

FINANCE COMMITTEE

Tuesday 21 December 2004

Session 2

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FINANCE COMMITTEE

34th Meeting 2004, Session 2

CONVENER

*Des McNulty (Clydebank and Milngavie) (Lab)

DEPUTY CONVENER

*Alasdair Morgan (South of Scotland) (SNP)

COMMITTEE MEMBERS

*Ms Wendy Alexander (Paisley North) (Lab)

*Mr Ted Brocklebank (Mid Scotland and Fife) (Con)

*Jim Mather (Highlands and Islands) (SNP)

*Mr Frank McAveety (Glasgow Shettleston) (Lab)

*Dr Elaine Murray (Dumfries) (Lab)

*Jeremy Purvis (Tweeddale, Ettrick and Lauderdale) (LD)

*John Swinburne (Central Scotland) (SSCUP)

COMMITTEE SUBSTITUTES

Gordon Jackson (Glasgow Govan) (Lab)

David Mundell (South of Scotland) (Con)

Alex Neil (Central Scotland) (SNP)

Iain Smith (North East Fife) (LD)

*attended

THE FOLLOWING GAVE EVIDENCE:

Anne Swarbrick (Anderson Strathern)

CLERK TO THE COMMITTEE

Susan Duffy

SENIOR ASSISTANT CLERK

Terry Shevlin

ASSISTANT CLERK

Emma Berry

LOCATION

Committee Room 1

Scottish Parliament

Finance Committee

Tuesday 21 December 2004

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

Charities and Trustee Investment (Scotland) Bill: Financial Memorandum

The Convener (Des McNulty): I welcome the press and public to the 34th meeting of the Finance Committee in 2004. I remind people to turn off their pagers and mobile phones.

The first item on the agenda is scrutiny of the financial memorandum to the Charities and Trustee Investment (Scotland) Bill, which was introduced to Parliament on 15 November 2004.

I draw to members' attention the letter that I received late last night from the Minister for Communities. It provides an update on the Office of the Scottish Charity Regulator's budget, which has been increased since the financial memorandum was published.

Members have previously suggested that we appoint an adviser to aid our consideration of financial memorandums. As it is a relatively time-consuming process, we have decided to pilot a new system today and have invited along an expert witness who will comment on the financial memorandum. We can get feedback from members later about how well the approach works, but it will certainly provide us with an interesting insight.

With that in mind, I welcome Anne Swarbrick, who is a specialist in charity law and an associate of Anderson Strathern solicitors. I invite her to make an opening statement. I will then allow a period for questions from members.

Anne Swarbrick (Anderson Strathern): I hope that members all have my submission on the financial implications of the bill. My opening statement will very much follow the format of the submission.

I will make six main points about the financial implications of the bill. To a certain extent, the first point is dealt with by the letter that we have seen this morning from the Minister for Communities, which indicates that OSCR's budget will be increased. The point that I make in the first part of my submission is that OSCR must be properly funded to do what is a very large and onerous task.

The second point, which is in many ways the most difficult one, is about the Scottish charity register and the Scottish charity test. Paragraph 122 of the explanatory notes indicates that the Scottish charity test should have a neutral effect on the number of charities in Scotland and the make-up of the sector. I do not accept that. I think that the proposed new definition is much narrower in scope than both the current definition and the proposed new English definition, and that that might have quite a profound effect on the number of charities in Scotland. We have heard an awful lot about the independent schools sector, but I am not talking about the independent schools sector when I make those remarks; the point is of much wider application throughout the sector. I am happy to come back to the matter and discuss it further if the committee would find that helpful.

The narrower definition has various knock-on effects. The first is that there will be significant costs to charities in trying to defend their charitable status in the light of the proposed new definition. There might also be significant costs to beneficiaries of charities. If a charity loses its charitable status and closes its doors, where will those people go for the services that they currently receive from the charity? There might be costs to local authorities in picking up the services that are no longer being provided. One point on independent schools is that the explanatory notes do not seem to make clear that there could be costs to local authorities for educating pupils who might require education as a result of possible closures of independent schools.

