

The Convener: Mr Harvie, do you wish to move amendment 114?

Patrick Harvie (Glasgow) (Green): You will be astonished to learn that I am not going to move amendment 114.

Amendment 114 not moved.

The Convener: You never fail to astonish, and not just the convener.

Amendment 5, in the name of Scott Barrie, is grouped with amendment 159.

Scott Barrie: We are returning to a debate that we touched on last week when we agreed to amendment 149, in the name of Donald Gorrie, on misconduct and mismanagement. A number of us raised the issue in the stage 1 debate and it was highlighted in the stage 1 report. The committee supported the view expressed by a number of witnesses that it would be unfortunate if trustees who might be responsible for some form of minor management of a charity found themselves subject to misconduct proceedings. I am aware that we previously got into a debate about semantics and I apologise to the minister because she rightly identified Humpty Dumpty in "Alice in Wonderland"; it was not the Mad Hatter, as I asserted.

Most if not all of us on the committee believe that the terms mismanagement and misconduct are understood to mean different things, at least in layman's terms. Mismanagement indicates more of a guddle or muddle, whereas committee

members view misconduct much more seriously, as it indicates a degree of intent to mislead. Amendment 5 attempts to clarify that important distinction. Given that the definition of misconduct in section 103 includes mismanagement, we must consider it further to ensure that we are not saying that misconduct and mismanagement are one and the same, which is the impression that the current definition gives. Saying that misconduct does not include minor mismanagement conveys clearly the idea that there is a difference between those who deliberately set out to deceive and are guilty of misconduct and those who have simply been involved in a clerical or mismanagement error. That would also reassure existing and future trustees and ensure that the potential sanctions do not dissuade individuals from coming forward. It would set a higher threshold so that we get people to come forward and do a valuable job. We do not want to dissuade people from becoming trustees of charitable organisations, which could be an unforeseen consequence of the bill as drafted.

I move amendment 5.

Christine Grahame: I am sympathetic to amendment 5 but, with respect, amendment 159 provides even greater clarity. I refer to paragraph 27 of the committee's report on the bill, where we recommended

"that the Executive should amend the definition of 'misconduct' in section 103 to reduce the possibility of those charity trustees who make relatively minor and genuine errors of mismanagement having action taken against them."

That is why amendment 159 introduces the phrase "but not minor errors". The minister's letter says:

"It might be worth noting at this stage that mismanagement is not entirely distinct from misconduct."

I would agree. It is a matter of degree, which is why amendment 159 introduces the term "gross mismanagement". There is a grey line between them. A matter of misconduct would be carried out knowingly, but there are degrees of negligence that are so bad that they verge on misconduct.

The minister goes on to say that amendments 5 and 159

"are founded on the mistaken belief that mismanagement refers to mistakes or negligence—a 'muddle'".

Mismanagement can be a muddle. Again, it is a matter of degree, which is why amendment 159 introduces the words, "minor error". On the minister's assertion about the common meaning of the words, I would support Scott Barrie. People might say, "There is a bit of mismanagement going on here", when it is something really quite light, for example that someone has not kept the cash box up to date. Something like that can be remedied, but it is completely different when something has gone on for a long time and the mismanagement has been pointed out; that gets us to the point of gross mismanagement. That is the stage at which no one knows what money is coming in or out—of the charity shop for example—despite their having been told that mismanagement is occurring. It is a matter of degree.

Further on in your letter, minister, you say:

"OSCR must always act reasonably and proportionately and is therefore unlikely to take immediate enforcement action under section 31 in a case of minor mismanagement."

Rather than saying "it is unlikely", you could just say "will not". In the next paragraph you say something more telling:

"Distinguishing between types of mismanagement in the Bill would require OSCR to first judge how serious an act is before deciding whether it has power to take any action and then to decide what action, if any, to take."

I would say yes, exactly. I would expect OSCR to judge how serious an act is before deciding whether to take any action. That is the point of lodging amendment 159. If a minor error is reported, for example that for one day the cash list was not filled in for the till, I would expect OSCR, rather than going in with big, thundering feet, just to say, "We've had a look at this and it is fairly minor. It can be remedied." That is not misconduct. That is why it is important to add the words

"gross mismanagement but not minor errors".