10:15

Section 3 of my submission relates to the reorganisation of charities. The point about educational endowments is slightly esoteric in some ways, but it is of great importance to universities, for instance, which derive quite a lot of their funding from such endowments. The proposals in the bill exchange one restriction on the reorganisation of educational endowments for a new restriction. My submission suggests that all the restrictions should be lifted. They are unnecessary and simply hinder the efficient reorganisation of such funds. We all know that education is a fast-changing sector. There is no need or reason to make it more difficult for educational establishments to marshal their funds.

The second point on reorganisation concerns trusts. The explanatory notes make it clear that public trusts that are not charities will be unable to use sections 40 and 41, which are about the reorganisation of charities. Such trusts will continue to reorganise themselves under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990. However, one problem with the 1990 act is

that it prohibits trusts from transferring their assets to incorporated charities. Sections 10 and 11 of that act were designed to encourage the transfer of funds from outmoded and outdated trusts into something that is a bit more relevant to today's circumstances. The fact that those trusts can transfer only to another trust and not to an incorporated charity does not assist transfers. Small amendments to sections 10 and 11 would greatly improve the use of such funds.

Section 4 of my submission is about charity trustees. Section 65 of the bill proposes additional duties for charity trustees and imposes criminal provisions. Those measures are much too demanding and are likely only to deter people from volunteering to be charity trustees. Charities already have difficulties in identifying people who are willing to take on the tasks, which can be onerous. Some existing charity trustees might well resign as a result of the provisions. One or two people have already asked me whether their considering resigning would be worth while. The provisions will lead to additional costs for charities in recruiting and training new trustees.

Section 5 of my submission concerns appeals and the Scottish charity appeals panel. The explanatory notes say that charities that wish to use the panel will have no costs. That might be correct as far as it goes, but it is not the whole story. The panel cannot award expenses to a charity that takes an appeal to the panel and succeeds. If a charity wants to take legal advice about an appeal, it must bear the cost itself—the alternative is that the charity goes to the tribunal unprepared and unrepresented. Such a charity would be taking on OSCR, which will undoubtedly have legal advice available to it. That would lead to inequalities between OSCR and appellants to the tribunal.

Therefore, I suggest that the Scottish charity appeals panel should have the power to award expenses to successful appellants. It should probably also have a limited power to award expenses to OSCR, but only when its view is that an appeal amounts to an abuse of process. That is the position that the Joint Committee on the Draft Charities Bill at Westminster reached on appeals and the arguments apply equally in Scotland.

The range of people who can appeal to the Scottish charity appeals panel is narrow. The policy memorandum envisages that anybody else who wants to question a decision of OSCR will have to use judicial review. That extremely costly process could be avoided by widening the list of potential appellants to the Scottish charity appeals panel and allowing anyone who is affected by one of OSCR's decisions to have it reviewed by the tribunal.

In the sixth section of my submission, which focuses on trustee investment powers, I suggest

how we might improve an already improved regime. I believe that the provisions miss an important aspect. Part IV of the Trustee Act 2000 gave trustees in England and Wales the power to delegate certain functions, including investment of assets, to agents or nominees. That power should also be given to Scottish trustees to increase the possibility of improving investment returns for those trusts.

I hope that that summary of my paper has been helpful.

The Convener: Thank you. Your comments have been very valuable. Before we move to questions, I should point out that the committee is concerned more with the bill's financial implications than with any purely policy issues. Some of the points that you raised relate to policy issues.

Aside from Anne Swarbrick's evidence, members have received a range of submissions from other organisations. I will kick off our questions by asking whether you have any views on concerns expressed by a number of agencies, including the National Galleries of Scotland, about the implications of the proposed regime for their fundraising arrangements. After all, if they are unable to fundraise as much as they have been able to, that might impact on other budgets.

Anne Swarbrick: The other submissions make a number of very valid points. First, the National Galleries of Scotland's submission refers to the extension to the National Gallery of Scotland building on Princes Street, which was at least partly funded by substantial grants from charitable grant-giving trusts. By and large, those trusts can give grants only to charities. If the National Galleries of Scotland had not been a charity, it would not have been able to receive that significant tranche of funding, which is set out in the submission.

Secondly, the proposed regime will have significant tax implications. Although I do not pretend to be a tax lawyer, I will give the committee my understanding of those implications. The National Galleries of Scotland receives many paintings as part of inheritance tax provisions. Losing its charity status would have a knock-on effect on those bequests, as there would be difficulty in obtaining tax relief on them. I am afraid that that is as technical as I am prepared to get on the subject. I understand that there is a difficulty in that respect, and the committee might require to receive more detailed advice on it than I can provide.

The Convener: Without going into any details, do you think that similar issues arise for similar organisations under the English legislation?

Anne Swarbrick: That has not happened, because the definition in that legislation is couched in significantly different terms. In principle, it allows all existing charities to retain their charitable status, although they are required to satisfy a public benefit test. As a result, the English sister organisations of the National Galleries of Scotland would retain their charitable status and, because all galleries are open to the public anyway, would certainly be able to satisfy the public benefit test. The question will not arise down there.

The issue of independence that is raised in the Scottish bill is not raised in the same manner in the English legislation, and so does not give rise to the difficulties that we think that aspect might create up here.

Mr Ted Brocklebank (Mid Scotland and Fife) (Con): I am interested in your comments about OSCR's budget. Despite the fact that it has been significantly increased to about £4 million, you maintain that that is still not enough, because its remit is narrower than that of its counterpart in England. Have you been able to identify a more appropriate overall figure?

Anne Swarbrick: I am not quite saying that. In the paper, I said that OSCR's role is very wide. That role is not just to register and monitor charities, but to carry out investigations. OSCR must be properly funded to deal with all those issues. I am not in a position to say what the proper funding would be. I left OSCR earlier this year and things will have moved on immeasurably since then. I am heartened by the fact that there is additional funding for OSCR, which probably deals with my point. OSCR has a huge remit and a big task to take on. If it is not properly funded to carry out that task, it will not be able to do so properly. That is in no one's interests.

Mr Brocklebank: You referred to how the charitable status of independent schools might be affected. Could you develop that point and explain what your fears are?

Anne Swarbrick: It depends a little on how the public benefit test develops in Scotland. I understand that the Home Office bill is to be published today, which might cast some light on how the issue is being viewed in England. At present, it is difficult to predict what effect the proposals might have on independent schools, which receive substantial rates and tax relief. The loss of either of those two types of relief might have a significant effect. However, to an extent that will depend on the nature of individual schools. Depending on how the public benefit test is couched, many independent schools might be able to satisfy it.

Mr Frank McAveety (Glasgow Shettleston) (Lab): I am in the curious position of almost

wanting to come to the rescue of the Duke of Sutherland's art collection. At the same time, I am attracted by the idea that many independent schools might move into the local authority sector. I am confused about the potential outcome of this piece of legislation.

We have received submissions not just from the National Galleries of Scotland but from the Royal Commission on the Ancient and Historical Monuments of Scotland and other cultural organisations that fall into a grey area as regards the definition of a charity. Based on your experience, what do you think are the solutions to that issue? How could the committee explore those solutions with the Executive? Will you also comment generally on the definition of public benefit in the English legislation? It would be productive for us to explore those issues.

Anne Swarbrick: I have not yet read the English bill, which is to be published today but has not yet appeared. I cannot be definite about what the bill will do in respect of public benefit. It has been trailed that the Home Office might adopt the stance that Scotland has taken and set criteria for public benefit. Those criteria are not exclusive, but provide an indication of the sort of things that must be taken into account when deciding whether a charity provides public benefit. I do not know whether the Home Office will take that approach, but we will find out. Once I have had a chance to examine the bill, I could submit evidence on it to the committee in writing, if members would find that helpful.

I have forgotten your other question.

Mr McAveety: What kind of policy approach could be adopted that might allow charities to continue fundraising? There is no doubt that the National Gallery connection could not have been built if there had not been a flexible arrangement that allowed endowments to be developed. There is a real peril that the bill will eliminate that arrangement.