During the current debate and at stage 3, anyone who has an interest in charities will understand what I—and perhaps others here—mean by "minor errors", "gross mismanagement" and "misconduct". There are distinctions between them.

Donald Gorrie: I did not find the arguments in the minister's letter convincing but, rather than go another three rounds on the subject, we could start again from scratch. Amendment 5 is helpful and the committee should agree to it. We could have a thorough discussion of the issue at the peace conference that the minister has agreed to have before stage 3. I am sure that we are all aiming at the same thing, but the wording of sections 65 and 103 does not help to achieve that result. In my view, and that of most people outside this whole hoo-ha—is hoo-ha a parliamentary word?

Christine Grahame: We will find out in the *Official Report*.

10:45

Donald Gorrie: People outside the discussion think that there is a moral stigma attached to misconduct that is not attached to

mismanagement. Other people dispute that, but it is a widely held perception.

There are therefore two issues. One is the motive and whether the trustee was culpable in his or her conduct, so that it becomes misconduct. The second is the issue of mismanagement, which can be very serious even if it is not intended, and it can also be relatively minor. We have to distinguish between those two. My objective and that of the committee is that OSCR should be given flexibility so that it can respond appropriately. For example, if a small charity is a bit incompetent about its accounts, OSCR could write to the trustees and say, "You really have to get a grip on this or you will be in trouble next time". The trustees could then sort themselves out. There could be a full range of penalties, from that slap on the wrist to disbarring trustees. Whether we call it mismanagement or misconduct, there has to be a clear-cut rule so that trustees and OSCR know where they stand.

So we should go along with amendment 5, which represents the views of the committee at stage 1. If the minister has problems with that and with the amendment on the same subject that we passed last week, we should have further discussion and try to sort the whole thing out. It might be that another totally new amendment is necessary.

Linda Fabiani (Central Scotland) (SNP): I will be brief. The first part of the minister's letter is about amendment 149, which we have already passed and which replaced the words "is to" with "may". I understand the logic of that part of the letter.

However, I disagree completely with the latter part of the letter, which tries to justify the idea that misconduct and mismanagement are one and the same thing. It is obvious that the common perception is that those two things are not the same. I fail to understand why that is not recognised. I suggest that if whoever is responsible for the wording was to go out into the street and ask a dozen people whether misconduct and mismanagement are different, the vast majority would say yes.

I also fail to see why this cannot be sorted fairly easily with all the wonderful brains that we have in the Scottish Executive. It seems very simple and straightforward. Christine Grahame is not the only lawyer that I have discussed this with. The majority of people would not have a problem with clear definitions and the lawyers with whom I have spoken would also not have a problem with seeing it as good law. The problem has to be sorted and entrenched positions are not helpful. We should agree an amendment today to reflect what the committee believes and look for a way of agreeing on the issue by the time we get to stage 3.

Mary Scanlon: The more that we discuss the issue, the more complex it becomes. I have listened to my colleagues Christine Grahame and Scott Barrie and my concern is that misconduct could potentially be passed off as mismanagement. People could plead ignorance and say that they had just made an administrative error. As has been pointed out, there are genuine administrative errors and, like Linda Fabiani, I think that we have to be very clear.

As I was listening to Scott Barrie I remembered the words, "a muddle, not a fiddle". We have to be clear about justification. When Scott Barrie talked about deceit with intent, he made a very important point. We could have mismanagement with intent or mismanagement by default. We cannot say that something is mismanagement and that therefore it is not misconduct. Mismanagement can be misconduct; that is why I am finding this quite difficult.

I ask the minister whether either of the amendments addresses those problems. That brings me to my other point. What constitutes minor mismanagement and what is major mismanagement? Who decides what is minor and what is major? Is there an acceptable level of normal, everyday mismanagement? Is there a legal definition of what is minor and what is unacceptable? That is my problem with Scott Barrie's amendment 5.

I have a similar problem with Christine Grahame's amendment 159. At industrial tribunals, gross misconduct is difficult to define; it is difficult to decide at what point misconduct becomes gross misconduct. Is there an acceptable level of mismanagement? Christine Grahame's amendment refers to gross mismanagement. How bad is gross mismanagement? Is normal mismanagement okay? It is a question of degree. This is an important point. We are putting the words in legislation, so we need to know whether "minor" means something in law and whether minor mismanagement is okay, while major mismanagement is unacceptable. We need to know whether ordinary mismanagement is okay but gross mismanagement is unacceptable. I ask the minister to confirm whether those are acceptable legal definitions.