Anne Swarbrick: There is. The way in which to approach this matter is to examine the actions of trustees once they are appointed. The question is, how do trustees act? Do they allow themselves to be influenced by third parties once they have been appointed? There will always be influences on appointments. In a small charity that is run by a committee, someone might say that they know a person who would make a good member of the committee, for example. To an extent, such influences operate in every charity in the land. The question is: do the people who are appointed act properly? That is a regulatory issue; it is for OSCR to examine how the charity is run after someone has been appointed. I suppose that a half-way house might be to require that fewer than 50 per cent—or whatever the number—of the trustees of

non-departmental public bodies must be political appointments, but that would not obviate the need to examine what people do when they are in post and how they do it. It seems to me that that is how we must approach the matter.

10:30

Jim Mather (Highlands and Islands) (SNP): I have been looking at the numbers. If we do a simple sum and divide the £4 million by 28,000 charities, it appears that the notional annual subscription in 2005-06 would be £142 per charity, compared with the current rate of £46 per charity. That would be a considerable uplift, even without considering the cost of expenses and wider access to the appeals process. Is such an uplift reasonable, given the different profile of the activity that OSCR will undertake?

Anne Swarbrick: To be frank, that is a difficult question to answer. I am sure that OSCR would have similar difficulties in speculating about the future. Part of the problem is that we do not have much knowledge about the charitable sector in Scotland. We think that there might be about 28,000 charities, but we are not even sure about that. There are a lot of uncertainties, but many things will become clearer during the next five years or so. In the meantime, there will be at least as many inquiries into charities as there have been in the past. Indeed, there will probably be more inquiries, because certainly in the initial few years after the bill is passed OSCR will uncover practices that might otherwise have continued for several more years. That is part of the bill's purpose, of course. More action might have to be taken against charities to enforce the new legislation.

Jim Mather: I am intrigued by the rapid inflation in OSCR's budget. Would we have a better chance of controlling that if we were to match the English definition of charitable status and retain charitable status for all existing charities?

Anne Swarbrick: If the definition in the Scottish bill is retained, there will be many appeals to the tribunal, which could get very out of hand. Many charities will find themselves in serious difficulties because of the definition. Your suggestion might help to prevent that.

The Convener: According to the briefing from the Scottish Parliament information centre, 67 per cent of charities—two thirds—have an income of less than £25,000. If every charity must pay a £2,000 subscription, a substantial element of charities' income will be spent on registration. As Jim Mather pointed out, that would represent a significant uplift for many charities.

Anne Swarbrick: I understood that there would be no charge for registration with OSCR—the

situation might have moved on and I might have missed something.

The Convener: Could a threshold be established? What would be an appropriate threshold for subscriptions?

Anne Swarbrick: I understood that there would be no charge for registering with OSCR.

Jim Mather: Charities might be liable for administrative costs.

The Convener: The Scottish Council for Voluntary Organisations certainly thinks that charities would have to pay £2,000, which would be unmanageable for many charities.

Anne Swarbrick: I think that you are talking about the potential cost of complying with OSCR's requests for information. Is that the context?

The Convener: It might well be, but the committee briefing refers to a £2,000 "charge set for registration".

Anne Swarbrick: I do not think that OSCR will charge that sum; I think that that refers to the cost to the charity—

Jim Mather: Paragraph 130 of the financial memorandum says:

"While OSCR will not charge for registration there may be some minimal administrative costs to charities ... for most it should be minimal but for others it could be up to £2000."

The figure refers to charities' internal administrative costs.

The Convener: From paragraph 130, we do not know how the charges will operate and what criteria will be set. How will the scaling be set? Will the charge be a percentage of turnover?

Anne Swarbrick: Any additional costs are significant for some small charities, but it is impossible to set up the sort of regime that we are talking about for OSCR without requiring charities to input to it; otherwise, the regime would be completely unrealistic. The new system will undoubtedly entail some costs for charities—you cannot make an omelette without breaking eggs.

The question is more for the Scottish Council for Voluntary Organisations and the sector than for me. The existence of a register and a central information point will probably provide a long-term benefit for all charities. Given the present state of knowledge, we should not set up a register without making it comprehensive, at least initially. Perhaps in five or 10 years, we could consider whether some charities could fall under a regime that has a lighter touch or might even be deregistered entirely, although charities might not want that. We are taking the initial steps in the right way. There will be costs, but they are unavoidable.

John Swinburne (Central Scotland) (SSCUP):

I am not sure whether this is a political or a financial question, but will the bill improve the situation in Scotland, or is it a method of paying lip service to a problem that exists in the minds of the public? Many charities have a bad reputation, although many others do tremendous work. What percentage of donations should go to the good cause? Is 50 per cent an acceptable or unacceptable figure? People perceive that the percentage of donations that goes to the good cause can be extremely low, which is one reason for the bill. Do you have a ballpark figure for that?

Anne Swarbrick: The short answer is no, because charities vary enormously. For instance, it is difficult to say that, for all charities, administrative costs must be no more than 20 per cent of their income. Some charities have high administrative costs due to the nature of their work. To give what is in some ways a bad example, although it is graphic, the work of the Samaritans involves using the telephone a lot, which means that the telephone bills must be astronomical. It would be unreasonable for that charity to be required to have the same level of overheads, including telephone bills, as a charity that does different work. We cannot give an across-the-board figure. Even the Charity Commission, which has been dealing with the issue since about 1960, will not nail its colours to the mast. The matter depends on the charity in question and the nature of its work.

John Swinburne: That was a good political answer.

Jeremy Purvis (Tweeddale, Etrick and Lauderdale) (LD): Even if there is not a registration cost, there is an inevitable cost in putting information together and providing annual reports for the registration to be valid, which I think is what you were getting at. If I give money to a charity, I expect such information to be in the public domain and I do not think that there is a problem with that.

From your legal perspective, can you say whether there is anything to prevent NDPBs from remaining under ministerial control and being accountable to Parliament, while setting up charitable operations that are totally separate from Government to receive paintings or endowments? The remit for their role within the public sector in advancing the arts and culture and so on can be set by ministers, but their charitable arm, with regard to receiving donations or gifts, can be a completely separate operation from what is in effect their public service remit. Would that be fair to say?

Anne Swarbrick: That would need a bit of thinking about. It is certainly not the way in which it has hitherto been organised, and there may be

some difficulties with it. For instance, in the case of the National Galleries of Scotland one question that strikes me immediately is what would happen to the buildings. Would the charity have control over them or would some political control be needed? I do not know the answer to that. Difficult issues would be involved, particularly in relation to the funding and the building of the extension. Also, if the paintings have been left to the nation, there may be tax difficulties in them then being given to another body. I do not know. What you are referring to is complicated and would need to be thought about carefully. I would not reject it out of hand, but it might be awkward to achieve.

Alasdair Morgan (South of Scotland) (SNP):

We have been discussing the costs of all this, but do we have any idea what the cash benefits would be? It seems to me that the benefits are either that we stop illegitimate charities, which are in effect swindling the public, or that we make some of those that are working work more efficiently so that they spend less on administration. I do not know whether there are any other benefits that can be quantified in cash terms, but do we have any estimate of the annual cost of the things that are happening at the moment? Does it approach the costs of the regulation that we are putting in place to stop them?

Anne Swarbrick: I do not have the figures at my fingertips, but no doubt OSCR's current budget could be ascertained. Until about this time last year, when OSCR was established, the Scottish Charities Office was undertaking inquiries into charities. I think that the budget of the SCO was in the region of £400,000—it was very small.

Alasdair Morgan: But what are the costs to the public of what may be being swindled from them—not swindled directly, but taken from them by maladministration and not spent effectively? Do we have a clue as to what those figures might be?

Anne Swarbrick: We do not, but it is rather like asking a senior police officer how much money is lost in credit card fraud every year. I do not think that he would be able to answer that question either. It is in the realms of speculation.

Alasdair Morgan: It is a question that is worth asking, because if we are going to spend more than £4 million solving a problem, we should maybe have an idea of what the cost of the problem is.

Anne Swarbrick: I can see that. Various other models were considered before the OSCR model was decided upon, some of which would have been a cheaper solution, and at least one of which would arguably have been a more expensive solution. I suppose that it is possible that things could be organised differently.