I take Linda Fabiani's point—she has been excellent on the subject of mismanagement and misconduct this morning and she has highlighted it from the beginning. However, I fear that misconduct could be passed off by unscrupulous people as mismanagement, and the wording will give them a good excuse.

Mr Home Robertson: We are all wrestling with the same problem. Mary Scanlon expressed very well the distinction between bad people and good

people and all the grey areas in between. We have thousands of decent, public-spirited people manning the charitable sector in Scotland and we want them to go on doing that well. We do not want to frighten them off. It seems that the terms that are available to us are misconduct and minor mismanagement, but it is not as straightforward as that—that is Mary Scanlon's point.

At one end of the scale is malice, which is obviously serious and needs to be dealt with severely. In the middle of the scale is negligence at various levels. We are all human beings and negligence happens, although it is not to be condoned. OSCR needs to try to steer individuals and organisations in the right direction. At the other end of the scale are minor administrative and procedural mistakes. It is only human to make such mistakes and we do not want to come down too heavily on them. We need to find a way to strike a balance and give due discretion to OSCR in its approach to the matter. It seems to me that Scott Barrie's amendment 5 is the best way to achieve that at this stage, although we may well need to return to the matter at stage 3.

Johann Lamont: I hope that Linda Fabiani does not think that I am pursuing an entrenched position. The discussion is interesting because there is not a hard position on either side. We are all wrestling with the same difficulties. For what it is worth, my preferred position is for neither of the amendments to be agreed to, but I recognise the strength of feeling of the movers of the amendments and I recognise that there is some gathering of support around Scott Barrie's amendment. I will go through some of the issues that have been highlighted in the debate.

It is important to recognise the issue about deterring volunteers. We do not want to inhibit or dissuade people from becoming charity trustees. Doing anything that would result in that would be contrary to our position of having a flourishing charitable sector. However, people must understand that responsibilities accompany being a charity trustee and that people who do not take those responsibilities seriously face consequences. We are trying to strike a balance.

Some of the discussion is about the meanings of mismanagement and misconduct. Linda Fabiani argues that a layperson's view is that mismanagement is different from misconduct, but I am not sure how generally accepted that distinction is, because I do not make that distinction. I do not know how out of step I am with the rest of the world on that.

Even if that were the layperson's view of those words' meanings, we are dealing with legislation, so we must consider the legal interpretation of the bill. As we have said, the definition of misconduct has been discussed from the beginning. We touched on it again last week when we debated amendment 149 and I wrote to the committee about the matter. I hope that the letter was helpful, but I suspect that for some it was not.

Amendments 5 and 159 would limit the definition of misconduct to exclude the possibility of OSCR taking action when charity trustees or managers have made a minor mistake. That position is well motivated, but neither amendment would achieve the intended result.

The dictionary definition of misconduct—I know that it might not help—includes conduct that is illegal, unethical, immoral and bad management. The definition in section 103 merely confirms the understanding that mismanagement can also be misconduct. However, more important for the purpose of the discussion is the fact that neither expression conveys any sense of whether conduct or management was deliberate or in error, or of whether a problem was a one-off or was persistent, which members tried to get at. Intent was the concern. One act can look the same as another but what motivated a person's behaviour and whether the conduct lasted for a period can change our perception.

The amendments would exclude minor mismanagement from the meaning of misconduct or limit the meaning of misconduct to gross mismanagement, but that would not exclude all minor errors from the definition of misconduct. For example, if a charity failed to lodge its accounts on time, that would still be misconduct, whatever the reason for the failure. Neither amendment would change that.

However, the amendments could undermine the effective regulatory regime for charities that the bill tries to establish. I know that nobody on the committee wants to do that. That is especially the case when the amendments are read with amendment 149, which was agreed to last week. As the independent regulator, OSCR must have appropriate powers to take action in cases of misconduct and the discretion to decide when to use them. Equally, a penalty must be able to be imposed for breach of duties by charities and trustees, or the regulatory regime will lack bite and OSCR's role will be devalued to being advisory rather than directive. For that reason, a breach of any duty should also be a breach of the law.

Most existing charities and their trustees are expected to continue to act responsibly and in accordance with the new provisions. However, the unscrupulous might use the dilution of a strict duty as an avenue to excuse their misconduct. That may be the point that Mary Scanlon suggested. Such an outcome would be unfortunate, and neither existing charities nor the general public would be likely to view that as a welcome development.

OSCR and the court must be able to take appropriate action under sections 31, 32 and 34 in the event of apparent misconduct. After investigation, OSCR should be able to decide whether regulatory action needs to be taken. That will depend on the seriousness and impact of a case. I expect OSCR to consider several ways of dealing with misconduct. According to the circumstances, OSCR may consider a simple reminder of the threat of regulatory action to be a more appropriate course of action.

However, amendments 5 and 159, together with amendment 149, would require OSCR to take a three-step decision before proceeding. First, OSCR would have to establish whether non-compliance or a breach had taken place. Then, as a result of amendment 149, OSCR would have to consider whether non-compliance by a charity or charity trustee was misconduct. Following from amendments 5 or 159, it would have to judge whether mismanagement was minor. Only then would OSCR be able to take regulatory action. That process is complex and could cause unnecessary delay. It would also import uncertainty into the regulatory regime for OSCR, charities and charity trustees. The amendments could obscure the standards that are expected and make the provision of guidance unduly complicated. Transparency would be lost and OSCR's efficiency could be compromised. As a result, the public could fail to find the reassurance that they seek in the system. None of us would view such an outcome as satisfactory.

11:00

The motive behind amendments 149, 5 and 159—which I understand and support—appears to be to ensure that minor breaches of trustee duties do not automatically attract the full weight of OSCR's regulatory power. In previous meetings, we have spoken about the need for OSCR to act reasonably, but there might be merit in saying again that, although its powers will be far reaching, as a public body it must act in a way that is both proportionate and justifiable. In addition, all OSCR's decisions will be subject to review and appeal. It will not be able to take any action without the need to be proportionate coming into play. Perhaps we should consider making that clearer. OSCR's reasonableness and its responsibility to be reasonable is a key issue, and that addresses concerns about people who have made mistakes triggering the full weight of OSCR. That is not the intention of the framework.

I have looked back at the discussions on the concerns that motivated the amendments and am aware of the part that has been played by the fact that section 65 provided that breaches of some charity trustee duties were offences. Therefore, I remind members that we have amended the relevant section and removed those offences. In doing so, we envisaged an approach whereby the consequence of breaching a section 65 duty would not automatically result in an offence, but such a breach would instead be considered to be misconduct and, if necessary, it would be open to OSCR to take one or more of the actions that are set out in section 31 of the bill.

As I said in my letter, we will need to revisit the full implications of amendment 149 at stage 3. In doing so, we will seek to find a way of addressing the committee's concerns without compromising the efficiency of the regulatory regime. Far from there being entrenched positions, we are all seeking an ultimate position on which to agree. We are balancing interests in wanting to involve charity trustees but not wanting to be over heavy on them in managing a regulatory regime.

On what Christine Grahame said, my letter states that it would be unlikely that OSCR would take action, but it will be independent of the Executive. Equally, its actions must be proportionate and reasonable.

I have said that I recognise the commitment of Scott Barrie and others on the issue and I have indicated the Executive's preferred position. Whatever the outcome of the debate, I commit the Executive to further discussions on how we can reach at stage 3 a satisfactory conclusion with respect to amendment 149 that maintains the regulatory regime and does nothing to harm the strength of the charitable sector.

Scott Barrie: When people take broadly the same position on matters, there is sometimes more debate than there is when people take opposing positions, which is interesting. When people take opposing positions, at least the dividing lines are clear. The minister is absolutely right to say that we are all—including the Executive—seeking to do exactly the same thing, and that should be noted.

Mary Scanlon asked what level of mismanagement is acceptable. In an ideal world, no mismanagement should be acceptable, but we live in the real world rather than an ideal world and minor mismanagement is sometimes understandable. That is where the difference lies. I am not talking about an absolute position, and that strikes at the very heart of the debate on misconduct, mismanagement and issues relating to intent and to when people have simply got themselves into a bit of a guddle, which I mentioned previously.