Jeremy Purvis: Part of our evidence—I think that it was from the SCVO—dealt with the cost of training in compliance with the requirement to provide accounts information and so on. The bill simply indicates that an annual report should be provided, but it leaves it up to OSCR to determine what should be within that; it could be half a page of A4 or it could be a substantial document. Are you aware of the typical requirements and costs of registration systems south of the border or elsewhere? Certainly, the SCVO says that it is unclear about the financial memorandum's costing for training requirements.

10:45

Anne Swarbrick: I have two points to make on that. First, I am sure that that the Charity Commission has figures on the cost to charities of preparing their annual reports, but I cannot tell you what they are off the top of my head. However, I am sure that officials would be able to obtain that information. Secondly, there is a lot of leeway on the length of annual reports. OSCR has been doing a monitoring project, of which you are probably aware, that uses a relatively lengthy questionnaire. Whether it should always be as lengthy is another matter. I would expect it to get shorter, but OSCR would have a better idea of that than I would.

Mr Brocklebank: I was interested in the point that you raised in your opening statement about charities that might lose their status. What would happen to the vulnerable people who depend on such charities? Obviously, it is difficult to speculate about how such people might be affected, but who would have to pick up the tab for them? Have you thought that through?

Anne Swarbrick: Presumably, local authorities and social services in some form or another would be involved. Another charity might also help. However, if one charity that provides particular services experienced difficulties with the new definition, it is likely that all charities that provide such services would have the same difficulties.

Mr Brocklebank: You said earlier that the galleries that receive paintings and other works of art on loan might, in turn, lend them on. It occurs to me that the Scottish Parliament plans to get into that line of business and take works of art on loan. I gather that the galleries are groaning with unshown works of art, some of which are likely to come to the Parliament. The Parliament will presumably pick up the tab for insuring them, but I assume that there will be a benefit in kind to the Parliament and that that will have tax implications.

Anne Swarbrick: I would think not, because the paintings will be on loan and will be available for the public to come to the Parliament to view them.

That will probably be regarded as an extension of the galleries' obligations to put the paintings on show. I would expect that paintings on loan to the Parliament from the National Gallery would remain firmly in the gallery's ownership.

The Convener: As a supporter of the clean walls strategy for the Parliament, I would prefer to get rid of some of the works of art rather than get more in.

Jim Mather: I am keen to explore two points, which are not completely related, but which I think are of some merit. First, have we lost sight of maximising the possible positive effect of increasing public confidence in charities, and hence increasing markedly the amount of money that is donated to them?

Anne Swarbrick: There are arguments for different ways of registering. At least part of the consultation that has been going on for what seems like for ever but is actually about three and a half years has been examining other possible models. One could argue that what OSCR is doing is sufficient but that it is not sufficiently public and that the register is needed in order to create transparency and public confidence. I suppose that one could stop at various points along the route and assess how much requires to be done and at what cost.

Jim Mather: The other thing that interests me is the possibility that, rather than put the burden so heavily on OSCR's shoulders, there might be a mechanism whereby we could respecify the nature of a charity audit and create a specialist requirement for the auditing profession to be somewhat more rigorous and perhaps focus on specific areas when carrying out a charity audit. In other words, perhaps we should delegate the audit out there and get it done at the coalface.

Anne Swarbrick: That might be one way of looking at it.

Jim Mather: It strikes me that we could place a heavier emphasis on creating a healthier balance between compliance and cost control. I am thinking in particular of cost control and the public purse.

The Convener: That is an issue that we could take up with Executive officials when they come before us next week.

Anne Swarbrick: I would have difficulty in saying much more on the issue.

Dr Elaine Murray (Dumfries) (Lab): I want to return to the issue of the national cultural institutions. The SPICe briefing suggests that the problem is not the fact that the charity trustees are appointed by Government, given that they are obliged to act in the best interests of the charity, but the fact that the charity would be directed by

ministers. As I understand it, the problem relates to the ministerial guidance and direction.

Anne Swarbrick: Yes. There is at least a theoretical possibility of trustees being controlled by ministers. Two issues are involved: the question of who appoints trustees—and for what reason and with what remit—and the question of what control may be exerted over trustees once they are appointed. I think that a path can be found, if a bit more thought is put into the requirement on trustees for independence of action once appointed.