The minister talked about charities not lodging accounts on time being construed as misconduct. In an absolute sense, what she said was true, but there might be understandable circumstances that

led to that happening. However, the non-lodging of accounts on numerous occasions and people not correcting previous management failures would not be permissible—Christine Grahame made that point in speaking to her amendment. That is why I was seeking to use the word "minor", which would differentiate between minor infringements that led to mismanagement and absolute mismanagement. I am not sure whether amendment 5 has got it right or whether the committee got it right last week. Perhaps we need to return to the matter. The minister has indicated a willingness to address the issue before stage 3. I, for one, will take up that invitation, as I am sure will all other committee members. It is important that we get it right. As members have all acknowledged, the concern is not to put people off—either people who are currently trustees or people who might become trustees. Perhaps it would have been better if the word "mismanagement" had not been included among the definitions in the first place, but it is there and we must deal with the bill as it stands. Now that the word is in the public domain we cannot pretend that it is not there.

Although we will return to the matter in some form, I want to emphasise the point and so I will press the amendment.

The Convener: The question is, that amendment 5 be agreed to. Are we agreed?

Members: No.

The Convener: There will be a division.

FOR

Barrie, Scott (Dunfermline West) (Lab)
Craigie, Cathie (Cumbernauld and Kilsyth) (Lab)
Fabiani, Linda (Central Scotland) (SNP)
Gorrie, Donald (Central Scotland) (LD)
Grahame, Christine (South of Scotland) (SNP)
Harvie, Patrick (Glasgow) (Green)
Home Robertson, Mr John (East Lothian) (Lab)
Whitefield, Karen (Airdrie and Shotts) (Lab)

ABSTENTIONS

Scanlon, Mary (Highlands and Islands) (Con)

The Convener: The result of the division is: For 8, Against 0, Abstentions 1.

Amendment 5 agreed to.

The Convener: Amendment 159, in the name of Christine Grahame, has already been debated with amendment 5. Does Ms Grahame wish to move the amendment?

Christine Grahame: Am I allowed to say something or can I just move or not move the amendment?

The Convener: Move or not move.

Amendment 159 not moved.

Christine Grahame: I am so obedient.

The Convener: Obedient is not a term that I would usually think of in relation to you, Ms Grahame.

Christine Grahame: I have been that way since I was three.

Mr Home Robertson: Obsequious?

Amendment 65 moved—[Johann Lamont]—and agreed to.

Section 103, as amended, agreed to.

Section 104—Short title and commencement

Amendment 118 moved—[Johann Lamont]—and agreed to.

Section 104, as amended, agreed to.

Long Title

The Convener: Amendment 158, in the name of Christine Grahame, is in a group on its own.

Christine Grahame: As the debate on the bill has unfolded, we have seen that it is not just a case of regulation, registration and so on, but that the prime policy is, as has always been the case, to ensure that we have an honest, accountable, flourishing and reliable voluntary and charitable sector. I noted that in the minister's remarks in the debate on misconduct and mismanagement she referred to a flourishing charitable sector. That was also the committee's view. I refer to paragraph 49 of the committee's stage 1 report:

"Nevertheless, the Committee does see a value in including a wider and more general reference to promoting a flourishing charitable and voluntary sector in Scotland and suggests that the Executive should give consideration to whether this would be most appropriate in the long title or in the body of the Bill."

Amendment 158 seeks to put such a reference in the long title, which we understand is not enforceable—in that sense—in litigation. It is a purpose behind the bill, so I think that such a reference would reflect our discussions. The long title refers to

"provision about fundraising in connection with charities and other benevolent bodies".

My amendment would insert

"with a view to promoting a flourishing charitable and voluntary sector"

before the long title concludes

"to amend the law in relation to the investment powers of trustees; and for connected purposes."

I think that we have gone along that route. By its very presence, OSCR's role is not just to be a policeman and enforcer but to encourage the kind of sector that we all want. Such an approach is as much of a carrot as a stick. Given that the

committee recommended this unanimously, I move amendment 158.