Dr Murray: In that case, if the NDPB, or any cultural institution, was independent of Government, even though its trustees, or some of them, could have been appointed by ministers, is there still an issue about an artwork that is donated in lieu of taxation? Surely the work would be given not to Government but to someone independent of Government. Will that issue still arise?

Anne Swarbrick: It might. As I said, I am not a tax lawyer. I am sorry, but the detail of the question is therefore out with my area of expertise.

The Convener: If I may, I will pose a more fundamental question. If I get the gist of Malcolm Chisholm's letter right, we are looking at a trebling of OSCR's budget. If you wanted to put an additional £2.5 million into the charitable sector, would you put the money into supporting the Office of the Scottish Charity Regulator? I will leave that question hanging from the wall for a minute.

I am trying to get at the gap between the perceived problem, which is the improprieties that happened in a very small number of Scottish charities, and the solution, which is to put in place the enormous edifice—well, a £4 million edifice—of OSCR. That figure covers its direct costs, in addition to which we have to consider the knock-on costs and implications for charities. However, we cannot assess those costs on the basis of the financial memorandum. In your view, is the balance an appropriate one? Does the bill give value for money? What bang are we getting for our buck?

Anne Swarbrick: As I said, the argument on the subject raged quite a few years ago when the whole question of charity law reform began to be discussed. At the time, my view was that the remit of the Scottish Charities Office should be beefed up a bit more and that the SCO should be given more personnel. I also thought that the way to go was to have a much better register than the Scottish charity index that we have at the moment. That view has been rather overtaken by events. It was not the view that was adopted at the time and we now have the proposal for OSCR that is included in the bill.

Although the solution may not be quite as expensive as that of the Charity Commission, it is expensive nonetheless. I can well understand why you are asking the question.

The Convener: I declare an interest. I was a member of the Kemp commission in 1997, which recommended significant changes to charity legislation in Scotland. However, I do not quite follow how those changes came to be consolidated into this large regulatory mechanism. That is not what witnesses at the time suggested should be done. Certain changes to legislation were required, but not the scale of regulatory structure that is now proposed. As someone who has been in the business for a long time and has perhaps been in more day-to-day contact with it than I have, can you shed any light on how we got here?

Anne Swarbrick: It was a very tortuous route. I am not sure that I know where the OSCR model arose. It is difficult to remember all the twists and turns. However, the model is of relatively recent origin and was not under discussion at the time of the Kemp commission. It would be possible to look back and work out how we got to this point, if that were thought to be useful.

Jeremy Purvis: In paragraph 2.2 of your paper, you indicate that a number of charities will fall foul of the new, more limited definition of a charity. You compare that with what I understand to be the current definition under the 1990 act and refer to

“other purposes beneficial to the community”.

What is the difference between that and

“the advancement of civic responsibility or community development”,

to which the bill refers?

Anne Swarbrick: The two are significantly different from each other. Community development is an area of charitable endeavour that has been developed and covers activities such as volunteering. The overall public benefit test can be divided into many little pockets, one of which is the community development pocket. The language can be quite technical. We will have to accept that that is the way things are. In the new definition, we are trying to cope with 400 years of common law. Community benefit presses a particular button and relates to issues such as volunteering.

Jeremy Purvis: Is it possible for that to be made more explicit? Many existing charities that say that their purpose is beneficial to the community would also argue that it is beneficial to development of the community in which they operate and to civic responsibility. Presumably, it is for OSCR to decide whether that is the case. You indicate that it is likely that a considerable

number of those charities would fall foul of the new definition and would need to lodge an appeal to ensure that there was an investigation. How explicit will the distinction between

“other purposes beneficial to the community”

and

“the advancement of civic responsibility or community development”

become? I would have difficulty making that distinction.

Anne Swarbrick: The difficulty is in determining the basis on which OSCR will decide whether a charity satisfies the public benefit test. That is where the effect of 400 years of common law becomes apparent. At the moment, the bill tries to sweep the issue to one side and to say, “We are not having that.” However, that is a completely impractical approach. Even if the previous legislation is repealed, it will still be examined in practice, as guidance. The existing definition will be retained in England, so it will still be highly relevant there.