Donald Gorrie: I have great sympathy for Christine Grahame's aim in amendment 158, and will be interested to hear the minister's response. We might well be able to include the positive comments highlighted in the amendment somewhere else in the bill, but it is important to highlight the Parliament's desire to promote the charitable and voluntary sector. After all, any such legislation is almost entirely concerned with keeping people on the straight and narrow and dealing with those who stray from it.

We should also indicate our sense that the majority of trustees and charities are very helpful to the whole community and that most people do a good job and put in a lot of unpaid time and effort. It would help if the bill said somewhere that its objective was to produce a flourishing charitable and voluntary sector. Otherwise, people who study it might get the wrong impression that we are policing the sector, not promoting it. I would very much like the bill to contain wording such as that suggested by Christine Grahame but, as I have said, I will be interested to hear the minister's response before I decide what to do.

Mary Scanlon: I agree with the sentiments that Christine Grahame and Donald Gorrie have expressed and should point out that I signed up to the stage 1 report's recommendation that the bill should say something more in that respect.

However, I am not sure about the phrase

"with a view to promoting a flourishing charitable and voluntary sector".

As the bill itself moves towards that aim, I do not think that such an amendment is totally necessary. Perhaps I will return to the matter at stage 3; however, although I agree with some of the sentiments, I would like the wording to be more concise.

Johann Lamont: In our previous discussion we wrestled with issues of real substance; in contrast, I am not sure whether this issue has any real substance. It is perhaps more to do with sentiment than anything else.

I am aware that amendment 158 follows the recommendation in the committee's stage 1 report that the Executive should consider making a wide reference either in the bill or in the long title to the promotion of a flourishing charitable and voluntary sector in Scotland. As I have said, I support the sentiment. However, I will set out the technical argument—which I have been saving for Donald Gorrie, who I know will love it—after which I will give the committee our view on the merits of adding this wording to the bill.

Putting the proposed reference in the bill or in the long title goes against the Presiding Officer's guidance on the style and content of bills, which states:

"The text of a Bill—including both the short and long titles—should be in neutral terms and should not contain material intended to promote or justify the policy behind the Bill, or to explain its effect."

If nothing else, we are at least in line with the Presiding Officer's guidance.

I am very pleased to provide a robust, transparent and proportionate regulatory framework for charities in Scotland that will reassure the public and in turn help the sector to grow and flourish. This policy has been set out in the consultation paper accompanying the draft bill, in my oral evidence to the committee in February and in the policy memorandum. Moreover, my comments today will again ensure that this issue is part of the parliamentary record. Because legislation should give effect to policy, not make policy statements, and because the wording in amendment 158 would go against the Presiding Officer's guidance, I ask Christine Grahame to withdraw her amendment.

I should also add that OSCR by itself will not create a flourishing voluntary sector. It is a regulatory body and is therefore, to a large extent, the police officer. Indeed, the charitable and voluntary sector is to be commended for arguing hard for OSCR, because it saw its establishment not as a substitute for the sector but as a way of underpinning and supporting it. We must highlight that distinction. The proposed legislation is about supporting the sector's desire to flourish and to contribute to Scottish society; it is not meant to be the be-all and end-all of the life and work of charities, charity trustees and the voluntary sector.

I have set out the technical and policy arguments. This bill—indeed, any legislation—does not cover the sum total of the sector's activity. We believe that it will enhance the sector and will enable it to continue its very important work throughout Scotland. Again, I ask Christine Grahame to withdraw amendment 158.

11:15

Christine Grahame: I lost my previous tussle with the Presiding Officer over the long title of the Abolition of Poindings and Warrant Sales Bill when I argued that that bill was simply renaming, not abolishing, those activities. As a result, I am very aware of my prospects in trying to get this wording into the long title of this bill.

In the circumstances, I seek leave to withdraw amendment 158, because I feel that the Presiding Officer will impose the same ruling on me again. However, I shall return with it in another form at

stage 3 and will seek to circumvent his previous ruling by putting the wording elsewhere in the bill. He can read that if he likes—I do not care.

Amendment 158, by agreement, withdrawn.

Long title agreed to.

The Convener: With that, we end our stage 2 consideration of the bill.

Meeting closed at 11:16.

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