Jeremy Purvis: Are you saying that the wider definition that refers to

“other purposes beneficial to the community”

will be kept in England?

Anne Swarbrick: Yes. England will keep all the little pockets around public benefit that we are sweeping away entirely. I will give you an accessible example. Paragraphs (j) and (k) of section 7(2) of the bill mention disability specifically. Paragraph (j) refers to “provision of accommodation” for the disabled and paragraph (k) refers to “provision of care” for the disabled. In England, there is only one term, which is “relief of disability”. That term is wide and includes, for example, guide dogs for the blind and disability rights advice. It seems to me that neither of those is covered by “provision of accommodation” or “provision of care”. Such issues around the definition cause me great concern. We have two paragraphs that cover disability, but they are narrower than the English provision on the subject.

Alasdair Morgan: Are you saying that under the tests the Guide Dogs for the Blind Association might not be able to register?

Anne Swarbrick: If it wanted to set up a Scottish guide dogs for the blind association, it would struggle on the basis of the definition in the bill.

Jeremy Purvis: It would be fine if it made sure that it looked after the dogs, under the advancement of animal welfare.

Anne Swarbrick: The situation is even more ridiculous than that. The association could train

handlers to handle the dogs, but it could not train the dogs.

11:00

Jeremy Purvis: As the lead committee considers the bill, there will inevitably be many such issues. In my area there is a housing association that was set up to house people with mental health problems, and there could be a question mark over that. Every MSP will have their own issues and that committee will go into details.

However, what we are interested in is the likely proportion of charities—although we do not even know how many there are in the first place—that will encounter the problem that you indicated and might seek to appeal. We are interested in the resources that OSCR will require. Is it fair to say that the tripling of the budget is a sensible precautionary measure, given the potential for appeals, and that there should be a review of OSCR’s budget or a sunset clause as the system settles down? We do not want a huge backlog of appeals at the beginning because charities need to continue to do their valuable work. You said that the system might take five years to settle down, but could we say that we will then reduce OSCR’s scope and size?

Anne Swarbrick: I think that you and I probably know that that will be a difficult thing to achieve once the system has been set up.

Jeremy Purvis: That is on the record.

Jim Mather: On guide dogs, I notice that one of the charitable purposes in the test is

“the provision of care to the aged”

and

“people with a disability”.

Would the Guide Dogs for the Blind Association not qualify under that?

Anne Swarbrick: I do not think so, because its work is not about care. It is about training a dog to do a job.

Jim Mather: So we could have an anomaly whereby that wonderful charity is vigorous and strong in the rest of the UK but totally absent here—

Anne Swarbrick: Absolutely.

Jim Mather:—with all the cost implications that would ensue.

Alasdair Morgan: No. Charities would find it beneficial to register south of the border, but they would continue to operate here.

Jim Mather: They could distribute money here, but I do not think that they could operate here.

Anne Swarbrick: That might be the result. The Guide Dogs for the Blind Association will be required to register with OSCR if it undertakes significant activities in Scotland. I do not know where it will be left if it does not qualify as a Scottish charity.

Alasdair Morgan: There are obviously some UK charities—

Anne Swarbrick: The Guide Dogs for the Blind Association is an English charity, but one of the provisions in the bill requires charities that are registered elsewhere to register with OSCR as well if they conduct significant activities in Scotland.

Alasdair Morgan: I presume that they will have to pass the tests in the Scottish legislation.

Anne Swarbrick: Presumably so. There is a looming difficulty with that.

The Convener: You have helped us to identify a number of questions to ask the Executive witnesses when they come before us on 18 January. I thank you for coming along today, and I indicate to everyone that we hope to sign off our report on 1 February. Anne, you offered to help us by telling us how we got here from the Kemp commission. Could you give us a short note on that?

Anne Swarbrick: I can do that, yes.

The Convener: That would be helpful. Thank you for all your assistance.

We move into private session for our next item, on the budget seminar.

11:04

Meeting continued in private until 11.33.

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